THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

CONTAINING ALL A.F.R. DECISIONS OF THE
HIGH COURT OF JUDICATURE AT ALLAHABAD

2021 - VOL. V
(MAY)

PAGES 1 TO 324

PUBLISHED UNDER THE AUTHORITY OF THE GOVERNMENT OF UTTAR PRADESH
COMPOSED AT INDIAN LAW REPORTER SECTION, HIGH COURT, ALLAHABAD.

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(2021)05ILR A1
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.05.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 2027 of 2013

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

Counsel for the Appellant:
Sri Amit Kumar Srivastava, Sri Ramesh Kumar Mishra

Counsel for the Opposite Party:
A.G.A

A. Criminal Law - Indian Penal Code,1860-Section 302 - Code of Criminal Procedure, 1973 - Sections 207,313-conviction-circumstantial evidence-deceased found dead drenched with blood with marks of sharp weapon injuries on his head-quality of prosecution evidence too poor to establish the guilt of the offence of murder-suspicion, howsoever, strong cannot take the place of proof-conviction of the appellants based on insufficient evidence-unsustainable.(Para 1 to 46)

The appeal is allowed.(E-5)

List of Cases cited:-

1. Sharad Birdichand Sarda Vs St. of Mah.(1984) 4 SCC 116

2. Aftab Ahmad Ansari Vs. St. of Uttaranchal,(2010) 2 SCC 583

3. Delhi Admn. Vs Balakriishan (1972) AIR SC 3

4. Md. Inayatullah Vs St. of Mah.(1976) AIR SC 483

5. N.J. Suraj Vs St.(2004) 11 SCC 346

6. Santosh Kumar Singh Vs St. thru CBI (2010) 9 SCC 747

7. Rukia Begum Vs St. of Karn. (2011) AIR SC 1585

8. Sunil Rai @ Paua & ors. Vs. U.T. Chandigarh,(2011) AIR SC 2545

9. Sampat Kumar Vs Inspr. of Police, Krishnagiri,Cri.Appl. 1950 of 2009

(Delivered by Hon'ble Subhash Chandra Sharma, J.)

1. The present Criminal Appeal is being preferred against the judgment and order dated 30.04.2013 passed by Additional Sessions Judge, (Ex Cadre Post) II, Fatehpur in Session Trial No.43 of 2010 (State vs. Bakshraj) arising out of Case Crime No.106 of 2009, under Section 302 I.P.C., Police Station Dhata, District Fatehpur, whereby the appellant was convicted and sentenced for life imprisonment and fine of Rs.10,000/- in default of payment of fine to undergo for six months additional simple imprisonment.

2. The prosecution case in brief is that on 09.10.2009 Rajan aged about 45 years (deceased) the brother of informant Bachcha Lal @ Chapra went to look after his fishes kept in tank namely Balram Pond in the evening at about 9:00 P.M. but he did not return till the next day morning. Thereafter, the informant his brother Kallu and Suraj were going to search about him towards the tank meanwhile they saw some blood lying near the chuck road in the garden of Iqbal Bahadur Singh. They made

search near that place and found dead body of their brother drenched with blood, under a mango tree in the North East with marks of sharp weapon injuries on his head. On this they suspected that on account of old enmity Bakshraj s/o Binga and unknown persons had committed murder of their brother. Thereafter, informant Bachcha Lal @ Chapra went to police station Dhata at about 7:30 A.M on 10.10.2009 and by giving a written taharir lodged an F.I.R. as Crime No.106 of 2009, under Section 302 I.P.C.

3. Sub-Inspector Sri Vipin Kumar Trivedi proceeded to the place of occurrence and conducted inquest of deceased Rajan Pasi in presence of witnesses. He prepared inquest report and other essential papers for post mortem of deceased and sealed the dead body. It was handed over to constable Sunil Narain and constable Pramil Vivek to carry it for post mortem with essential papers.

4. Post mortem of dead body of decased Rajan Pasi was conducted on 11.10.2009 at mortuary Fatehpur. Dr. R.K. Verma conducted the autopsy of the dead body of deceased Rajan Pasi on the same day at about 2:15 P.M. and prepared post mortem report which is Exibit Ka 2. Details of post mortem report are as under:

External Examination

Aged about 45 years; after death about one and half day average built body rigor mortis was present on upper and lower extremities, eyes closed, mouth half open.

Ante Mortem Injuries

(i) incised wound at occipital area of head size 17cm x 2cm bone deep 6cm above the right ear;

(ii) incised wound at right side of neck size 3cm x 1cm bone deep, 7cm back to right ear;

(iii) incised wound at head posterior area size 3cm x 5cm bone deep, 8cm below to injury no.1;

(iv) incised wound at upper back at chin size 3 cm x 1 cm muscle deep, 3 cm below the 7th vertebra;

(v) incised wound at uper back size 4cm x 1cm muscle deep, 7cm below the right shoulder joint;

(vi) multiple abrasions at back size 5cm back to left shoulder joint size 10cm x 5cm;

(vii) abraded contusion at left elbow area posterior aspect in an area of 4cm x 3cm with dislocation of elbow joint;

Enternal Examination

Neck- as mentioned above

Skull- occipital and right temporal Bone- fractured

Membrane- lacerated

Brain- lacerated and about 100 ml clotted blood present in cavity

Base- NAD

Vertebrae- NAD

Spinal Cord- not opened

Thorax

Walls, Ribs & Cartilages- NAD

Pleuss- NAD

Larynx, Trachea & Bronchai- NAD

Right and Left Lungs- Pale

Pericardium- NAD

Heart- Empty Both Side

Vessels- NAD

Abdomen

Walls- NAD

Peritoneum- NAD

Cavity- NAD

Buccle Cavity- Teeth, Tongue and Pharyad 16/16

Oesophagus- NAD

Contents in stomach- about 500ml semi digested food material present

Small Intestine- Empty

Large Intestine and its content- half filled with gases and faecel material

Liver and Gall Bladder- Pale, Full

Pancreas- NAD

Spleen- Pale

Kidenys- Both Pale

Urinary Bladder- Half filled

Genetic Organs- NAD

Cause of Death- Shock and hemorrhage as a result of ante-mortem injuries.

5. Investigating Officer collected blood stained and plain soil from the place of occurrence and putting into separate boxes, sealed them and prepared fard on 10.10.2009 which is Exibit Ka 6. On 30.10.2009, he arrested the appellant who made disclosure statement about the hiding place of knife used in the commission of murder of deceased. On the instance of appellant knife was recovered from the turf lying on the back side of his house and it was taken into possession and sealed at the spot. Recovery memo Exibit Ka 8 was prepared in the presence of witnesses. Even site plan of place of recovery was also prepared.

6 . During investigation the site plan, where the incident took place, was prepared which is Exibit Ka-7 on 10.10.2009. Statements of witnesses conversant to the facts of the case were recorded by Investigating Officer and he concluded the investigation and found a prima facie case made out under Section 302 I.P.C. against the appellant only. After preparing the charge-sheet he submitted it before the court concerned.

7. Learned C.J.M. Concerned took cognizance of the offence and provided copies of essential prosecution papers to accused/appellant in compliance of provisions of Section 207 Cr.P.C. and committed the case to the court of sessions for trial.

8. Learned trial court framed charge under Section 302 I.P.C. against the appellant on the basis of material on record after giving opportunity of hearing to the appellant and charge was read over and explained to the appellant. He did not plead guilty but denied it and claimed for trial. Consequently, case was fixed for prosecution witnesses.

9. The prosecution examined PW-1 Bachcha Lal @ Chapra, PW-2 Shambhar Pasi, PW-3 Badal Harijan, PW-5 Kallu and PW-7 Ghur Patiya, PW-8 Suraj Singh as witnesses of fact out of which PW-2 and PW-3 turned hostile. PW-4 Dr. Rajesh Kumar Verma who conducted the post mortem of deceased Rajan Pasi, PW-6 Head Constable Nanhe Lal who prepared chick F.I.R. on the basis of a written taharir and entered the substance into the G.D. PW-9 Sub-Inspector Vipin Kumar Trivedi who investigated the case, conducted inquest of deceased and prepared site plan, PW-10 S.O. Pradeep Kumar Yadav who conducted remaining part of investigation and prepared charge-sheet.

10. After conclusion of prosecution evidence statement of appellant was recorded u/s 313 Cr.P.C. in which he negated the statements made by witnesses before the Court and said that witnesses have implicated him falsely due to enmity. He further stated that witnesses are relatives. Recovery of knife had been shown to be fabricated after making his arrest from home. He had further stated that deceased went to look after the tank in which fishes were kept with 5-6 people. They committed his murder on account of village party bandi and family enmity. He was arrested from his house and booked in this case after showing fabricated recovery. Appellant was given an opportunity for defense but he did not adduce evidence in his support.

11. Learned trial court heard the arguments for prosecution as well as for appellant, passed the judgment and order dated 30.04.2013 in which he found the appellant guilty u/s 302 I.P.C. and sentenced him for life imprisonment with fine amounting to Rs.10,000/- and in default of payment of fine to undergo 6 months additional imprisonment. Against the said judgment and order present appeal has been preferred.

12. We have heard Sri Amit Kumar Srivastava and Sri Ramesh Kumar Mishra, learned counsel for the appellant and Sri Ratan Singh, learned A.G.A. for the State and perused the record.

13. Learned counsel for the appellant submits that the judgment and order dated 30.04.2013 passed by the learned trial court is against the evidence available on record which is bad in the eyes of law and based on the testimony of interested witnesses who are close relatives of deceased. No any independent witness has been examined. PW-2 and PW-3 turned hostile those were planned as witnesses of extra judicial confession of appellant. No one had seen the occurrence and only on the basis of suspicion appellant has been named by the informant. PW-1, informant, PW-5 and PW-8 are brothers of deceased and they had also not seen the occurrence. Even PW-7 who is wife of deceased was also not an eye witness. In addition to this, there is no other witness who can be said to have seen the incident. The suspicion created in the minds of informant and other witnesses has been related to 14-15 years prior enmity in which it has been said that brother of appellant namely Buakhal was

murdered by the deceased Rajan Pasi when both of them went to commit a dacoity somewhere and villagers killed Baukhal but there is no any evidence of such incident of dacoity on record even the Investigating Officer has also not disclosed such event to have taken place as per the police record as has been alleged. There is no blood stain found on the knife and it was also not sent to F.S.L. for serological analysis as a result it cannot be said that the recovered knife was used in the commission of murder of deceased. There is no any witness who can be said to have last seen the appellant in company of deceased and at last the theory of extra judicial confession comes on the ground because PW-2 & 3 witnesses of alleged extra judicial confession have not supported the said theory but turned hostile.

14. In this way, the conviction and sentence as awarded by the learned trial court is not based on solid and clinching evidence but is totally hypothetical and is outcome of conjectures and suspicion which is against the established principles of criminal law. In this way, the prosecution could not prove its case beyond reasonable doubt as a result appellant is entitled for benefit of doubt and appeal is liable to be allowed.

15. Learned A.G.A. opposed the submissions made by learned counsel for the appellant and urged that in this case appellant had motive to commit murder of the deceased Rajan Pasi because 14-15 years ago Buakhal brother of appellant went to commit dacoity with the deceased Rajan Pasi where he was killed by some people of the village and Rajan Pasi fled away from there. On this informant and members of his family come to know that deceased Rajan Pasi had plotted the murder of Baukhal and since then appellant was planning to take revenge of murder of his brother and consequently he committed his murder. This was the strong motive with the appellant to commit murder of deceased Rajan Pasi. This has been established with the evidence on record as deposed by prosecution witnesses. In addition to this, the knife used in commission of murder has also been recovered on the instance of appellant and post mortem report supports that murder was committed with the sharp weapon like knife. Extra judicial confession was also made before PW-2 & 3 but on account of village rivalry and fear witnesses turned hostile. Learned trial court has well considered the evidence on record and found the appellant guilty under Section 302 I.P.C. and sentenced him for imprisonment of life which is right in the eyes of law. There is no illegality or impropriety in the said judgment and order. The appeal is devoid of merit and is liable to be dismissed.

16. From the submissions of learned counsel for parties and perusal of record, the following questions emerge for consideration before this Court as to whether motive is absent and witnesses are close relatives. There is no eye witness account of witnesses who have seen the occurrence. There is no last seen. The knife recovered on the instance of the appellant is not blood stained and cannot be said to have been used in commission of crime. This is blind murder and no one has seen the incident but the whole prosecution story runs on suspicion and conjectures that cannot be made base for convicting the appellant.

17. Before we deal with the contentions raised by the learned counsel

for the appellant, it will be convenient to take note of witnesses account as adduced by the prosecution.

18. PW-1 Bachcha Lal @ Chapra is the informant and brother of deceased who deposed that on the day of incident after taking food his brother Rajan Pasi went to look after the tank having fish at about 9 O'clock in the night. In the morning when he did not return home then he, Kallu and Suraj went in search of his brother. They saw blood on the chak road of garden of Iqbal Bahadur Singh. On search they found dead body of Rajan Pasi drenched with blood, having marks of injuries, under the mango tree in the North East. Murder of his brother has been caused by Bakshraj on account of old enmity. His brother Rajan Pasi and brother of Bakshraj namely Baukhal had gone to commit dacoity at Godwapar about 14-15 years ago where villagers caught Baukhal and murdered him. Then Bakshraj was young and after having grown up he made the wife of Baukhal as his own wife. Bakshraj suspected that his brother Rajan Pasi had plotted the murder of Baukhal. This was the enmity and on account of this enmity to take revenge he had committed murder of his brother Rajan Pasi. There was no enmity with any other person. He has also proved the written taharir given by him to the police station as Exibit Ka-1. This witness was subjected to gruel cross-examination by learned counsel for the appellant. During the cross-examination he has stated clearly that he had not seen anyone to commit murder of his brother.

19. PW-2 Sambhar Pasi has deposed that he did not know as to how Rajan Pasi died or murdered. Accused Bakshraj did not come to him on 12.10.2009. He did not disclose before him that he had taken revenge so he could manage to help him with police. Bakshraj never made confession regarding murder of Rajan Pasi before him. Later on this witness was declared hostile and subjected to cross-examination by learned prosecutor in which he has also denied the fact of enmity between Rajan Pasi and Bakshraj.

20. PW-3 Badal Harijan has also deposed that on 11.10.2009 after the murder of Rajan Pasi, accused Bakshraj did not come to him and he did not say to him that he could help him with the police because he had committed murder of Rajan Pasi. Bakshraj never made confession before him about the murder of Rajan Pasi. This witness was also declared hostile and subjected to cross-examination by the prosecutor. During cross-examination he expressed inability to know about the enmity between Rajan Pasi and Bakshraj.

21. PW-5 Kallu is brother of deceased who has deposed that Bakshraj is resident of his village. There was enmity between accused Bakshraj and Rajan Pasi because Baukhal brother of accused and Rajan Pasi had gone to commit dacoity somewhere and Baukhal was murdered there on which the accused suspected that Rajan Pasi had plotted the murder of Baukhal. On the day of incident his brother Rajan after taking food went to look after his fishes at about 9 O'clock in the night and he did not return in the morning. He and his brother Surajpal and Bachcha Lal @ Chapra went to search him meanwhile near kachcha road blood was seen. So, they made search near about that place. They saw dead body of their brother Rajan Pasi under a mango tree. There were injuries on his head and hand. He told that on account of old enmity Bakshraj had committed murder of his brother. Bakshraj married the wife of his

brother Baukhal and said to take revenge. After incident Sub-Inspector caught Brajesh and left him after query then after 13-14 days arrested Bakshraj and brought him to the village where a knife was recovered on the instance of the appellant from the back of his house before us. He also said to the police that he had committed murder of Rajan with that knife. The knife was sealed by Sub-Inspector at the spot and fard was prepared and he got affixed thumb impression of the appellant on it. This witness has also been subjected to cross-examination by learned counsel for the appellant in which he has stated clearly that he did not know when Baukhal was murdered. As had been told to him by the members of his family he was telling. He had not seen Buakhal and he could not tell as to how many years ago Baukhal was murdered.

22. PW-7 Ghur Patiya who is wife of deceased Rajan Pasi has deposed that on the date of incident at about 7:30 O'clock in the evening his husband went to look after the tank of fish after having food and did not return in the morning. Her brother-in-law Chapra, Sukhlal, Kallu and Suraj went in search of her husband whose dead body was found under a tree in the garden of Iqbal Bahadur Singh. Accused Bakshraj was threatening from before to commit murder of her husband. Prior to the incident her husband and Baukhal brother of Bakshraj had gone to commit dacoity in Bodhwapur where Baukhal was murdered by either police or public. Bakshraj threatened before her husband and brother-in-laws that he (Rajan Pasi) plotted murder of his brother Baukhal so he would also murder him. On account of that enmity Bakshraj committed murder of her husband. This witness was also subjected to cross-examination in which she has stated that no such case was proceeded against her husband and near about 14-15 years have been passed after the incident of Bodhwapar. Her husband did not go to the jail in that incident.

23. PW-8 Suraj Singh who is also brother of the deceased has deposed that deceased Rajan Pasi was his real brother. He went to look after his fishes in the tank at about 9 O'clock after taking food. On the next day when he did not return then while searching for him he went to the garden of Iqbal Bahadur Singh where blood was seen on the chak road. On a short distance under the tree of mango dead body of Rajan Pasi was lying with injuries on the head and person. He believed that accused Bakshraj had committed murder of his brother Rajan Pasi on account of old enmity. Brother of Bakshraj namely Baukhal was murdered during a dacoity in the village Godhwapar by the villagers. Bakshraj told him that his brother Rajan Pasi had plotted the murder of his brother (Bakshraj) and he would kill his brother Rajan Pasi. Afterwards accused Bakshraj married with the wife of Baukhal and said that he would take revenge of his brother's death by committing murder of Rajan Pasi. This witness was also subjected to cross-examination by the learned counsel for the appellant.

24. PW-6 H.M. Nanhe Lal who, lodged F.I.R. on the basis of written taharir given by the informant has proved the F.I.R. as Exibit Ka-3 and the entry made in the G.D. as Exibit Ka-4 dated 10.10.2009 in his hand writing and signature.

25. PW-9 Vipin Kumar Trivedi is the Investigating Officer who visited the place of occurrence and prepared site plan Ex.

Ka-7 on the instance of informant and also conducted inquest of deceased and prepared inquest report as Ex Ka-5. He has also proved the fard related to taking into possession of blood stained as well as plain soil and also proved the recovery of knife on the instance of appellant and recovery memo as Exibit Ka-8 with site plan as Exibit Ka-9 in his hand writing and signature.

26. PW-10 S.O. Pradeep Kumar Yadav is second Investigating Officer who has proved the charge-sheet as Exibit Ka-10 to be in his hand writing and signature.

27. There is no dispute about the fact of murder of deceased Rajan Pasi with some sharp weapon and also about the place of occurrence as shown in the site plan which is Exibit Ka- 7 and as stated by the prosecution witnesses including the Investigating Officer.

28. There is also no dispute about the fact that no one has seen the commission of murder of deceased by the appellant. PW-1, PW-5, Pw-7 & PW-8 have nowhere asserted the fact that they have seen the appellant committing the murder of deceased Rajan Pasi on 09.10.2009 in the night. Even PW-9 Sub-Inspector Vipin Kumar Trivedi who investigated the case has also stated during his cross-examination that during investigation no any witness had told him about the fact that he had seen the appellant committing murder of deceased Rajan Pasi.

29. Likewise PW-10 S.O. Pradeep Kumar Yadav has also stated during his cross-examination that no such statement has been recorded by him as well as by his predecessor about the fact of witnessing the murder of deceased by the appellant. In this way, it is well established on the basis of evidence on record that there is no eye-witness account of the said incident. No any prosecution witness has deposed about the presence of any last seen witness of the incident also.

30. It may be stated at the outset that there is no ocular evidence of the commission of the offence and the prosecution case is based entirely on circumstantial evidence.

31. The legal position regarding the standard of proof and the test which the circumstantial evidence must satisfy is well-settled by a long line of decisions by the Hon'ble Apex Court. It is unnecessary to burden this judgment by making reference to all such decisions. We are content with reference to some of those decisions**. In Sharad Birdhichand Sarda v. State of Maharashtra** (1984) 4 SCC 116, Hon'ble The Supreme Court laid down the following five tests to be satisfied in a case based on circumstantial evidence:

"(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved, and (5) There must be a chain of evidence so complete as not to leave any

reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

32. The decision of Hon'ble **The Supreme Court in Aftab Ahmad Ansari v. State of Uttaranchal** (2010) 2 SCC 583 is a timely reminder of the abovementioned requirements in the following words:

"In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be."

33. Coming to the facts of the present case, there are three circumstances relied upon by the prosecution and accepted by the trial court to hold the appellants guilty of the offence. These are as under:

I. Appellant Bakshraj made an extra judicial confession before PW-2 Sambhar Pasi & PW-3 Badal Harijan.

II. The recovery of the blood-stained knife (Ex. 8) on the instance of appellant Bakshraj on the basis of his disclosure statement before I.O.

III. There was motive for the accused to commit murder of deceased Rajan Pasi.

34. Let us now examine the evidences in support of each of the three circumstances enumerated above.

35. So far as the fact of extra judicial confession made by appellant before PW-2 and PW-3 is concerned, it is not supported by the testimony of these witnesses. They have denied about this fact straightway that appellant has made any confession before them about the murder of deceased Rajan Pasi and he has not asked him to manage help with the police. They turned hostile and subjected to cross-examination by learned prosecutor but nothing was found to support the prosecution version. Therefore, the evidence about extra judicial confession also goes out and not established by the evidence on record to support the prosecution version. Therefore, the evidence about extra judicial confession also goes out and not established by the evidence on record.

36. Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of informations given by the accused while in custody. The question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Indian Evidence Act, 1872 (in short the Evidence Act') is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly

relates to the fact discovered is admissible in evidence against the accused, This position was succuinctly dealt with by Hon'ble the Supreme Court in **Delhi Admn v, Balakrishan. AIR (1972) SC 3 and Md. Inayatullah v. State of Maharashtra AIR (1976) SC 483**. The words "so much of such information" as relates distinctly to the fact thereby discovered. are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate, The ban as imposed by the preceding sections was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If al! that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion: and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken in to custody and becomes an accused. after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact. in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did come from a person not in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. in other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. !t is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any Information obtained from a prisoner. such a discovery is a guarantee that the Information supplied by the prisoner is true. The information might be confessional or non- inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. it is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in Palukuri Kotayya v. Emperor AIR (1947) PC 67, is the most quoted authority of supporting the interpretat ion that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the

information given must relate distinctly to that effect. [see State of Maharashtra v. Dam Gopinath Shirde and Ors, (2000) Crl.L.J 2301. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered." But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given.

37. Now the recovery of knife on the instance of appellant is to be taken into consideration as to whether this was used in commission of murder of deceased. Exibit Ka- 8 is fard recovery of one knife said to be used in the commission of crime as per the statement of appellant after his arrest by the police. There is no mention in the fard Exibit Ka- 8 that the recovered knife was blood stained. Even PW-9 Sub-Inspector Vipin Kumar Trivedi who made recovery of knife has also not disclosed this fact about the presence of blood stains on the knife during his examination before the court even at the time of this knife was produced before the court as material Exibit- 3. The report obtained from F.S.L. Has not been proved by the prosecution. It also does not mention that there was human blood found on the knife.

38. In the aforesaid circumstances, the recovery of the knife on its own is a circumstance too fragile to bear the burden of the appellant's conviction for murder.

39. So far as the version of prosecution related to the motive that there was enmity between the deceased and appellant is concerned, it is noteworthy that no F.I.R. was lodged in relation to that incident of dacoity in the village Godwapar and murder of Baukhal (brother of appellant) by the villagers or by the police which is said to be the cause of enmity between deceased and appellant. PW-9 Sub-Inspector Vipin Kumar Trivedi who investigated the case has stated during his cross-examination that he inspected the records relating to the dacoity of Godwapar at local police station but he has not mentioned it in case diary because he did not found evidence relating to that incident in record. Thus the incident of dacoity prior to 14-15 years from the instant incident does not get support from any police record. It appears improbable as to whether such type of incident, in which one criminal likely to commit dacoity is get murdered by the police or public, takes place, remained unregistered at the police station. The testimony of other witnesses those are related to deceased Rajan Pasi in this regard remains uncorroborated and unsupported with any other reliable evidence, therefore, motive for committing murder of deceased Rajan Pasi by the appellant cannot be said to be proved. In any event, motive alone can hardly be a ground for conviction.

40 . In **N.J. Suraj vs. State** represented by Inspector of Police (2004) 11 SCC 346, the prosecution case was based entirely upon circumstantial evidence and a motive. Having discussed the circumstances relied upon by the prosecution, the Hon'ble Supreme Court rejected motive which was the only remaining circumstance relied upon by the prosecution stating that the presence of a motive was not enough for supporting a

conviction, for it is well-settled that the chain of circumstances should be such as to lead to an irresistible conclusion, that is incompatible with the innocence of the accused.

41. To the same effect is the decision of the Hon'ble Supreme Court in **Santosh Kumar Singh v. State** through CBI. (2010) 9 SCC 747 and **Rukia Begum v. State of Karnataka AIR 2011 SC 1585** where the Hon'ble Supreme Court held that motive alone in the absence of any other circumstantial evidence would not be sufficient to convict the appellant. Reference may also be made to the decision in **Sunil Rai @ Paua and Ors. v. Union Territory, Chandigarh (**AIR 2011 SC 2545) where Hon'ble The Supreme Court explained the legal position as follows :

"In any event, motive alone can hardly be a ground for conviction. On the materials on record, there may be some suspicion against the accused but as is often said suspicion, howsoever, strong cannot take the place of proof."

42. In case of **Sampat Kumar v. Inspector of Police, Krishnagiri** in Criminal Appeal No.1950 of 2009 decided on 02.03.2012 Honb'le The Supreme Court has held in Para No.15 which is as follows:

"Suffice it to say although, according to the appellants the question of the appellant-Velu having the motive to harm the deceased-Senthil for falling in love with his sister, Usha did not survive once the family had decided to offer Usha in matrimony to the deceased-Senthil. Yet even assuming that the appellant- Velu had not reconciled to the idea of Usha getting married to the deceased-Senthil, all that can be said was that the appellant-Velu had a motive for physically harming the deceased. That may be an important circumstance in a case based on circumstantial evidence but cannot take the place of conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt."

43 . On the materials on record, there may be some suspicion against the accused but as is often said suspicion, howsoever, strong cannot take the place of proof. We, therefore, find and hold that the conviction of the appellants is based on completely insufficient evidence and is wholly unsustainable.

44. It is seen above that the quality of the prosecution evidence is too poor to satisfactorily establish any of the three circumstances for holding the appellants guilty of the offence of murder. As none of the three circumstances were sufficiently proved, there is no question of taking them as links forming an unbroken chain that would lead to the only possible inference regarding the appellant's guilt. But before parting with the records of the case, we must sadly observe that so far as appellant is concerned, it's a case of no evidence at all.

45. Thus, seen for any angle the conviction of the appellant cannot be sustained. The judgment and order of the trial court is completely unsustainable. The judgment and order is set aside. The appellant is acquitted of the charges and is

directed to be released forthwith unless required in connection with any other case.

46. In the result, the appeal is ***allowed.***

47. Copy of this judgment alongwith original record of Court below be transmitted to the Court concerned for necessary compliance. A compliance report be sent to this Court within one month. Office is directed to keep the compliance report on record.

(2021)05ILR A13
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.03.2021

BEFORE

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

Criminal Appeal No. 3750 of 2011

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

Counsel for the Appellants:
Sri Chandra Shekhar Kushwaha

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

A. Criminal Law - Indian Penal Code,1860-Sections 324,307-attempt to murder by firing-the testimony of doctor and the fact asserted by the injured himself contradictory-infact, injured witness is tutored once-on account of enmity, false case was lodged-version of the injured that the injury was caused from a distance of 2 to 1 feet while nature of injury was indicative of fact that the fire was shot from the point blank range –FIR describes number of persons were working in the field at the time of occurrence at 8.00 A.M. still no one arrived on the spot-whereas injured was taken to the police instead taken to hospital-no villager or farmer was examined working in the vicinity of the place of occurrence-trial court failed overlooked these vital aspects.(Para 1 to 56)

The appeal is allowed.(E-5)

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

1. Heard learned counsel for the appellants, learned A.G.A. for the State and perused the record.

2. The instant appeal has been preferred against the judgment and order dated 08.06.2011 passed by the Additional Sessions Judge / Special Judge, J.P. Nagar, in Session Trial No.225 of 2007 State Vs. Kuwarpal and others, arising out of Case Crime No.834 of 2006, under Section 324 I.P.C., Police Station Naugawa Sadat, District J.P. Nagar, sentencing each of the appellant to undergo three years rigorous imprisonment coupled with fine Rs.5000/- with default stipulation for three months additional simple imprisonment.

3. Relevant facts of this case as reflected from record for understanding the outcome of this appeal appear to be that the first information report was lodged by Devendra Singh son of Ram Sukhiram Singh at Police Station Naugawa Sadat on 30.08.2006 at 9:30 p.m. regarding the occurrence pertaining to the firing that took place on 29.08.2006 at 8:00 a.m. in the village Akkha Nagla within Police Station Naugawa Sadat, District J.P. Nagar with description that on 29.08.2006 at about 8:00 a.m., the informant's son Pushpendra

and his nephew Vipin Kumar son of Samarpal, resident of Samandpur, Police Station Rajavpur who had come over to the house of the informant, were proceeding towards tubewell of the informant carrying gadget tools for irrigation on the bullock / buffalo cart ('Buggi'), while the informant who had arrived at the tubewell prior to them was waiting for them over there. After waiting for a while, when they did not arrive at the tubewell the informant out of curiosity came on the chak-road leading towards his village for tracing them and in the meanwhile when he was passing along, he heard sound of fire near sugarcane field of Natram. He rushed in that direction where he saw Kuwarpal, Vijendra and Santram who after firing on his nephew made their escape good towards the southern side of the chak-road. The informant saw his nephew seeped in blood on the cart (buggi). It has further been narrated in the first information report that there was persisting enmity between the accused and the informant on account of pending litigation. The informant was told by his son and nephew that three accused who were possessing 'Tamanchas' (countrymade gun) opened fire but the fire shot by Kuwarpal hit his nephew. A number of persons arrived on the spot. The informant and the people who had arrived on the spot afterwards took the injured to the government hospital Amroha and Moradabad due to which delay was caused in lodging the report. This written report is Ext. Ka-1.

4. On the basis of the written report, its contents were taken down in the Check F.I.R. (Ext. Ka-3) at Case Crime No.834 of 2006, under Section 324 I.P.C. at Police Station Naugawa Sadat on 30.08.2006 at 9:30 p.m. and the case was registered by entering relevant note in the concerned general diary of aforesaid date at the aforesaid Police Station at 9:30 p.m. at aforesaid case crime number under aforesaid section of I.P.C., carbon copy of the general diary entry is Ext. Ka-4

5. Record reveals that the injured was brought to the C.H.C. Amroha prior to the lodging of the report and was medically examined by Dr. Gyan Singh (PW-9) on 29.08.2006 at 10:00 a.m. who found the following injuries on the person of the injured Vipin Kumar:-

I. Circular lacerated wound 2 cm in diameter, depth cannot be probed due to bleeding. There is blackening and scorching of hair around the wound in 6 cm in diameter around a huge traumatic swelling at medial side of knee joint. This 'wound' was present medial side of left knee joint, 6 cm medially from top of left knee.

II. There is wound of exit lacerated wound, 1 cm diameter margin evert, no blackening. There is traumatic mild around. Advised x-ray. It is 9 cm lateral from top of knee. Kept under observation. Advised x-ray.

6. All above injuries were caused by firearm (gunshot) wound. (I) wound of entry, (II) wound of exit, Kept under observation, Advised x-ray left knee, at District Hospital Moradabad. Injuries are fresh.

7. In above medico legal injury report, injury no.1 and 2 were kept under observation, patient had been referred to Senior Radiologist at District Hospital Moradabad for x-ray of left knee.

8. Medical examination report has been proved by Dr. Gyan Singh PW-9 as Ext. Ka-7.

Supplementary report

9. On reference by the doctor, x-ray examination of left knee of the injured Vipin Kumar was done on 11.09.2006 by Dr. Harish Chand Dua PW-4.

10. According to report of Senior Radiologist of District Hospital Moradabad, vide x-ray plate with x-ray report no.4103 / dated 29.08.2006, part x-rayed - left knee - "no bony injury seen". "Loss of soft tissue seen on the back of knee joint as marked on plate".

11. Injuries were rated simple in nature and caused by gunshot.

12. Dr. Harish Chand Dua has proved his x-ray report as Ext. Ka-2.

13. Thereafter, on the basis of the aforesaid radiological report, supplementary medical report was prepared by Dr. Gyan Singh PW-9 as Ext. Ka-8 wherein also x-ray report (Ext. Ka-2) was affirmed that "no bony injury was seen".

14. After the F.I.R. was lodged on 30.08.2006, the Investigation of the case ensued and was taken over by the first Investigating Officer S.I. Randhir Singh who took the investigation of this case on 30.08.2006 and proceeded to collect material / evidence and in the process he took note of the contents of the relevant documents say - written report, check F.I.R., general diary pertaining to the Case Crime No.834 of 2006 of date of Police Station Naugawa Sadat and recorded statement of Constable Sunil Kumar and Devendra Singh and on the pointing out of the informant, prepared site plan besides he also recorded statement of various persons obtained x-ray report vide Parcha No.2 of C.D. Dated 04.09.2006 and also prepared different memos and obtained supplementary medical examination report and entered contents thereof in the concerned general diary of date 13.09.2006. He again recorded statement of other witnesses and also collected affidavit of various persons and came to the conclusion that the case is fake one and recorded in the charge sheet that it transpired during investigation, he came to know that Pushpendra was possessing illicit weapon at the time of the occurrence and due to his negligence, the weapon went off accidently which injured Vipin Kumar causing firearm injury, therefore, the allegations were found false and instead of Section 324 I.P.C, a case was found under Section 338, 211 I.P.C. against the informant Devendra Singh and witness Pushpendra and injured Vipin Kumar for hatching conspiracy to falsely implicate the the appellants in this case.

15. Thus, finding the appellants innocent filed charge sheet under Sections 338, 211 I.P.C. This charge sheet is numbered as 148 of 2006 dated 20.09.2006 under Sections 338, 211 against Devendra Singh and witness Pushpendra and the injured Vipin Kumar, which has been proved by him (the first I.O. - DW-1) as Ext. Kha-1. Besides he also proved a number of affidavits given to him by certain persons and which affidavits during period of his part of investigation have been made part of the record as Paper No.5/13 to 5/37.

16. Relevant to mention here that in this case, the first Investigating Officer Randhir Singh DW-1 has been examined not by the prosecution but by the defence

and his aforesaid charge sheet was later on cancelled by the superior police officer but that charge sheet has been proved as Ext. Kha-1.

17. Subsequently to the the Investigating Officer - Randhir Singh, the investigation was then entrusted to Surendra Pal Singh PW-7. He was directed by the Senior Superintendent of Police, Moradabad to investigate into the offence registered at Case Crime No.834 of 2006 under Section 324 I.P.C. and on that day, Devendra Singh and his nephew Vipin Kumar had met him but on account of illness they did not give any statement. Thereafter, he visited village Akkha Nagla on 14.11.2006 and recorded statement of Rajpal Singh and on the very same day, the complainant Devendra Singh, his son Pushpendra met him at their house but did not give any statement on account of they being ill.

18. On 26.11.2006, the informant Devendra Singh, injured Vipin Kumar and Pushpendra met him at S.I.S. Office Moradabad, however, they expressed inability to give statement on account of being ill. He also recorded statement of the other prosecution witnesses during course of the investigation and proceeded with the investigation. On 06.12.2006, Pushpendra met him but did not give statement on account of he being in utmost hurry on account of his father Devendra Singh being ill. On 12.12.2006, Devendra Singh and Jitendra Singh gave statement at S.I.S. Office, Moradabad, which was recorded by him.

19. The investigation was then taken over by another S.S.I. Maharaj Singh, PW-8 on 25.12.2006 on account of fact that Surendra Pal Singh PW-7 has fallen ill. He also proceeded with the investigation of the case and recorded statement of various persons and recorded statement of Pushpendra and Vipin Kumar on 23.01.2007. The statement of Dr. Gyan Singh was recorded on 27.01.2007. Thereafter statement of Dr. Harish Chand Dua was recorded on 12.02.2007.

20. During course of the investigation, on the basis of medical examination report and other relevant papers, on 18.02.2007 Section 307 I.P.C. was added to the aforesaid Case Crime No.834 of 2006 and relevant entry was made in the concerned general diary of date. Previously submitted charge sheet filed by the first Investigating Officer (S.I. Randhir Singh) being numbered 148 of 2006 was got cancelled by him after sending it to the Superintendent of Police, J.P. Nagar. He also recorded statement of the accused Vijendra Singh and after that investigation was transferred to another Investigating Officer.

21. Pursuant thereto, the investigation was then taken over by S.I. Kushal Pal PW-6. After adding Section 307 I.P.C. at Case Crime No.834 of 2006 on 26.04.2007, he also proceeded with the investigation of the case and took note of the contents of the various records. On 17.05.2007, he recorded statement of the injured Vipin Kumar. He also visited the spot and at the pointing out of the informant prepared the site plan Ext. Ka-5 and after completing the investigation filed charge sheet Ext. Ka-6, under Section 307 I.P.C. against the appellants.

22. Pursuant thereto, proceedings were committed to the court of Sessions from where it was transferred for conduction and disposal of the case to the

aforesaid trial court of Additional Sessions Judge/Special Sessions Judge, J.P. Nagar, who in turn heard both the sides on point of charge and was prima-facie satisfied with case against the appellants, accordingly, framed charge under Section 307/34 of I.P.C. on 11.02.2008. The charge was read over and explained to the appellants who abjured charges and opted for trial.

23. Consequently, the prosecution was required to adduce its testimony in support of the charge. The prosecution produced in all nine witnesses. A brief sketch of the same is as here under:

24. Devendra Singh PW-1 is the informant, Pushpendra PW-2 is eyewitness of the occurrence like PW-1. Vipin Kumar PW-3 is the injured witness. Dr. Harish Chand Dua PW-4 got x-ray examination of left knee of the injured Vipin Kumar and also proved x-ray report and x-ray plate and has stated that "no bony injury was found" and has proved it as Ext. Ka-2 and x-ray plate as material Ext. 1. Constable Sunil Kumar PW-5 has proved check FIR and copy of general diary as Ext. Ka-3 and Ext. Ka-4, respectively. S.I. Kushalpal PW-6 is the fourth and the last Investigating Officer who filed the charge sheet under Section 307 I.P.C. against the appellants and has proved the same apart from proving his part of investigation. Surendra Pal Singh PW-7 is also one of the Investigating Officers of this case and he has also proved his part of the investigation. Likewise Mahraj Singh PW-8 also conducted the investigation and has proved his part of the investigation in this case. Dr. Gyan Singh PW-9 examined the injured Vipin Kumar on 29.08.2006 at 10:00 a.m. at C.H.C. Amroha and has proved the injury report Ext. Ka-7 and also proved supplementary medical examination report - Ext. Ka-8.

25. Thereafter, evidence for the prosecution was closed and statement of the accused-appellants (under Section 313 Cr.P.C.) was recorded wherein charge was denied and in defence, S.I. Randhir Singh DW-1 was produced in support of the charge sheet filed against the informant and his son under Sections 338, 211 I.P.C and also the investigation conducted by him while acting as the first Investigating Officer of this case from 30.08.2006 onwards up to certain period of time.

26. No other testimony adduced by the defence except as DW-1. Consequently, the evidence for the defence was closed and both the parties were heard on merits of the case. The trial Judge after vetting the evidence on record and considering the prevailing facts and circumstances of the case, acquitted the appellants under Section 307 I.P.C. while convicted them under Section 324 I.P.C. and sentenced each of them to undergo five years rigorous imprisonment coupled with fine Rs.5000/-, and in default of payment of fine, three months' additional imprisonment.

27. Resultantly, this appeal.

28. Contention extended on behalf of the appellants, in brief, is that in this case, no offence whatsoever has been committed by the appellants and it is obvious that merely on account of pending litigation between the parties and on account of animosity, a false case has been cooked up in collaboration with the police. Facts and circumstances of the case are suggestive of

reality that in this case, no one, in fact, saw the occurrence and nothing of the sort ever happened in the manner as alleged in the first information report.

29. The statement of the eyewitnesses of the occurrence and the injured are in material contradictions to each other and full of improvement and embellishment. If anyone of the three eyewitnesses including the injured is taken to be true in his account of the occurrence and acted upon as such then statement of the other eyewitness gives different version of the incident and a reasonable doubt is created regarding the actual occurrence, that profusely suggests that the incident did not take place in the manner and style as stated by the prosecution. The place of occurrence is surrounded by a number of agriculture fields and it has emerged in the testimony of the prosecution witnesses of fact that the villagers were working in their field at the time of the occurrence (which is around 8:00 a.m.) - in the morning and it has also been described in the first information report as well as in the testimony that a number of villagers arrived on the spot, however, this fact is contradicted by the prosecution witnesses of fact themselves to the ambit that no independent witness or person in the vicinity of the spot arrived on the spot and no independent witness has been examined by the prosecution which throws lot of doubt on the veracity of the prosecution story itself.

30. Insofar as the injury report is concerned that apparently is fake. It has been got manufactured by the prosecution. The gun shot wound caused to the injured is said to be simple in nature, its nature is neither fatal nor grievous. The injury allegedly sustained by the injured is artificially created. If the version of the prosecution witnesses and in particular, that of the injured Vipin Kumar is taken to be absolutely correct then this sort of injury cannot be caused to the injured in the manner alleged by the injured. However, in this case, the first Investigating Officer who was entrusted with the investigation had come to know during course of the investigation that Pushpendra was possessing illicit weapon which accidentally went off thus causing injury to the injured Vipin Kumar, the nephew of the informant Devendra Singh. It being so, the matter was tried to be improved and twisted by colouring it as an offence committed by the appellants on account of enmity with the informant. S.I. Randhir Singh, the first Investigating Officer of this case was examined by the defence and not by the prosecution. This also throws doubt on the veracity and authenticity of the prosecution case that any such incident ever took place in the manner alleged.

31. Dr. Gyan Singh PW-9 has categorically stated that this sort of injury can be caused only by firing from point blank range. It means that it cannot be caused from any other distance say without gap between the nozzle of the gun and the seat of injury but a categorical narration has been made in the statement of the injured Vipin Kumar, to the extent that the firing was done from a distance of 2 to 1 feet. The doctor witness asserts in his cross examination that this sort of injury can be caused only by firing with point blank range, i.e. without leaving any gap between the weapon and the seat of injury. Thus the version of the injured witness regarding manner of firing from a distance of 2 to 1 feet stands falsified.

32. Further site plan itself is vague and it does not indicate in precise manner

or specific terms the very place where the appellants (accused) were in fact standing and opened fire on the injured. This vital aspect not only throws doubt on the entire incident but also proves fact that in fact no accused participated in such incident and no one was present on the spot. Had it been really so, how and why the site plan Ext. Ka-5, would have been silent about their specific position from where firing was done. The statement of the three prosecution witnesses of fact, if believed, to be true then the same are highly contradictory on material points.

33. Learned A.G.A. has controverted the aforesaid argument by submitting that the incident has been proved by the prosecution witnesses of fact namely PW-1, PW-2 and PW-3 beyond all reasonable doubt and the trial Judge has justifiably taken correct view of the incident and has recorded conviction and passed just sentence. The site plan depicts clearly the very spot marked by word capital "A" where the incident took place. Doctor's testimony on point of distance is opinionative, it is not binding and conclusive.

34. Also considered the above submissions pros and cons made by both the sides.

35. In the light of the rival submission and the respective claim of the appellants and the prosecution, the moot point that arises for adjudication of this appeal relates to fact whether the testimony of the prosecution witnesses of fact is innocuous and inspiring confidence and the charges framed against the appellants have been proved beyond all reasonable doubt ?

36. In that regard before appraisal and analysis of the facts and circumstances of the case vis-a-vis testimonial account of the occurrence is taken note of and addressed on its merit, contents of the first information report are to be taken note of at this juncture in the beginning. It is gathered that the first information report was lodged by the informant Devendra Singh on 30.08.2006 at Police Station Naugawa Sadat at 9:30 p.m. with the description that on 29.08.2006 at about 8:00 a.m., his son Pushpendra and his nephew Vipin Kumar (Bhanja - who had come over to his house) were proceeding towards tubewell of the informant after taking gadgets meant for irrigating his field on bullock-cart (Buggi). The informant had arrived at his agriculture field / tubewell prior to his son and his nephew and was waiting for them over there. When they did not arrive in time, out of curiosity, the informant went in search of them towards the village. While proceeding so, he heard sound of fire near sugarcane filed of Netram then he rushed towards the spot where he sighted Kuwarpal, Vijendra and Santram firing on his nephew and secured their escape towards the southern side.

37. On arriving at the spot, he found his nephew lying on the cart seeped in blood. The motive for committing the offence was enmity and animosity on account of pending litigation with the informant. When asked by him on the spot, he was told by his son and the nephew that all the three accused were possessing countrymade gun, all fired from their respective weapons and shot fired by Kuwarpal hit his nephew. After arrival of the informant on the spot and subsequently to him, a number of persons arrived on the spot and they took the injured to the government hospital Amroha - Moradabad due to which the first information report could not be lodged earlier. This basic

description of the occurrence appears in the written report Ext. Ka-1.

38. Now in the wake of the aforesaid factual description of the occurrence, the relevant aspects of the case are to be assessed and analyzed properly. The relevant point for adjudication crop up regarding the presence of Devendra Singh (informant) on the spot, firing by the appellants on the spot - their position and causing of gun shot injury to the injured Vipin Kumar around 8:00 a.m. on 29.08.2006. In that regard, the three witnesses of fact have been examined as PW-1 Devendra Singh, the informant. PW-2 Pushpendra - who was accompanying the victim at the time of the occurrence and was sitting beside him on the bullock-cart (Buggi) and PW-3 Vipin Kumar, the injured of this case.

39. Insofar as the manner and the description of the incident as has been given in the written report is concerned, the same is more or less similar to as appearing in the testimonial account of the three witnesses of fact with certain variations. The first information report suggests that a number of other persons also arrived on the spot and the injured was taken to the government hospital with their help, whereas, testimonial account of the witnesses of fact does not support this version because Pushpendra PW-2 and Vipin Kumar PW-3 have categorically stated that except Devendra Singh and his uncle, no one else from the nearby place arrived on the spot.

40. However, in the testimonial account of Vipin Kumar PW-3, obviously it has emerged that a number of persons who were working at the time of occurrence in their fields but no one arrived on the spot. Therefore, the description to the magnitude of the other persons arriving on the spot does not appear to be sound one, for the reason that three shots were fired on the spot and that too as per testimonial account of the prosecution witnesses, were fired at certain gap within a span of one minute intermittently and not in one moment. It means that the three shots were fired intermittently within a minute and there was gap in firing each shot. If it was so, how can it be that persons working in the nearby field were unaware of the incident and did not arrive on the spot and if they arrived on the spot, who were those persons and what were their names, have not been brought on record. Though this variation is of little significance but description contained in the first information report is one aspect based on claim that a number of persons arrived on the spot becomes improbable. It alludes to the inference that the first information report is motivated and improved one on the point of incident. The enmity is admitted in the first information report and in the testimony of the prosecution witnesses of fact, it has been asserted time and again that a number of cases are going on between the parties wherein both the sides are contesting their respective case.

41. In the testimonial account of PW-1, he claims that at the time when he arrived on the spot, he was told by his nephew that shot of Kuwarpal hit him and the shot was fired by all the three assailants, whereas, PW-2 in his cross examination in paragraph no.17 of page no.12 of his testimony has asserted that he did not tell anything to his father (the informant PW-1 Devendra Singh) as to who were assailants, whereas, testimonial

account of PW-1 on this point appears to be an improvement subsequently to the occurrence.

42. As per testimony of Vipin Kumar PW-3, relevant query pops up, while considering particular position of both the witness on the bullock-cart when the incident occurred that both Pushpendra and he himself, were sitting side by side on the bullock-cart and the distance between them was about half feet i.e. 6 inches and three shots were fired on them by three persons, prime motive was to kill Pushpendra and not the nephew of the informant with whom assailants had no cause. But not a single pellet touched Pushpendra that is normally not possible in such circumstances because the weapon used was countrymade gun and shots were fired not by one person but by three different persons which should be from three different directions but not a single pellet hit the other person (say Pushpendra) who was sitting beside the injured is highly improbable because dispersal of pellets will be always there. Not only this, but the astonishing aspect of the case is that three shots were fired in the direction of both Pushpendra and Vipin Kumar who were sitting on the bullock-cart but there is no pellet mark found even on the bullock-cart, that also raises reasonable doubt regarding the manner and the style of the firing opened by the assailants on the spot that not a single pellet mark was caused / found on the bullock cart.

43. It is noticeable that prime object of the appellants was to kill Pushpendra and he was sitting side by side Vipin Kumar - the injured - then how Pushpendra escaped unhurt on the spot and Vipin Kumar sustained injuries in the incident when Pushpendra remained there and did not escape to save himself. It is beyond comprehension. There is no description of the sort in the narration of the incident in the written report (Exhibit Ka-1) that the assailants tried their best to cause injury / harm to Pushpendra on the spot. It was never their (assailants) objective merely to open firing on the two persons available on the spot which is not justified when only one of the two was the target, moreso when the other most wanted objective (Pushpendra) was well within target. It is virtually admitted that there is enmity between the parties. Prime motive of the assailants is claimed to cause harm to Pushpendra then why will assailants spare their main objective and instead will satisfy themselves only by injuring some other person against whom the assailants had no cause or enmity. This motivating aspect has not been explained even then least by the prosecution.

44. Moreover, Dr. Harish Chand Dua PW-4 has proved the x-ray plate no.4103 (material Ext. 1) and the x-ray report Ext. Ka-2 wherein "no bony injury was seen". He conducted the x-ray examination of left knee of the injured Vipin Kumar, on reference being made by C.H.C. Amroha on 29.08.2006.

45. Relevant to take note of the medical examination of Vipin Kumar on the same day i.e. 29.08.2006 at 10:00 a.m. at C.H.C. Amroha by the Medical Officer, wherein, injuries as referred hereinabove were said to be gun shot wound. Injury no.1 was gun shot wound of entry and the injury no.2 was gun shot exit wound and it was kept under observation and referred for treatment and the same was found to be fresh. Supplementary report of the same

was prepared by the Medical Officer, C.H.C. Amroha, J.P. Nagar on 11.09.2006 wherein "no bony injury was seen". The loss of soft tissue was seen on the back of knee joint as marked on plate. This injury was said to be firearm injury but "simple in nature".

46. The medical examination report and supplementary report have been proved as Ext. Ka-7 and Ext. Ka-8, respectively. But it is quite surprising that the doctor witness in his cross examination has categorically stated that this sort of injury cannot be caused by firing from distance, but it can be caused only by firing from point blank range. It means that the injured was hit by shot from point blank range and it can not be a shot from a distance of 2 to 1 feet. This testimony is particular and peculiar and has come forth from none other than the doctor who has specifically asserted that this sort of injury can be caused only by firing from point blank range. This witness has neither been declared hostile nor has been re-examined by the prosecution in order to clarify the situation and that testimony stands unrebutted and admitted to the prosecution itself. It is not opinionative but testimony beyond doubt and there is no reason to discard it. If it is so, it is absolutely certain that the investigation done by Randhir Singh DW-1 was correctly done when he filed charge sheet against Devendra Singh, Pushpendra under Sections 338, 211 I.P.C. at Case Crime No.834 of 2006, for misleading the police with a view to falsely implicate the appellants in this case. The superior police officers acted mechanically without caring for the element of truth involved in the claim of the prosecution.

47. The testimonial ramification of the doctor witness Gyan Singh in his cross examination regarding the manner of causing injury to the injured establishes fact beyond doubt that the occurrence never took place in the manner and style as stated by the injured PW-3 himself - PW-3 and the other witnesses of fact namely Devendra Singh PW-1 and Pushpendra PW-2. Certainly, they are not telling the truth but they are under circumstances interested witnesses and their testimony on the whole does not inspire confidence, particularly for the reason that the circumstances of the case when tallied with the style of occurrence does not conform to it in its practical shape.

48. In the wake of the above, their testimonial account must have been corroborated / supported by some independent testimony or proved and admitted circumstance but that particular aspect is missing in this case. It is surprising that the shot hit on the knee of the injured Vipin Kumar and there being entry wound and exit wound, but it did not cause any fracture and was found to be simple injury, neither grievous nor fatal. S.I. Randhir Singh has been produced by the defence and he has proved the charge sheet filed by him under Sections 338, 211 I.P.C. which is dated 20.09.2006 numbering 148 of 2006, however, it was got cancelled by the subsequent Investigating Officer of this case through their superior officers.

49. Merely because some application was made to the D.I.G. Moradabad Range, who in turn transferred the investigation of the case from district J.P. Nagar to Moradabad range then the investigation was done by as many as three different Investigating Officers - say in chronological order, Surendra Pal Singh PW-7 who took over investigation on

28.10.2006 pursuant to the order passed by S.S.P. Moradabad in Case Crime No.834 of 2006, under Section 324 I.P.C. Thereafter, the investigation was taken over by Maharaj Singh PW-8 on 25.12.2006. He took over the investigation of the case and added Section 307 I.P.C. on the basis of the medical report and documents brought on record, consequently, converted the case from Section 324 I.P.C. to 307 I.P.C. - would not mean that the subsequent Investigating Officers alone were justified for filing charge sheet. One of the three subsequent Investigating Officers got cancelled the charge sheet submitted by Randhir Singh DW-1 from his superior officer.

50. It is surprising that the medical documents are absolutely silent about any fatal injury and the nature of the injury was simple and left knee was hit by gun shot. Certainly It cannot be treated to be vital part of the body. Assuming it to be that any shot was fired even then considering the nature of the injury to be simple and no bony injury was seen that alone will not travel beyond the purview of Section 324 I.P.C. It appears that PW-8 was highly motivated and enthusiastic and he has exaggerated the matter in order to please his superior police officers because the investigation was transferred by order of the D.I.G. Moradabad Range from J.P. Nagar to Moradabad. Such attitude should be controlled by the superior officer. Here such supervision is woefully wanting.

51. S.I. Kushal Pal PW-6 took over the investigation on 26.04.2007 after the case was converted under Section 307 I.P.C. by the Investigating Officer PW-8. He prepared the site plan Ext. Ka-5 and filed the charge sheet Ext. Ka-6. A glance over the site plan is reflective of fact that there is no whisper about the place from where the shots were fired and where the accused were in fact standing on the spot. It merely indicates place marked by word capital 'A' where the incident is alleged to have taken place. It also indicates the place marked by word 'B' from where the informant Devendra Singh saw the occurrence but there is no mention of the actual position of the assailants as to from where they fired on the injured, it is silent about the actual position of the assailants though passage of their arrival on the spot and escape from the spot have been marked by different arrows. This omission in not specifying exact position of assailants in the site plan also throws lot of doubt on the actual place of the occurrence and the presence of the appellants on the spot. It virtually creates serious doubt about actual physical presence of the assailants on the spot. All these descriptions, if taken together regarding the injury being caused to the injured in the manner and style in which it is claimed by the informant to have taken place and by description of the two other witnesses of fact namely Pushpendra PW-2 and the injured Vipin Kumar PW-3, render the whole prosecution story improbable in the face of inherent infirmities appearing in the case and the testimony of Dr. Gyan Singh PW-9.

52. Besides it is also gathered that in the testimony of Pushpendra PW-2, it has emerged that as soon as firing was done, he did not make any attempt to secure his escape from the place of occurrence. Further in the testimony of the three prosecution witnesses of fact, it is noticed that after the occurrence, the injured was not taken to the hospital though it is claimed that there was severe bleeding

caused by causing the injury but the injured was taken by the informant first to the police outpost 'Munda Khera'. It means that prior to the lodging of the first information report, there was interference by the police, therefore, process of deliberation with the police prior to the lodging of the first information report cannot be ruled out under prevailing facts and circumstances of the case.

53. Insofar as on this material point and in particular the manner and style of causing the incident, and the possibility of causing this sort of injury as asserted by the doctor witness PW-9 is concerned, (to the ambit of firing from point blank range), it stands falsified by none other than the testimony of the injured himself when he says that the shot was fired from a distance of 1 to 2 feet. It means that the injured witness is tutored one and he is not telling the truth and his testimony is fraught with embellishment. Either of the two description may be correct if the shot was fired from a distance 1 to 2 feet then description of the occurrence as given by the prosecution witnesses of fact falsifies the very nature of the injury and in case the testimony of PW-9 is believed to be accurate, moreso it being reasonable on point of nature of injury caused then the case of the prosecution is thrown out. Thus the manner and style of the occurrence as claimed by the prosecution becomes highly improbable and it cannot be accepted with certainity that it in fact occurred as per claim of the prosecution witnesses of fact. Certainly, on account of enmity based on litigation, there are chances of developing a false case and trying to falsely implicate the appellants in this case once something unfortunate happened with the injured either on the spot or somewhere else. The version of the injured that the injury was caused by firing from a distance of 2 to 1 feet cannot be accepted as correct position. Here in this case, in view of the testimony of the doctor as to how injury in this case can be caused to the injured.

54. The trial Judge could not consider aforesaid aspects of the case in its right perspective and took casual view of the occurrence and the testimonial account which obviously is in contrast to the medical evidence on point of the causing of the occurrence thus bypassing vital testimony of Dr. Gyan Singh PW-9 when he categorically asserted that the nature of the injury is indicative of fact that the fire was shot from point blank range meaning thereby that it cannot admit of firing from any distance, be it 1 or 2 feet. There is improvement also when FIR describes that a number of persons were working in the field at the time of the occurrence (8:00 a.m.) in the morning still no one arrived on the spot, whereas the description of the first information report shows that a number of persons arrived on the spot and with their help, the injured was taken to the hospital, but here too facts have been distorted because the injured was first taken to the police outpost Munda Khera by the informant. It is admitted position that no villager or farmer who was working on his/her field in the vicinity of the place of occurrence has been examined by the prosecution as such and no such name is figured in the investigation by any Investigating Officer.

55. The trial court somehow overlooked these vital aspects and diluted the same by imaginary reasoning, but the above factual aspects cannot be diluted by any stretch of reasoning and it requires complete and satisfactory explanation which is woefully lacking.

56. Thus, on the basis of analysis made herein above, this Court is of the view that the trial court's finding on the point of recording conviction against the accused-appellants for the offence under Section 324 I.P.C. is not in accordance with the evidence and law and the prevailing facts and circumstances of the case and the same is not sustainable, in the result, the judgment and order of conviction impugned here in this appeal is liable to be set aside and the appellants are liable to be acquitted and the appeal is liable to be allowed.

57. For all the reasons stated above, the appellants are entitled to the benefit of doubt and, accordingly, entitled to acquittal.

58. In the result, the appeal is allowed and the the judgment and order of conviction and sentence dated 08.06.2011 passed by the Additional Sessions Judge / Special Judge, J.P. Nagar, in Session Trial No.225 of 2007 State Vs. Kuwarpal and others, arising out of Case Crime No.834 of 2006, under Section 324 I.P.C., Police Station Naugawa Sadat, District J.P. Nagar, is hereby set aside.

59. Appellants Kuwarpal, Vijendra and Santram are acquitted of the charge levelled against them in this case. They are on bail. They need not surrender. Their bail bonds cancelled and sureties stand discharged. They are required to furnish bonds within a month in compliance of Section 437A of the Criminal Procedure Code.

60. Let a copy of this judgment/order be certified to the court concerned for necessary informant and follow up action.

(2021)05ILR A25
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.05.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 4080 of 2007

Munna @ Teerathraj ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Vinay Saran, Sri Balwant Singh

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

A. Indian Penal Code,1860-Section 376,506 - Code of Criminal Procedure,1973-Section 313,207-conviction-appellant took the victim in sugarcane field on the pretext of sprinkling insecticide, committed rape with 8 year old girl-no inordinate delay in FIR- no occasion for suspicion in commission of incident- statement of victim, her mother and father inspire confidence and gets support with the medical report as well as testimony of doctor-prosecution was successful in establishing its case beyond reasonable doubt against the appellant-since appellant has already been in jail for a considerable period-sentence of imprisonment for life is modified to imprisonment of 14 years.(Para 1 to 62)

The appeal is disposed off.

List of Cases cited:-

1. H.P. Vs Shree Kant Shekari, (2004) 8 SCC 153

2. Sohan Singh & anr Vs St. of Bih. (2010) 1 SCC 68

3. St. of Punj. Vs. Gurmit Singh & ors (1996) AIR SC 1393,

4. St. of Punj. Vs Ram Dev (2009) AIR SC 1290

5. M.P. Vs Dayal Sahu (2005) CLJ 4374 SC

6. Wahid Khan Vs St. of U.P. (2010) 2 SCC 9

7. Rameshwar Vs St. of Raj. (1952) AIR SC 54

8. Narianamma Vs St. of Karnataka, (1994) SCC 5 728

9. Punj. Vs Gurmit Singh (1996) SCC 2 384

10. Bavo @ Manubhai Ambalal Thakore Vs St. of Guj. (2012) 2 SCC 684

11. Dagdu & ors Vs St. of Mah. (1977) 3 SCC 68

12. Muniappan Vs. St. of T.N. (1981) AIR SC 1220

13. Hazara Singh Vs Raj kumar (2013) 9 SCC 518"

14. Devidas Ramachandra Tuljapurkar Vs St. of Mah.(2015) 6 SCC 1

(Delivered by Hon'ble Subhash Chandra Sharma, J.)

1. This criminal appeal emanates from the judgment and order dated 23.05.2007 passed by learned Additional Sessions Judge/F.T.C.-2, Kushi Nagar at Padrauna in Session Trial No. 111 of 1999 (State Vs. Munna Alias Teerathraj) arising out of Crime No. 142 of 1996, under Section 376 of Indian Penal Code, Police Station Kotwali Hata, District Kushinagar by which appellant has been convicted and sentenced under Section 376(1) IPC with life imprisonment and fine of Rs.50,000/-. out of which 80 percent amount was to be given to the victim and the amount was to be realized as arrears of land revenue. No additional sentence for imprisonment was provided in case of default in making payment of fine.

2. The prosecution case in brief is that on 19.06.1996, victim aged about 8 years was alone at her house at about 2 p.m. Appellant Munna Alias Teerathraj went there and on the pretext of sprinkling insecticide, took her in the field of sugarcane and there he committed rape with the victim. Consequently, she became unconscious and younger brother of appellant, Raj Kumar brought her to his home where his mother gave some treatment to her. At that time parents of victim were not at home. Father of victim returned on 20.06.1996 and then they went to police station and lodged an F.I.R. on 21.06.1996 at 11.15 o'clock at Police Station Kotwali Hata against accused-appellant as Case Crime No. 142 of 1996 under Sections 376 & 506 IPC.

3. Victim was taken to Women Hospital, Padrauna where she was medically examined. The detail of medical examination is as under:-

General Examination: Height 129 c.m. Weight 20 Kg. Number of teeth upper jaw 13 and lower jaw 11. The incident as narrated by uncle (maternal) Bhikhu of the patient has occurred at about 2 p.m. on 19.6.1996.

Injuries: No marks of external injury present over any part of body. A linear tear, margin of tear is whitish in colour. Vascularisation, seen, about 2 c.m. present at posterior wall at the midline of fornix. Vagina admits little finger. Hymen not present. Uterus very small in size.

Bleeding on finger examination. Vaginal smear taken and handed-over to constable Prem Shankar Singh C.P. for vaginal smear test to District Hospital Deoria for pathological examination for presence of spermatozoa and gonococci. Girl was also sent to District Hospital, Deoria for x-ray examination of right knee, right ankle, right elbow and right shoulder joint for verification of age. Duration about 3-4 days old.

Opinion: Vaginal injury is caused by some hard and blunt object by forceful penetration. Opinion about rape is to be given after the pathological report.

Supplementary report of the victim: All the epiphysis around ankle, knee, elbow and wrist joint are not fused. Carpal bones 7 in number present.

Pathological report: No spermatozoa and gonococci are seen in vaginal smear as reported by Dr. L.P. Gupta, Pathologist, District Hospital, Deoria. Opinion: Evidence of rape is found.

4. One piece of trouser worn by victim was taken into possession by the police which was already washed but some blood stains were seen to be present on its miyani. Memo was prepared.

5. The investigation of the case was handed-over to Sub-Inspector R.N. Tandon, who after recording the statements of informant and other witnesses including victim, visited the place of occurrence and prepared site plan. Prima-facie commission of offence under Section 376 IPC was found to be established against the accused appellant Munna Alias Teerathraj and charge-sheet was submitted.

6. The court concerned, took cognizance of the offence and having provided essential papers to the appellant in compliance of Section 207 Cr.P.C, committed the case to the court of Sessions for trial.

7. The learned Sessions Judge framed charge under Section 376 IPC against the appellant on the basis of material on record which was read-over and explained to the appellant. He did not plead guilty but claimed for trial.

8. In support of its case prosecution examined P.W.1 Ramakant who is informant and father of victim, P.W.2 Dr. Rita Barnwal who examined victim, P.W.3 Victim herself, P.W.4 Smt. Phoolmati mother of victim, P.W.5 Shambhu Kushwaha-head-master Primary School, Singhpur and P.W.6 Sub-inspector Virendra Pratap Singh who lodged F.I.R. on the basis of written Tahreer given by informant at police station and also proved the handwriting of Sub-inspector R.N. Tandon who submitted charge-sheet.

9. After conclusion of prosecution evidence statement of appellant under Section 313 Cr.P.C. was recorded in which he stated that wrongful statements had been given by the witnesses against him. He did not adduce any evidence in defence.

10. After hearing the arguments for accused/appellant as well as the State, learned trial court passed the impugned judgment dated 23.5.2007 in which he found appellant guilty under Section 376(1) IPC and punished him as aforesaid.

11. Being aggrieved with the conviction and sentence this criminal appeal has been preferred by the appellant.

12. Heard Shri Balwant Singh, learned counsel for appellant as well as Shri R.P. Pandey, learned A.G.A. for State and perused the record.

13. Learned counsel for the appellant submits that he is innocent and has falsely been implicated in this case. The conviction and sentence passed against him is against weight of evidence on record which is bad in law. He further submitted that in this case, F.I.R. had been lodged after two days' delay without sufficient cause. There is no any independent witness of the occurrence. P.W.1-informant is father of victim and P.W. 4 is mother of victim. Both of them are not eye-witnesses. The sole witness of the incident is victim herself. None saw the victim to be taken by the appellant to the field of sugarcane. Even during pathological examination, no spermatozoa and gonococci were found in the vaginal smear. This fact has not been taken into consideration by the learned trial court. The injury found on the private part of the victim would have been caused by falling on some hard and blunt object like cut root of sugarcane. No any external injury was found on any part of body of victim. The absence of spermatozoa in vaginal smear also verify that injury was not caused by penetration but by falling on the cut root of sugarcane. The trouser of the victim was also not sent for chemical examination to assure as to whether it was blood stained or not. In this way, it cannot be concluded that the injury to the private part of the victim was caused by appellant while committing rape. He further argued that the incident was narrated by the victim to her mother and father. Her father lodged the F.I.R. but in written Tahreer Ext. Ka-1 informant has not disclosed that incident was narrated to him by the victim. Even during his examination before the court, he has disclosed that he came to know about the incident from the villagers not from the victim. The statement made by the informant and victim are contradictory, yet learned trial court has relied on such statements. The statement of victim is also not reliable and does not get corroboration with the medical report. He has further argued that in this case investigation was conducted by the Sub-Inspector R.N. Tandon but he has not been examined before the court by the prosecution. In such a way, learned trial court has held guilty to the appellant against established principle of law and conviction and sentence based on such evidence is not sustainable, therefore, impugned judgment is liable to be set aside and appeal to be allowed.

14. Learned A.G.A. vehemently opposed the contentions made by learned counsel for the appellant and submitted that in this case delay in lodging the F.I.R. has been explained properly by the informant even in his written Tahreer as Ext. Ka-1 and also during his examination before the court. Appellant took the victim with him into the field of sugarcane on the pretext of sprinkling insecticide when she was alone at her house and parents were out. As soon as they returned, she narrated the incident to them, thereafter they lodged an F.I.R. She was medically examined and injury was found at her private part. Though, spermatozoa and gonococci were not found in vaginal smear but there was bleeding present from the tear of hymen of the victim. On the basis of which doctor conducting the medical examination has opined that rape was committed with the victim. It is not necessary that spermatozoa and gonococci would be present on the private part of the victim or in the vaginal smear. For the offence of rape only penetration is sufficient as defined under

Section 375 IPC. There was no cut root in the field of sugarcane at that time as is clear from the statement of victim herself. Even the doctor-P.W.2 has also not expressed possibility about the injury to be caused otherwise. Victim has stated categorically about the incident as taken place with her and she also complained of it to her mother and also stated about it before the court. During cross-examination also she has supported the version of rape with her. There is no any material contradiction which is likely to affect her testimony adversely. The medical report and testimony deposed by doctor-P.W.2 also corroborates the version of rape as stated by the victim and supported by her mother as P.W.4. It cannot be said that lack of independent witnesses falsify the prosecution case. In such cases of rape accused always chooses some secret place where ingress and egress of people would not be possible. It is settled principle of law that in case of rape the testimony of victim is sufficient to hold conviction of accused, corroboration is not necessary at all, if the account given by the victim inspire confidence. In the present case, victim was aged about 8 years, she was alone at her house and on the pretext of sprinkling insecticide in the field appellant took her with him to the field of sugarcane where he committed rape with her. She became unconscious on the place and was brought to the home of appellant by his younger brother and after giving some primary treatment by his mother, she was left to her home. As soon as the parents of victim came back from outside to their house, victim narrated the incident as happened with her to her mother on which F.I.R. was lodged. The testimony of victim as well as her mother inspire confidence and it is corroborated with the testimony of medical expert, therefore, no suspicion arises in the case about the complicity of appellant in committing rape with victim. Learned trial court has considered all facts along with evidence and concluded that rape was committed with victim by the appellant and convicted him which is based on sound principle of law. The impugned judgment is not bad in the eye of law but the appeal lacks merit which is liable to be dismissed.

15. Learned counsel for the appellant has lastly submitted that appellant has been languishing in jail since long and at the time of commission of offence he was too young i.e. about 25 years old. It was his first offence. He comes from a poor family. The award of life imprisonment and fine of Rs. 50,000/- is excessive. This fact was also mentioned before the trial court but not considered at the time of awarding punishment and without assigning any reason maximum punishment for said offence was awarded which should be mitigated in the present case. The learned A.G.A. appearing for the State vehemently opposed the submission.

16. From the submissions and perusal of record, the following questions emerge for consideration of this court as to whether there was delay in lodging the F.I.R, witnesses are relative and no independent witness have been examined. No spermatozoa and gonococci found in the vaginal smear, nature of injury is not likely to be caused with penetration but it suggests to be caused by falling on cut root of sugarcane or some other hard and blunt object. Contradictions in the statements of witnesses, none examination of Investigating Officer and at last the excess of punishment.

17. Before we deal with the contentions raised by learned counsel for the appellant, it will be convenient to take note of the evidence which has been adduced by the prosecution.

18. P.W.1 Ramakant is father of victim who has deposed that age of his daughter (victim) was about 8 years. She was playing at the door at about 2 p.m. His wife was at home. The house of appellant Munna Alias Teerathraj was located in south of his house. He works in the field of Munna Alias Teerathraj. On the pretext of sprinkling insecticide in the field of sugarcane, he took his daughter. There being loneliness, he committed rape with his daughter. She became unconscious from where, she was brought by her mother. He was not at home but came back on the next day evening. Her mother narrated the story to him. He was going to lodge the F.I.R. but prevented by the people belonging to the caste of Munna Alias Teerathraj, thereafter on the next day, he went to police station with written Tahreer in company of other persons where F.I.R. was lodged. He identified his signature on the written Tahreer which was marked as Ext. Ka-1. Her daughter was examined medically by lady doctor. The statement of his daughter was recorded by the policemen. Her trouser was also taken and memo was prepared by the police. Site plan was also prepared by Sub-Inspector R.N. Tandon after visiting the site. This witness was subjected to gruel cross-examination by the learned counsel for the appellant in which he has disclosed that on the day of incident, he was out and when he came back the villagers narrated him about the incident. His wife did not tell him, thereafter he went to police station for lodging the F.I.R. He got the Tahreer written by Vairister. Victim was also brought to police station.

19. P.W.2 Dr. Rita Barnwal has deposed that on 22.6.1996, she was posted as in-charge Medical Officer, Women Hospital, Padrauna. On that day, victim aged about 11 years was brought to her by constable Prem Shankar Singh. She examined her. General examination:- Her height 129 c.m. Weight 20 Kg. Teeth 13/11. The maternal uncle was with her. According to him incident took place at about 2 p.m. on 19.6.1996. There was no any mark of external injury on the body of victim. Linear tear 2 c.m. on posterior wall of vagina was found. A linear tear margin of tear in whitish in colour. Vascularisation seen in the wound. Hymen not present. Vagina admits little finger. During examination, blood was oozing from the tear. Vaginal smear was taken and handed-over to constable Prem Shankar Singh C.P. for pathological examination about spermatozoa and gonococci. Victim was sent to District Hospital Deoria for verification of age and x-ray of right knee, right ankle, right elbow and right shoulder joint. Vaginal injury was found to be caused with some hard and blunt object by forceful penetration. Injury was simple in nature and 3-4 days old. Medical report was prepared in her writing and signature and on which identification mark and thumb impression of victim was affixed, which has been proved as Ext. Ka-2. X-ray and pathological reports were received on 26.6.1996 and then supplementary report was prepared. As per x-ray report elbow, ankle, knee, wrist epiphysis joint were not fused. Number of carpal bone in wrist was seven. In pathological report, there was no spermatozoa and gonococci in vaginal smear. On the basis of radio-logical and pathological report, the evidence of rape

was found. The age of victim was about 9 years old. She prepared supplementary report and proved it as Ext. Ka-3.

This witness was also subjected to cross-examination by the learned counsel for the appellant, during her cross-examination she has cleared that there were no mark of teeth bite on the cheek or breast of the victim. The injury sustained on the vagina could be possible with penis which could be hard and blunt object. She has further cleared that if victim fell in the field of sugarcane or on stone, such type of injury could not be sustained because by falling in such a way injury on other near by parts might also be sustained. Since, there was no any such injury, therefore, injury could not be sustained by falling. She has also opined that for the offence of rape presence of spermatozoa is not necessary. She found the evidence of rape on the basis of nature of injury which disclosed that rape was committed. Further she has categorically denied that such injury could be sustained by falling on any pointed thing.

20. P.W.3 victim has deposed that at about 2 p.m. she was at her door where appellant Munna Alias Teerathraj came and took her on the pretext of sprinkling insecticide in the field of sugarcane. There was, Raj Kumar younger brother of appellant, present whom he sent for purchasing biscuit from chauraha. When there was loneliness he opened her trouser by force and committed rape with her. Blood began to ooze from her private part. She became unconscious. Younger brother of appellant, Raj Kumar brought to her to his home. She was feeling pain and was weeping. Mother of appellant said to her that she would treat her. After treatment she left her at her home. At evening about 4 o'clock her parents came back, at the time of incident her parents were not present at home. She narrated the incident to her parents. Her father took her to the police station from where she was brought to Government Hospital for medical examination. She was examined medically and treatment was given in Government Hospital, Deoria. Her statement was also recorded in the court before the Magistrate and also she was examined by Investigating Officer.

This witness was also subjected to gruel cross-examination by the learned counsel for the appellant in which she stated that the house of appellant Munna Alias Teerathraj was near to her house. When the appellant came to call, she was alone. Her parents were not present. She went to the field. Appellant was having machine used for sprinkling pesticide. He told to sprinkle pesticide. She also stated that appellant made her fall down, opened her trouser and made her naked. He put off her sameej and committed rape with her in the mid of sugarcane field. He put off his pant. She became unconscious on account of rape. When she cried, Raj Kumar came there who lifted her then she became conscious and took her to his house. Blood was oozing from her vagina. There was no other injury. He made her wear her trouser. Her parents were out and came back about 4 o'clock then she narrated the incident to them. In the meantime, mother of Raj Kumar provided treatment to her. Appellant did not bite on her cheek. F.I.R. was lodged on the next date of incident. She has denied the suggestion that while cutting sugarcane, she fell down and

sustained injury with the sugarcane. She has also denied the suggestion for implicating him falsely.

21. P.W.4 Phoolmati, mother of victim has deposed that she was out in relation to *Jajmani*. Victim was alone at her house. When she came back about 4 o'clock her daughter was at home and was weeping. She was lying disorderly. She told her that appellant took her on the pretext of sprinkling insecticide in the field of sugarcane and he sent his younger brother Raj Kumar, to bring biscuit from Chauraha and he committed rape in the field of sugarcane forcefully. Blood was oozing from the vagina of the girl and blood stains were present on her trouser. She also narrated that brother of appellant, Raj Kumar brought her to his home and his mother provided treatment to her and dropped her at home. On the next day her husband went to police station with the victim and lodged an F.I.R.

This witness was also subjected to exhaustive cross-examination by the learned counsel for the appellant in which she has answered clearly the questions put to her. She stated that she was out in relation to Jajmani and came back at 4 o'clock. She examined the body of her daughter. The clothes worn by the victim were blood stained. There was no other injury on the body of victim except oozing blood from her vagina. Her husband came back on the next day, she narrated the story to her husband then he took the victim to police station. She has also stated that she went to the place of occurrence with the victim. The incident took place in the mid of the field of sugarcane. No person of the village told her to have seen the incident. There was tear in the vagina of the girl from where blood was oozing. She has denied the suggestion put to her on behalf of appellant that there was quarrel with the family of the appellant from before and also there was party-bandi in the village with her.

22. P.W.5 Shambhu Kushwaha, head-master of primary school has deposed about date of birth of victim as 04.07.1991 on the basis of school record.

23. P.W.6 Sub-Inspector Virendra Pratap Singh has deposed that on 21.06.1996 he was posted as head-constable in the police station and on the basis of written Tahreer, he lodged an F.I.R. as Crime No. 142 of 1996 under Sections 376 & 506 IPC in his writing & signature and proved as Ext. Ka-4. Detail of which was entered into G.D. in his writing & signature which he proved as Ext. Ka-5. He has also stated that investigation of the case was handed-over to Sub-Inspector R.N. Tandon. He has further stated that Sub-Inspector R.N. Tandon was also posted at police station and he saw him while reading and writing and was well acquainted with his handwriting. He proved site plan as Ext. Ka-6 and charge sheet as Ext. Ka-7 being in writing and signature of Sub-Inspector R.N. Tandon. He further stated that Sub-Inspector R.N. Tandon has died.

24. So far as the argument relating to delay in lodging the F.I.R. in a rape case is concerned, it is not of much "significance" as the victim has to muster courage to come out in open and expose herself in a "conservative social milieu".

In rape cases the delay in filing the FIR by the prosecutrix or by the parents in all circumstance is not of significance. Sometimes the fear of social stigma and on

occasions the availability of medical treatment to gain normalcy and above all psychological inner strength to undertake such a legal battle.

25. In the case of **H.P. vs. Shree Kant Shekari, (2004) 8 SCC 153** the Hon'ble Supreme Court has held that:-

"18. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactory explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of first information report does not in any way render the prosecution version brittle. These aspects were highlighted in Tulshidas Kanolkar v. State of Goa."

26. In the case of **Sohan Singh and another vs. state of Bihar (2010) 1 SCC 68** the Hon'ble Supreme Court has held as under:-

"12. As far as delay in lodging the FIR is concerned, we are also satisfied that it cannot be termed to be inordinately delayed. Even otherwise, in our considered opinion too, it cannot be said that there has been inordinate or unexplained delay in lodging the FIR.

13. When FIR by a Hindu lady is to be lodged with regard to commission of offence like rape, many questions would obviously crop up for consideration before one finally decides to lodge the FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted in such a manner. Obviously, the prosecutrix must have also gone through great turmoil and only after giving it a serious thought, must have decided to lodge the FIR. Precisely this appears to be the reason for little delayed FIR. As mentioned hereinabove, the delay has already been found to be properly explained by both the courts below. Thus, we are not required to deal with this issue any more."

27. In the instant case, incident took place on 19.6.1996 and F.I.R. was lodged on 21.6.1996 at 11.15 o'clock after two days. In the written Tahreer as Ext. Ka-1 the cause of delay has been explained by informant as he was not present at his home on the day, incident took place. When he came back on 20.6.1996 to his house, he went to police station for lodging the F.I.R. but was prevented by some people related to the appellant. He has also expressed the cause of delay in similar words in his statement during the examination before the court. This fact was also supported by P.W.4 Smt. Phoolmati wife of informant in the words that on the day of incident, she was not present at her home, she went to Ram Nagar in Jajmani with her husband,

she came back on the same day but her husband went in Barat who came back on the next day of incident, thereafter, he went to police station with the victim. The victim P.W.3 has also stated that at the time of incident her parents were not present at home. In this way delay in lodging the F.I.R. has been explained by the informant while in the Tahreer and also in his statement made before the court. There was sufficient cause in lodging the F.I.R. after two days, therefore, the cause of delay seems to be sufficient and natural. It is not likely to affect the prosecution case.

28. Coming to the first submission relating to the delay in lodging the FIR for the commission of the offence, in our considered opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but also considering the facts and circumstances of the case, it was natural."

29. Regarding non-availability of independent witnesses, it is noteworthy that in such type of cases of rape accused always chooses separate or solitary place for committing the offence where approach of independent witnesses cannot become possible. In this case, the girl was taken by the appellant to the field of sugarcane and where no other persons was present except younger brother of appellant who was sent by him for bringing biscuit from the Chauraha. Meanwhile offence was committed with the victim in the field of sugarcane. It cannot be expected from younger brother of appellant that he would come in evidence against his real brother. So lack of independent witness does not affect the credibility of the testimony of victim. Victim herself is injured witness and her testimony cannot be said to be unreliable on the basis of lack of independent witness because she herself is injured and she would not like to conceal the real culprit and to implicate false one.

30. Evidence of the prosecutrix or woman, who has been raped, is very crucial piece of testimony to prove the case against the accused. It is now well settled that conviction for an offence of rape can be based on the sole testimony of the prosecutrix if it is found to be natural, trustworthy and reliable. In the case of rape, the onus rests on prosecution to prove firmly with evidence each ingredient it seeks to establish and such onus never shifts. The victim, who reports a rape case, suffers at each stage i.e. after reporting to the police, during investigation and trial. Witness of victim also suffers harassment, humiliation, financial loss, loss of time resulting mental pain and suffering to the victim and her witnesses.

31. The most important question in a prosecution for the offence of rape is how exactly to appreciate the testimony of the rape victim. One important aspect is whether the testimony invariably requires corroboration or not and in case corroboration is required or desired, what is the nature and extent of such corroboration and the source of such corroboration.

32. In the case of **State of Punjab vs. Gurmit Singh and others AIR 1996 SC 1393,** the Hon'ble Supreme Court held that "the Court can rely upon the evidence of the prosecutrix even without seeking corroboration. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult

to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony. The Hon'ble Supreme Court further observed that the evidence of a girl or of a woman who complains of rape or sexual molestation should not be viewed with doubt, disbelief or suspicion. The Hon'ble Supreme Court further held that the evidence of a victim of a sexual offence is entitled to great weight even without corroboration."

33. In the case of **State of Punjab vs. Ram Dev (AIR) 2009 SC 1290**, the Hon'ble Supreme Court held that there is no rule of law that testimony of the prosecutrix cannot be acted without corroboration in material particulars.

34. In the case of **State of M.P. vs. Dayal Sahu 2005 Criminal Law Journal 4374 (SC)** the Hon'ble Supreme Court observed as follows:-

"once the statement of prosecutrix inspires confidence and accepted by the courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required .....Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence."

35. In the case of **Wahid Khan vs. State of U.P. (2010) 2 SCC 9** the Hon'ble Supreme Court held that :-

" 16.The law on the point is now too well settled. No doubt, it is true that Dr. B. Biswas, who had initially conducted the medical examination of the prosecutrix, has not appeared on behalf of the prosecution to depose. But, that alone is not sufficient to discard the prosecution story. Corroboration is not the sine qua non for conviction in a rape case."

36. In this regard, the most celebrated observations of Justice Vivian Bose in the case of **Rameshwar v. State of Rajasthan AIR 1952 SC 54** may be quoted :

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...."

It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing therefrom. If she is found to be false, she would be looked by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracized by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward looking as the western countries are.

Thus, in a case of rape, testimony of a prosecutrix stands at par with that of an injured witness. It is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible....."

37. The witnesses are father and mother of victim, those are near relative. Their testimony cannot be discarded. Being mother, it is natural that victim would narrate the incident as happened with her because such incident cannot be disclosed before other person who is not related to her on account of social insult. Therefore, the argument that there is no independent witness of the incident has no force in regard to such type of offence like rape.

38. The contention made by learned counsel for the appellant regarding non-availability of spermatozoa and gonococci in the pathological report does not keep too much importance because in sexual offence as rape, it is not necessary that spermatozoa or gonococci be present in the pathological examination. Section 375 IPC, which contains definition of rape, does not require the presence of spermatozoa or gonococci. For the commission of rape penetration is sufficient.

39. Explanation to Section 375 IPC provides:- "Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

40. In the case of **Narainamma Vs. State of Karnataka, 1994 SCC(5)728** Hon'ble the Supreme Court has held as under:-

"(vi) With regard to the vaginal smear examination conducted at a different hospital, Dr Reeta, PW 3 has reported that no spermatozoa was seen on it, and the absence of sperms has been viewed against the version of the prosecutrix. It was never elicited from the prosecutrix as to whether the two persons who committed rape on her had reached orgasm emitting semen in her private parts. No presumption can be made that penetration of penis in the private parts of a rape victim must necessarily lead to the discovery of spermatozoa. It is a question of detail and has to be put to test by cross-examination. Otherwise also there may be various other factors which may negative the presence of spermatozoa such as faulty taking of the smear, its preservation, quality of semen etc. The absence of spermatozoa prima facie could not be allowed to tell against the version of the prosecutrix."

41. In this particular case, hymen was found not present. At the time of medical examination, there was linear tear in the vagina oozing blood as shown in Ext. Ka-2 and stated by doctor conducting medical examination on the person of victim. She has also opined that the injury was caused by some hard and blunt object like forcefully penetration. She has affirmed the injury to have been caused by penetration on the basis of nature of injury. During her examination before the court, she has categorically explained the injury found on the vagina of victim to have been caused by penetration. She has expressly denied the suggestion that such kind of injury was possible by falling on some pointed stone or object or in the field of sugarcane. Thus, the testimony of P.W.2 Dr. Rita Barnwal rules out the possibility of injury to have been caused by falling on some pointed object or cut root of sugarcane in the field. It also ruled out any other kind of possibility of injury to the victim. From the version of victim P.W.3, P.W.4 mother of victim and P.W.2 Dr. Rita Barnwal conducting the medical examination of the victim, it can be concluded without any hesitation that the injury sustained in the vagina of the victim was caused by penetration and not by falling on any object. The argument in this regard by

learned counsel for the appellant have no weight at all.

42. The argument relating to contradictions in the statement of prosecution witnesses, it is noteworthy that they are rustic and illiterate villagers and not acquainted with typical process of the court. They are also not in a position to understand the latent meanings of the questions put to them by the learned counsel, therefore, some contradictions are natural to occur in their statements. The contradictions, visible in the statements of P.W.1-informant and P.W.4-mother of victim are not related to material facts of the case but they are minor in nature. Which only show the naturality of the statements of the witnesses about the incident. Thus, these contradictions are cosmetic in nature having no affect on the merit of the case. There is no contradiction in the testimony of all the witnesses regarding the fact of rape with the victim. P.W.3-victim who sustained injury is intact even during her cross-examination about the facts of incident, there is no any contradictory statement which negates the commission of rape with her by the appellant or which shows some kind of exaggeration about incident but she has squarely narrated the incident how it happened.

43. In the case of **State of Punjab Vs. Gurmit Singh, 1996 SCC (2) 384**, Hon'ble Supreme Court held as under:

".....The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspirers confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations." In this way, the argument made by learned counsel for the appellant in this regard has no force.

44. It is noteworthy that there is no enmity or any other reason present between family of victim and the appellant on account of which it cannot be said that there is reason to implicate the appellant falsely. In this case, even the appellant has not stated in his statement under Section 313 Cr.P.C. recorded by the court that there was enmity between two families owing to which he was implicated falsely.

45. Now, on considering arguments placed by learned counsel for the appellant in context with the material on record, it is established that there is no inordinate and unsatisfactory delay in lodging the F.I.R. There is no occasion for suspicion in commission of incident. Oral account about the incident as narrated by the victim, her mother and her father inspire confidence and gets support with the medical report as well as testimony of doctor. It inspires confidence about the commission of offence with the victim by the appellant without any lapse.

46. Thus, we are of the considered opinion that in this case prosecution was successful in establishing its case beyond reasonable doubt against the appellant. There is clinching evidence against the appellant for conviction under Section 376(1) IPC and learned trial judge has held him guilty for commission of crime, which cannot be said to be against the established principle of law but he was right in convicting and sentencing the appellant under Section 376(1) IPC. As a result, the appeal regarding conviction under Section 376(1) IPC is devoid of merit.

47. So far as the argument of learned counsel for the appellant regarding excessive punishment is concerned, he has placed reliance on the judgment of Hon'ble Supreme Court in the case **of Bavo @ Manubhai Ambalal Thakore v. State of Gujarat, (2012) 2 SCC 684.** It appears that learned trial judge has awarded sentence for life imprisonment to the appellant which is maximum provided for the offence. The only question to be considered is whether the sentence for life imprisonment and a fine of Rs. 50,000/- is reasonable or excessive.

48. Section 376 IPC speaks about the punishment for rape. Sub-section (1) provides for punishment of rape. Sub-section (2) is not applicable in present matter. Sub-section (1) reads as under :

"(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years."

49. It is clear from the above statutory provision that for the offence of rape on a woman, punishment shall not be less than 7 years but which may extend to life and also to fine shows that the legislature intended to adopt strictness in awarding sentence. No doubt, the proviso to Section 376(1) lays down that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than 7 years. It is settled law that the courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. In the absence of any special and adequate reasons, recourse to the proviso mentioned above cannot be applied in a casual manner.

50. The Section 235 of the Criminal Procedure Code, 1973 reads:

"(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law".

51. In **Dagdu and Ors. v. State of Maharashtra, (1977) 3 SCC 68** Hon'ble Apex Court has held that :

"The imperative language of Sub-section (2) leaves no room for doubt that after recording the finding of guilt and the order of conviction, the Court is under an obligation to hear the accused on the question of sentence unless it releases him on probation of good conduct or after admonition under Section 360. The right to be heard on the question of sentence has a beneficial purpose, for a variety of facts and considerations bearing on the sentence can, in the exercise of that right, be placed before the Court which the accused, prior to the enactment of the Code of 1973, had no opportunity to do. The social compulsions, the pressure of poverty, the retributive instinct to seek an extra-legal remedy to a sense of being wronged, the lack of means to be educated in the difficult art of an honest living, the parentage, the heredity- all these and similar other considerations can, hopefully and legitimately, tilt the scales on the propriety of sentence. The mandate of Section 235(2) must, therefore, be obeyed in its letter and spirit."

52. In **Muniappan v. State of Tamil Nadu, AIR 1981 SC 1220** Hon'ble Supreme Court has held :

"The obligation to hear the accused on the question of sentence which is imposed by Section 235(2) of the Criminal Procedure Code is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The Judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence. All admissible evidence is before the Judge but that evidence itself often furnishes a clue to the genesis of the crime and the motivation of the criminal. It is the bounden duty of the Judge to cast aside the formalities of the Court-scene and approach the question of sentence from a broad sociological point of view. The occasion to apply the provisions of Section 235(2) arises only after the conviction is recorded. What then remains is the question of sentence in which not merely the accused but the whole society has a stake. Questions which the Judge can put to the accused under Section 235(2) and the answers which the accused makes to those questions are beyond the narrow constraints of the Evidence Act. The Court, while on the question of sentence, is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction."

53. In "**Hazara Singh v. Raj Kumar, (2013) 9 SCC 516"** Hon'b'e Apex Court has held that :

"it is clear that the maximum punishment provided therein is imprisonment for life or a term which may extend to 10 years. Although Section 307 does not expressly state the minimum sentence to be imposed, it is the duty of the courts to consider all the relevant factors to impose an appropriate sentence. The legislature has bestowed upon the judiciary this enormous discretion in the sentencing policy, which must be exercised with utmost care and caution. The punishment awarded should be directly proportionate to the nature and the magnitude of the offence. The benchmark of proportionate sentencing can assist the Judges in arriving at a fair and impartial verdict."

"17. We reiterate that in operating the sentencing system, law should adopt the corrective machinery or

deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment."

54. In the present case after the verdict of conviction the accused appellant had, at the time of hearing on the point of quantum of sentence, placed all relevant factors which should have been well thought out for determining the appropriate amount of sentence. But the trial Court, after mentioning them in the order, has not considered them, and without assigning any special reason the learned Sessions Judge had awarded maximum possible punishment. Thus the learned Sessions Judge, in the instant case, complied with the form and letter of the obligation which Section 235(2) imposes, forgetting the spirit and substance of that obligation.

55. There is no justification for the trial court while convicting accused-appellant for offence under Section 376 IPC to sentence him for life imprisonment. Only because Section 376 IPC provides life imprisonment as the maximum sentence, does not mean that the court should mechanically proceed to impose the maximum sentence, more particularly when there is no proof that any injury was caused during the incident. There is no justification for awarding the maximum sentence for life imprisonment in the present case.

56. In **Devidas Ramachandra Tuljapurkar v. State of Maharashtra, (2015) 6 SCC** 1 Hon'ble Apex Court has held :

"While we see no reason to differ with the concurrent findings recorded by the trial court and the High Court, we do see some substance in the argument raised on behalf of the appellants that keeping in view the prosecution evidence, the attendant circumstances, the age of the accused and the fact that they have already been in jail for a considerable period, the Court may take lenient view as far as the quantum of sentence is concerned. The offences having been proved against the accused and keeping in view the attendant circumstances, we are of the considered view that ends of justice would be met, if the punishment awarded to the appellants is reduced."

57. In **Bavo @ Manubhai Ambalal Thakore v. State of Gujarat, (2012) 2 SCC 684** Hon'ble Apex Court has held as :

"11. Considering the fact that the victim, in the case on hand, was aged about 7 years on the date of the incident and the accused was in the age of 18/19 years and also of the fact that the incident occurred nearly 10 years ago, the award of life imprisonment which is maximum prescribed is not warranted and also in view of the mandate of Section 376(2)(f) IPC, we feel that the ends of justice would

be met by imposing RI for 10 years. The learned counsel appearing for the appellant informed this Court that the appellant had already served nearly 10 years.

12. Coming to the quantum of fine, in the case on hand, the learned trial Judge has imposed Rs 20,000, in default, to undergo RI for three years. The learned counsel for the appellant submitted that the accused hails from a poor family and was working as an agricultural labourer and is not in a position to pay such a huge amount as fine which is not disputed by the State. Taking note of all these aspects, we reduce the fine of Rs 20,000 to Rs 1000, in default, to further undergo RI for one month.

13. In view of the above discussion, the conviction imposed on the appellant herein is confirmed. However, the sentence of life imprisonment is modified to RI for 10 years with a fine of Rs 1000, in default, to further undergo RI for one month.

14. With the above modification of sentence, the appeal stands disposed of."

58. It lies in the discretion of the trial court to choose a particular sentence within the available range from minimum to maximum; and in the present case the discretion has not been judiciously applied. In the present case the trial Court had chosen to award maximum punishment to appellant without considering the points which should have been taken into account at the time of pre-punishment hearing. This had infringed legal rights of appellant available to him under section 235(2) CrPC. Therefore the impugned judgment warrants interference in the exercise of appellate jurisdiction.

59 . Now the matter is limited to the sentence for the offence u/s 376 IPC, and we have to consider about the appropriate sentence for the appellant in this case. For it aggravating circumstances relating to the crime while mitigating circumstances relating to the criminal has to be considered. From the facts and circumstances of the case before us, as regards aggravating circumstance is concerned it is clear that appellant had found a girl of about 8 years of age in a lonely place, considered himself stronger than her and then given in to his sexual desire, used criminal force to satisfy his lust, without considering the effect of his act on the poor helpless girl and her life. So far as mitigating circumstances are concerned, taking note of various factors including the age of the young appellant-accused being about 25 years at the time of the incident which cannot be treated as very mature, his old mother being dependent on him, he is the only bread winner of his house, it is his first guilt and hailing from a poor family, award of life imprisonment and a fine of Rs. 50000/- is excessive. These points were mentioned in judgment by the trial Court at the time of hearing on point of quantum of sentence, but were not considered at the time of awarding the punishment; and without assigning any reason maximum possible punishment for the said offence were awarded,which should be mitigated on the facts of the present case. This contention of the learned counsel for the appellant cannot be ignored that during trial and then after conviction appellant has suffered sufficient time in incarceration (about 13 years) which would

have taught him an appropriate lesson to refrain from such overt acts.

60. In the aforesaid case the Supreme Court had, for the reasons presented by defence side, had mitigated the punishment for rape of a girl below 7 years to 10 years' imprisonment. But in said case appellant was in incarceration for long time. In present case the circumstances presented before the Sessions Judge, at the time of hearing under section 235(2) CrPC on point of quantum of sentence, was more dismaying. Appellant was aged about 25 years and was not too young.

61. While we see no reason to differ with the findings recorded by the trial court regarding the charged offence, we do see some substance in the argument raised on behalf of the appellants that keeping in view the prosecution evidence, the above mentioned aggravating and mitigating attendant circumstances, the age of the accused and the fact that he has already been in jail for a considerable period, the Court should take a balanced view as far as the quantum of sentence is concerned. The offences having been proved against the accused and keeping in view the attending circumstances, we are of the considered view that ends of justice would be met, if the punishment awarded to the appellant is reduced. So, it appears appropriate that, in present case the sentence should not exceed more than 14 years' imprisonment and lesser fine.

62. In view of above facts and discussion, the order of conviction u/s 376 IPC imposed on the appellant is hereby confirmed. But the sentence of imprisonment for life is modified to imprisonment of 14 years and fine of Rs. 50,000/- to Rs. 30,000/- out of which 80 percent amount is to be given to the victim. With this modification of sentence, the appeal stands ***disposed off.***

63. Copy of this judgment alongwith original record of Court below be transmitted to the Court concerned for necessary compliance. A compliance report be sent to this Court within one month. Office is directed to keep the compliance report on record.

(2021)05ILR A42
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

FAFO No. 337 of 2021

Smt. Indrawati ...Appellant
Versus
Sarvesh Soni & Ors. ...Respondents

Counsel for the Appellant:
Sri Shiv Narayan Pandey

Counsel for the Respondents:
Sri Sushil Kumar Mehrotra

A. Civil Law – Motor Accident Claims – Quantum of compensation - Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011.

According to the appellant, the Tribunal has taken into consideration a sum of Rs. 3000/- per month to be the income of the injured-claimant, which is unjust and improper, at least it could not be less than Rs. 16,000/- per month. It is submitted that no amount under the head of future loss of her career has been determined and granted. Amount under the non-pecuniary heads and the interest awarded are also on the

lower side and requires to be enhanced in view of authoritative pronouncements. (Para 5)

After considering the facts and circumstances, High Court has awarded her an income of Rs. 3000/- per month, to which as the injured was above 50 years at the time of accident, 40% of the income has been added as future loss of income to the injured. The loss of earning capacity to the extent of 25% as considered by the Tribunal has been maintained. (Para 7)

Further, the amount granted by the Tribunal for medical expenses has been enhanced to Rs. 3,50,000/- and Rs. 50,000/- for future medicine, Rs. 10,000/- for special diet and Rs. 10,000/- for attendant charges have been granted. As far as the amount under pain, shock and sufferings was concerned, looking to the fact that she was admitted in hospital and had undergone surgery, the amount has been enhanced to Rs. 25,000/-. The rate of interest has been decided to be 7.5%. (Para 8, 10)

Appeal partly allowed. (E-3)

Precedent followed:

1. Sanjay Kumar Vs Ashok Kumar & anr. (2014) 5 SCC 330 (Para 5)

2. Syed Sadiq & ors. Vs Divisional Manager, United India Insurance Company Ltd., (2014) 2 SCC 735 (Para 5)

3. Mekala Vs M. Malathi & anr. (2014) 11 SCC 178 (Para 5)

4. Hari Babu Vs Amrit Lal & ors., 2019 (2) T.A.C. 718 (All.) (Para 5)

5. Raj Kumar Vs Ajay Kumar & anr., (2011) 1 SCC 343 (Para 6)

6. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.) (Para 10)

Present appeal challenges award dated 09.04.2019, passed by Motor Accident Claims Tribunal/Additional District Judge Fast Track Court (New), Chiktrakoot.

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. &
Hon'ble Ajit Singh, J.)

1. Heard Sri Shiv Narayan Pandey, learned counsel for the appellant and Sri S.K. Mehrotra, learned counsel for the Insurance Company namely, TATA AIG General Insurance Company Ltd.

2. This appeal, at the behest of the injured-claimant challenges the award dated 9.4.2019 passed by the Motor Accident Claims Tribunal/Additional District Judge Fast Track Court (New), Chitrakoot (hereinafter referred to as 'Tribunal') in Claim Petition No. 57/70/2018 awarding a sum of Rs.7,14,852/- as compensation with an interest at the rate of 7%.

3. The accident is not in dispute. The injured was traveling in a vehicle is also not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent-Insurance Company has not challenged the liability imposed on them. The only issue which is to be decided is the quantum of compensation awarded.

4. The vehicle was insured with TATA AIG General Insurance on the date of the accident and is not in dispute as TATA AIG General Insurance has accepted the judgement and award passed in Motor Accident Claim Petition no. 57/70/2016 decided by Motor Accident Claim Tribunal/Addl. District Judge, FTC (New), Chitrakoot.

5. The only argument raised by the learned counsel for appellant in support of enhancement of the claim amount before this Court is that the appellant has sustained

90 per cent disability as a result of the accident and the Tribunal has not given due weight to this aspect of the matter and has also not awarded the compensation amount under the head of suffering, special diet and more particularly under the head of loss of her income due to the accident and further the Tribunal has also not granted any amount under the head of future economic loss to be caused to the complainant appellant due to 90 per cent disability while calculating the quantum of compensation admissible to her.

6. The learned counsel for the appellant has contended that the appellant was running a Canteen in 'Mandi Parisar' and was earning a sum of Rs. 16000/- per month from the said occupation and it has not been taken into consideration by the Tribunal. It is further submitted that though there was an additional income of Rs. 81500/- but it was discarded by the Tribunal.

4. The injured is now 57 years of age and she was 54 years of age when the accident occurred in the year 2017. She was running a canteen in 'Mandi Parisar'. She sustained 90% disability. She was admitted to District Hospital, thereafter she was referred to Alka Hospital, Allahabad w.e.f. 3.12.2017 to 14.1.2018. She had to undergo surgery on 4.12.2017 in which her left leg was amputated, as a result of which she became handicapped with 90 per cent disability.

5. It is submitted by learned counsel for the appellant that the Tribunal has taken into consideration a sum of Rs.3000/- per month to be the the income of the injured-claimant, which is unjust and improper, at least it could not be less than Rs.16,000/- per month. It is submitted that no amount under the head of future loss of her career has been determined and granted. It is also submitted that the amount under the non-pecuniary heads and the interest awarded are also on the lower side and requires to be enhanced in view of the following authoritative pronouncements:

(i) Sanjay Kumar Vs. Ashok Kumar and another, (2014) 5 SCC 330;

(ii) Syed Sadiq and others Vs. Divisional Manager, United India Insurance Company Limited, (2014) 2 SCC 735;

(iii) Mekala Vs. M. Malathi and another, (2014) 11 SCC 178; and

(iv) Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011.

(v) Hari Babu Vs. Amrit Lal and others, 2019 (2) T.A.C. 718 (All.).

6. As against this, it is submitted by the learned counsel for the respondent that learned Motor Accident Claim Tribunal has rightly considered the income of the claimant appellant to be Rs. 3000/- as there is no documentary evidence, which may prove the income to be of Rs. 16,000/- per month, was produced before the Tribunal and it is also submitted that the award can not be said to be incorrect rather it is just and proper and is in consonance with the decision of the Apex Court coupled with the fact in absence of any proof of income nothing more than the compensation amount granted by the impugned award the claimant was entitled to. The Tribunal has granted what is known as a just compensation. The compensation awarded by the Tribunal is just and proper and does not call for any interference by this Court as the income which is not proved cannot be taken into consideration while calculating the compensation.

7. After hearing the counsel for the parties and perusing the judgment and order impugned, this Court feels that her income can be considered to be Rs.6,000/- per month, to which as the injured was above 50 years at the time of accident, 40% of the income would have to be added as future loss of income to the injured in view of the decision of the Apex Court in **Raj Kumar Vs. Ajay Kumar and another, reported in (2011) 1 SCC 343 and Syed Sadiq and others (Supra).** The loss of earning capacity to the extent of 25% as considered by the Tribunal is maintained.

8. Further, the amount granted by the Tribunal for medical expenses is enhanced to Rs.3,50,000/- and Rs.50,000/- for future medicine, Rs.10,000/- for special diet and Rs.10,000/- for attendant charges are granted. As far as the amount under pain, shock and sufferings is concerned, looking to the fact that she has admitted in hospital and has undergone surgery, the amount is enhanced to Rs.25,000/-.

9. Hence, the total compensation payable to the appellant is computed herein below:

i. Income : Rs.3,000/-

ii. Percentage towards future prospects : 40% namely Rs.1200/-

iii. Total income : Rs. 3000 + 1200 = Rs.4200/-

iv. Loss of earning capacity : 25% namely Rs.1050/-

v. Annual loss : Rs.1050 x 12 = Rs.12,600/-

vi. Multiplier applicable : 11

vii. Total loss : Rs.12,600 x 11 = Rs.1,38,600/-

viii. Medical expenses : Rs.3,50,000/-

ix. Future medicine : Rs.50,000/-

x. Special diet : Rs.10,000/-

xi. Attendant charges : Rs. 10,000/-

xii. Amount under pain, shock and suffering : Rs.25,000/-

xiii. Total compensation : 7,14,852/-

10. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under:

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

11. No other grounds are urged orally when the matter was heard.

12. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petitioner till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

(2021)05ILR A46
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

FAFO (D) No. 1163 of 2011

Smt. Shaheen & Ors. ...Appellants
Versus
Manoj Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri S.D. Ojha

Counsel for the Respondents:
Sri Ashish Kumar Srivastava

(A) Civil Law - Motor Vehicles Act, 1988 - Section163A -Compensation enhancement - Special provisions as to payment of compensation on structured formula basis - contributory negligence - A person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place - future loss of income should be granted *(National Insurance Company Limited Vs. Pranay Sethi and others, 2017 0 Supreme (SC) 1050)* .(Para - 10,13)

Dispute relates only to computation and negligence of the deceased as decided by the Tribunal - claimants, challenges the judgment and award passed by Motor Accident Claims Tribunal awarding a sum of Rs.92,375/- with interest at the rate of 6%.(Para - 2)

HELD:- Total compensation payable to the appellants is Rs.10,07,200 /- . Out of the awarded amount deceased liable to the tune of 50% of negligence . Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the additional amount within a period of 12 weeks from today without deducting TDS . The amount already deposited be deducted from the amount to be deposited. (Para - 15,17)

Appeal partly allowed. (E-6)

List of Cases cited:-

1. Bajaj Allianz General Insurance Comp. Ltd. Vs Smt. Renu Singh & ors. First Appeal From Order No.1818 of 2012

2. National Insurance Co. Ltd. Vs. Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

3. National Insurance Co. Ltd. Vs. Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

4. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Co. Ltd. , 2007(2) GLH 291

5. A.V. Padma Vs Venugopal, 2012 (1) GLH (SC), 442

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. &
Hon'ble Ajit Singh, J.)

1. Heard Sri S.D. Ojha counsel for the claimants-appellants and Sri Ashish Kumar Srivastava for the Insurance Company. None for the owner, though served.

2. Though this is a defective appeal, we decided it finally as the dispute relates only to computation and negligence of the deceased as decided by the Tribunal.

3. This appeal, at the behest of the claimants, challenges the judgment and award dated 3.12.2010 passed by Motor Accident Claims Tribunal, Additional District Judge, Court No.02, Muzaffar Nagar(hereinafter referred to as 'Tribunal') in MACP No.235 of 2009 awarding a sum of Rs.92,375/- with interest at the rate of 6%.

4. This is a delayed appeal filed in the year 2011 though vehemently objected by the counsel. We condoned the delay in filing the appeal.

5. As the Insurance Company may not be saddled with interest after the matter would be admitted. Records be called. Paper books be filed and then enhancement is made as the judgment of the Tribunal is against the saddled principle enunciated by the Apex Court in Kirti Versus Oriental Insurance Company limited, (2021) 1 TAC page 1. We have requested the counsels to agree for getting the appeal disposed of today as it is covered by the judgment of Apex Court in the case of **National Insurance Company Limited Vs. Pranay Sethi and others, 2017 0 Supreme (SC) 1050.**

6. There is an error apparent on the face of record that the Tribunal has not considered awarding the amount under the head of what can be said to be future loss of income for the death of young person aged about 23 years of age who was a driver by profession. The Tribunal has considered his income to be Rs.3,000/- per month in the year 2009, applied multiplier of 15 and granted Rs.92,375/- under the head of non pecuniary damages. The deceased was survived by a minor daughter, widow and parents.

7. Sri S.D. Ojha, learned counsel for appellant submits that there are multiple errors first in considering the income, second not granting future prospects and third applying wrong multiplier and lastly considering the deceased to have contributed 75% to the accident having taken place.

8. Learned counsel for the respondent contended that the income considered cannot be said to be erroneous. The multiplier cannot be said to be erroneous and it is granted as per Law applicable. The amount awarded is just and proper under the head of non pecuniary damages considering the rules of Uttar Pradesh.

9. While considering the fact at the outset, we feel that the Tribunal has considered pecuniary damages as if considering the case under Section 163A of the Act, hence, the said finding is bad.

10. The question of contributory negligence has been discussed time and again. A person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place.

11. The Division Bench of this Court in First Appeal From Order No.1818 of 2012 (Bajaj Allianz General Insurance Company Limited Versus Smt. Renu Singh and others) decided on 19.7.2016 has held as under: -

"16. The term negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate

conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to cause physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act, 1988 contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle should slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection. This is termed negligence.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330*** *from the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

20. In light of the above discussion, I am of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, Courts cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with

reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits.

21. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part of driver of another vehicle."

12. We will have to appreciate the fact of negligence on the touchstone on evidence laid before the Tribunal. The Tribunal has considered the site plan, evidence of driver Krishna Pal, the driver Krishna Pal was driving his vehicle at a moderate speed. All the light of the said vehicle in working condition. He had parked his vehicle on its correct side as the tyre of the said vehicle had busted at that point of time the driver of Tata-1109 namely the deceased came and rammed. If this fact is believe, his earlier version that he had sustained injuries because of the accident and not throwing light where he was when the accident took place. The FIR and the witness Abid has in his oral testimony opined that the truck overtook the truck which was being driven by the deceased and abruptly applied breaks this fact has not been believed by the Tribunal. The driver of the offending vehicle was arrested on the spot and he was charge-sheeted by the Police is accepted by the driver in his cross examination before the Tribunal. He did not lodge any FIR. His vehicle having been stationary due to bursting of tyre no were finds place in the FIR . In this view of the matter, both the vehicles were found near the divider has not applied breaks. The driver driving a vehicle must maintain proper distance. In view of the matter we hold both the driver equally negligence.

13. It is submitted by counsel for the appellant that the total amount awarded by the Tribunal does not carry any amount for future loss of income which is apparent on the face of record and requires to be interfered with as recently the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and others, 2017 0 Supreme (SC) 1050** has held that future loss of income should be granted.

14. This takes us to the income of the deceased. The Tribunal has committed an error by considering the income of the deceased. The deceased who was driver by profession was qualified driver and his income can be said to be even if we consider bare wages in the year 2009, it would be Rs.4,500/- to which 40% will have to be added as per his age being below 50 years, out of which we would have to deduct 1/3rd for the personal expenses of the deceased and granted multiplier of 18 as he was 23 years of age. As far as non pecuniary damages are concerned, it should be Rs.70,000/- with 10% rise every three years as per judgment of **National Insurance Company Limited Vs. Pranay Sethi and others** which would be roughly calculated as Rs.1,00,000/-.

15. Hence, the total compensation payable to the appellants is computed herein below : -

i. Income : Rs.4,500/- per month

ii. Percentage towards future prospects : 40% namely Rs.1,800/- per month

iii. Total income : Rs.4,500 + Rs.1,800/- = Rs.6,300/-

iv. Income after deduction of 1/3rd = Rs.4,200/-

v. Annual income : Rs.4,200/- x 12 = Rs.50,400/-

vi. Multiplier applicable : 18

vii. Loss of dependency : Rs.50,400/- x 18 = Rs.9,07,200/-

viii. Amount under non pecuniary damages : Rs.1,00,000/-

ix. Total compensation : Rs.10,07,200 /-

16. Out of the awarded amount as we have held that deceased liable to the tune of 50% of negligence. The amount is halved.

17. In view of the above, the appeal is partly allowed. Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the additional amount within a period of 12 weeks from today without deducting TDS for which reasons are assigned herein below. The amount already deposited be deducted from the amount to be deposited.

18. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment is not passed because applicants /claimants are neither illiterate or restic villagers.

19. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291,** total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company /owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

20. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case

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(2021)05ILR A51
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

FAFO No. 2103 of 2017
With
FAFO No.1735 of 2017
with
FAFO No. 1819 of 2017

National Insurance Co. Ltd. ...Appellant
Versus
Smt. Anuradha Kejriwal & Ors. ...Respondents

Counsel for the Appellant:
Sri Kuldeep Shanker Amist, Sri Manoj Nigam

Counsel for the Respondents:
Sri Amit Kumar Sinha, Deepali Srivastava Sinha, Sri Mata Pher, Sri Ram Singh, Sri Manoj Nigam

(A) Civil Law - Motor Vehicles Act, 1988 - Section 166 - Compensation enhancement - Application for Compensation , Sections 147 - Requirements of policies and limits of liability, Sections 149 - Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks - *rash and negligent driving* - *negligence* - connotes reckless driving and the injured must always prove that the either side is negligent - If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply - principle of *contributory negligence* - A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place - in case of motor accident compensation, guess work is inevitable. (Para - 6,17,18,41)

Claimants (legal heirs namely widow and parents of the deceased who died in the vehicular accident) filed claim petition before the Tribunal claiming sum of Rs.3,40,50,000/- - Claimants as well as the Insurance Company saddled with liability - aggrieved by the award and decree passed by Motor Accident Claims Tribunal/ Additional District Judge - awarding sum of Rs.69,70,500/- as compensation with interest at the rate of 7%.

HELD:- The compensation payable to the appellants (in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi & ors., 2017 0 Supreme (SC) 1050) is** Rs.98,44,700/- Award and decree passed by the Tribunal shall stand modified the apportionment as 60% to the parents and 40% to the young widow of the additional amounts. The respondents shall jointly and severally liable to pay additional amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. (Para - 48,50)

Appeals (Preferred by claimants) partly allowed .

Appeal (Preferred by Insurance Company) dismissed. (E-6)

List of Cases cited:-

1. UPSRTC Vs Km. Mamta & ors., AIR 2016 SC 948

2. Munna Lal Vs Vipin, 2015 (3) TAC 1 SC and Smt. Savita Vs Binder Singh, 2014 (2) TAC 385 (SC)

3. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors., First Appeal From Order No. 1818 of 2012

4. Mallamma Vs Balaji & ors., 2003 (2) TAC 428

5. (Kant) & Oriental Insurance Co. Ltd. Vs Reena, 2011 (4) T.A.C. 227 (All.)

6. Yogendra Pal Vs M.A.C.P. 1995 (2) TAC 152 (All) (DB).

7. Md. Siddiqui & anr. Vs National Insurance Co. Ltd & ors., (2020) 3 SCC 57

8. Nirmala Kothari Vs United India Insurance Co. Ltd., (2020) 4 SCC 49

9. Oriental Insurance Co. Ltd. Vs Poonam Kesarwani & ors., 2008 LawSuit (All) 1557

10. Shashikala & ors. Vs Gangalakshmamma & anr., Civil Appeal No.2836 of 2015

11. V. Subbalakshmi & ors. Vs S. Lakshmi & anr. (2008) 4 SCC 224

12. Sangita Arya & ors. Vs Oriental Insurance Co. Ltd. & ors., (2020) 5 SCC 224.

13. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

14. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050.

15. National Insurance Co. Ltd.Vs Mannat Johat & ors., 2019 (2) T.A.C.705 (S.C.)

16. A.V. Padma & ors. Vs R. Venugopal, (2012) 3 SCC 378

17. General Manager, Kerala State Road Transport Corporation, Trivandrum Vs Susamma Thomas & ors., AIR 1994 SC 1631

18. Zeemal Bano & ors. Vs Insurance Company, 2020 TAC (2) 118.

19. Smt. Sudesna & ors. Vs Hari Singh & anr., F.A.F.O. No.23 of 2001

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Kuldip Shanker Amist, learned counsel for National Insurance Co. Ltd., Sri Ram Singh, assisted by Sri Amit Kumar Sinha, learned counsel for the claimant-parents, Sri Manoj Nigam, learned counsel for claimant-widow and Sri Mata Pher, learned counsel for the owner of the truck.

2. By way of these appeals, claimants as well as the Insurance Company who has been saddled with liability have felt aggrieved by the award and decree dated 3.3.2017 passed by Motor Accident Claims Tribunal/ Additional District Judge, Court No.5, Jhansi (hereinafter referred to as "Tribunal') awarding sum of Rs.69,70,500/- as compensation with interest at the rate of 7%.

3. Parties are referred to as claimants as they were arrayed in Tribunal and Insurance Company, owner and driver namely opponents as arrayed in Tribunal.

4. As these are appeals under Motor Vehicles Act, 1988, as per the decision of the Apex Court in **UPSRTC Vs. Km. Mamta and others, reported in AIR 2016 SC 948**, all the issues/grounds raised in the appeal and contested will have to be considered and decided.

5. The factual data as it emerges from the record is that the claimants are the legal heirs namely widow and parents of the deceased who died in the vehicular accident which occurred on 2.8.2015. Till penning of this judgment, it has not been brought on record whether the widow who has now in dispute with her in-laws after the decision of the Tribunal, has remarried or not? Therefore, we go on the premise that she continues to be the widow of the deceased.

6. The claimants had filed one claim petition being MACP No. 471 of 2015 before the Tribunal claiming sum of Rs.3,40,50,000/- for the death of Somesh Agrawal, as according to the claimants the accident took place on account of rash and negligent driving of the driver of the truck bearing No.UP 55 T 5151. It is averred in the claim petition that the deceased was aged 28 years and was earning Rs.25,00,000/- per annum as he was qualified engineer and was engaged in the business of construction work for U.P. Power Corporation.

7. Respondent-Abdul Kalam Azad is the owner of the truck which was being driven by respondent-Afzal Sekh and was insured with National Insurance Co. Ltd. who have been saddled with the liability to make good the amount of compensation.

8. As far as factum of accident is concerned, the same is not in dispute. The genesis of the accident as narrated in the claim petition and the record go to show that the accident occurred on 2.8.2015 at about 2.00 p.m. when the deceased was plying on his motorcycle bearing No.UP 93Z/7103 and was going to his factory at Pratappura, near Pratappur Gas Agency, the truck in question which was being driven rashly and negligently dashed the motorcycle of deceased from behind. The deceased died out of accidental injuries on the same evening.

9 . Tribunal decided issue Nos. 1 and 4 together as they were related to negligence and involvement of the vehicles in question. The learned Tribunal has decided the issues in favour of the claimants as First Information Report was filed against the driver of the truck and charge-sheet was laid against him. The claimants examined three witnesses out of whom P.W.2 was projected as eye-witness.

10. The claimants tried to prove negligence as is required under Section 166 of Motor Vehicles Act, 1988 (hereinafter referred to as "Act') by leading evidence and on relying upon documentary evidence produced. The vehicle being insured with National Insurance Co. Ltd. was sought to be proved by documents filed by the owner of the said vehicle who had filed reply and driving license of the driver as 17C-1/6. Very strangely the Insurance Company filed document showing that the driver was not authorized to drive the transport vehicle and the said licence had expired but did not produce any such documentary evidence so as to convincingly prove that the vehicle was being driven by a person who was unauthorized. The compensation as prayed for was on the basis that the claimants were the parents and the widow namely they were legal representatives of the deceased and that the deceased had taken loan of Rs.1 crore and was setting up a factory at Pratappura. The claimants had claimed that the deceased was earning Rs.25,00,000/- per year and for which they have filed before the Tribunal educational certificates, training certificates, loan approval certificate, land allocation certificate, Income Tax Return and copies of bank accounts of the deceased for the relevant period. The income of the deceased was objected by Insurance Company.

11. The Tribunal has considered the income of the deceased on the basis of Income Tax Return for the year which was filed prior to his death. The Tribunal has considered his income to be Rs.6,78,950/- per annum out of which it deducted tax and interest and considered income to be

Rs.6,09,749/-, deducted 1/3rd from the same, granted multiplier of 17 as the deceased was in the age group of 26-30 years and added Rs.60,000/- for non pecuniary damages. The Tribunal refused to grant future loss of income as according to it the deceased was not in employment and he was about to set up a factory and, therefore, there was no question of future loss of income is the finding of the Tribunal. The Tribunal has not considered the dicta in the judgments in **Munna Lal Vs. Vipin, 2015 (3) TAC 1 SC and Smt. Savita Vs Binder Singh, 2014 (2) TAC 385 (SC)** though cited before it. The Tribunal mulcted the liability on the owner but directed the compensation to be paid by the Insurance Company as the vehicle was insured.

12. As narrated above, the Insurance Company has challenged the award on the grounds that the deceased was a contributor to the accident having taken place, that the income considered by the Tribunal was on higher side and same would not have been made the basis of compensation and that the driver of the said vehicle did not have proper driving licence when the accident took place as it was proved by documentary evidence produced from the R.T.O. that the driver did not have licence to drive transport vehicle. It is submitted that the evidence produced by the owner also suffers from vice of not being given by the authority which is said to have issued the license.

13. As against these, claimants have also felt aggrieved as the Tribunal has not considered any amount for future loss of income. The Tribunal while granting compensation has not granted proper interest and that the Tribunal has committed an error in directing 2/3rd of the compensation to be paid to the parents and 1/3rd to the widow. The claimants have preferred two different appeals and, therefore, this submission is being made.

14. At the outset, the issue of negligence as raised, the contention that the deceased was driving the motorcycle on the middle of the road, that the F.I.R. was a belated F.I.R and was lodged in consultation with other people, and that the motorcycle in fact had slipped on the road and as the accident took place in the middle of the road, the deceased was also negligent will have to be decided.

15. It is submitted by Sri Shukla, learned counsel for the claimants that the deceased was rightly not considered to be negligent as he was driving a smaller vehicle and while driving the said vehicle he had taken all care and caution. The driver of the truck has been righly held negligent and the finding of facts need not be upturned. The submission that P.W.2 was not an eye-witness is belied from the fact that his name has been shown in the F.I.R. and the Charge-sheet. The truck dashed the motorcycle from behind. The delay in F.I.R. was because of the fact that the deceased was in hospital, he had a young widow and parents who had come in trauma on hearing the said accident to their son and, therefore, the delay has been rightly not considered to be fatal.

Negligence:

16. Let us consider the negligence from the perspective of the law laid down.

17. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a

reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

18. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place. The Division Bench of this Court **in First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330****. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits ***(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side." *emphasis added*

19. The latest decision of the Apex Court has laid down one further aspect about considering the negligence more particularly contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care.

20. It is further submitted by learned counsel for Insurance Company that the vehicle was not even involved in the accident as the F.I.R. was lodged after two days by the father of the deceased and that the technical report of both the vehicles do not corroborate the manner of accident as alleged. The technical report also substantiate that the truck did not hit any vehicle. The evidence of P.W.2 is full of contradiction and his presence at the place of accident is doubtful.

21 . Alternatively, it is submitted that even if the accident occurred involving truck No.UP 55 T5151, negligence on part

of the deceased in driving the motorcycle was maximum and the negligence should have been apportioned between the authors of the accident.

22. While considering issue of negligence, it emerges that deceased was on motorcycle, was going ahead of the truck. P.W.2 has categorically mentioned that the truck driver drove the truck rashly and negligently. The Insurance Company and the owner took the stand that the vehicle was not involved in the accident. The Tribunal has considered the depositions of P.W.1 who conveyed that his son started from his home to go to his factory and met with the accident though he is not an eye-witness, he was the author of the F.I.R. The accident occurred in broad day light. The eye-witness conveyed that he saw the deceased driving his motorcycle with all care and caution and was driving the vehicle on his correct side, at that time the truck came from behind and dashed with the motorcycle, the driver of the truck ran away from the place of accident and he was the one who informed the family members of the deceased.

23. The Tribunal has rightly considered the case of **Mallamma Vs. Balaji and others, 2003 (2) TAC 428 (Kant) and Oriental Insurance Co. Ltd. Vs. Reena, 2011 (4) T.A.C. 227 (All.)** in accepting the fact that the delay in lodging the F.I.R. occurred as the family was in trauma. The Tribunal further came to the conclusion that the motorcycle was dashed from behind. The driver and the owner except filing his written statement of denial of involvement, did not examine any witness. The learned Tribunal has relied on the decision in **Yogendra Pal Vs. M.A.C.P. 1995 (2) TAC 152 (All) (DB).** Recent decision of the Apex Court in **Md. Siddiqui and another Vs National Insurance Co. Ltd and others. (2020) 3 SCC 57** would come to the aid of the claimants as there was no colossal connection of the deceased having contributed to the accident. Hence, the said submission of Sri Amist that the deceased has contributed in the accident cannot be accepted.

Liability :

24. This takes us to the question of liability of the Insurance Company. Sections 147 and 149 of the Act reads as follows:

"147 Requirements of policies and limits of liability. –

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required—

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee—

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. --For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:--

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of

insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons"

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.—

"(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (l) of section 147 (being a liability covered by the terms of the policy) 1[or under the provisions of section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:--

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:--

(i) a condition excluding the use of the vehicle—

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-

disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a Court in India: Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect: Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6) In this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be. Explanation.--For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted under section 165 and "award" means an award made by that Tribunal under section 168"

25. Learned counsel for the Insurance Company has heavily relied on the fact that the driver of the truck did not have proper driving licence. It is submitted by learned counsel for the the Insurance Company that the document which was produced by the Insurance Company goes to show that on the date of accident, driver was not authorized to drive transport vehicle. The accident occurred on 2.8.2015. The document which was given goes to show that there is breach of policy as licence was not renewed. It is submitted that the driving licence produced by the owner could not have been relied by the Tribunal to come to contrary finding. It is further submitted that the R.T.O. Report produced by the owner was an after thought and accepted without granting any opportunity to Insurance Company to verify veracity of the same.

26. While considering the issue of breach of policy condition under Section 149 of the Act, we will have to elaborately sift the documentary evidence on record and whether the owner had taken proper care and caution to see that the driver was authorised to drive the vehicle or not. We will also have to look into all those issues on the touchstone of judgments which are supposed to throwing light.

27. We may first deal with the factual data and then the submission of Sri Amist, learned counsel for Insurance Company. We have perused the record and the driving licence to drive the vehicle which was produced before the Tribunal. The Insurance Company produced a document known as "Report of Jai Claims Recovery Consultants' which was produced before the Tribunal but, unfortunately, no one was examined to verify the data. The extract of driving licence was given by the R.T.O. The validity of licence to drive non transport vehicle was up to 17.3.2030 and validity of licence to drive transport vehicle was up to 17.3.2013. The said document reads as "LMV Transport Goods with effect from 8.3.2010, transport Vehicle M/HMV with effect from 9.11.2011". Issue of NOC was on 13.7.2012 and, therefore, the conclusion by "Jai Claim Recovery Consultants" was that the driving licence was not valid for driving the transport vehicle at the time of accident.

28. On production of this, the owner immediately came up with the certificate of extract of driving license which was valid up to 17.3.2016 for transport vehicle issued by R.T.O. Mumbai on 25.9.2012. If we go by the documentary evidence produced that of Government of Maharashtra by Insurance Company, the submission of Sri Amist would fail as issue of NOC/CC was in the year 2012, more particularly on 13.7.2012 which corroborates with D.L. extract dated 27.7.2016. Record goes to show that nothing was proved by the Insurance Company that the said extract was manipulated and was an after thought. The factual data has been considered by the Tribunal while deciding issue Nos. 2 and 3 and, therefore, in absence of any proof to the contrary we cannot take the different view then that taken by the Tribunal. The findings cannot be upturned just because the Certificate was given by R.T.O. West and was signed by R.T.O. East as we are not aware whether R.T.O. West was on leave. The document at 53 C/1 has been believed by the Tribunal as licence was renewed for three years. Therefore, the contention of learned counsel for Insurance Company that the driver was not holding valid and effective driving licence cannot be accepted.

29. The evidence on record on the contrary proved other way. The document/report was prepared by private agency and on one was examined on their part. The licencing authority was not examined by the Insurance Company. The submission that they were not permitted to examine them is also absent. There was no application filed by them for examining the author of the report dated 9.2.2017. Even if the said document was not there, the document produced by the Insurance Company of a private agency showed that the driver was having driving licence. He was having a transport vehicle licence which is even present in the record produced by the Insurance Company itself.

30. While considering the case of the Insurance Company, can it be said that the driver did not have valid driving licence? This question has to be answered in favour of the claimants and owner. We are fortified in our view by the latest decision of the Apex Court in **Nirmala Kothari Vs. United India Insurance Co. Ltd., (2020) 4 SCC 49.**

31. Further, this aspect also goes against the Insurance Company that the Insurance Company has not examined any person so as to prove that the report of the R.T.O. is vitiated. We are even supported in our view by the decision of this Court in **Oriental Insurance Company Limited Vs. Poonam Kesarwani and others, 2008 LawSuit (All) 1557**, where in a similar situation converse view then that contended by Sri K.S. Amist is taken. Reliance can also be placed on the finding of the Tribunal which unless proved to the contrary should not be easily interfered with. Further, the owner of the vehicle was satisfied and it was proved that he has taken all care and caution that vehicle was being driven by a person who was authorised to drive the same which is even apparent from the fact that the owner has gone to the extent of producing evidence so as to bring home the fact that there was no breach of policy condition.

32. In that view of the matter, on the facts and the law, it cannot be said that the owner has committed breach of policy conditions.

33. This takes us to the issue of compensation which has aggrieved the claimants and the Insurance Company.

Compensation :

34. As far as age and profession of the deceased are concerned, he was 28 years of age and was an Engineering Graduate, Contractor/Supplier in U.P. Power Corporation and was running Electrics Tools Manufacturing Company. The age of his widow was 24 years and parents were 54 and 51 years of age respectively at the time of death of their son. These facts are not in dispute.

35. Learned counsel for the claimants has contended that the Tribunal has erred in not granting future loss of income, filial consortium. It is also submitted that the Tribunal has not granted proper amount under the head of non pecuniary damages to the widow who became widow at the age of 24 and who has not re-married.

36. It is also submitted that the interest awarded by the Tribunal is on the lower and as the legal heirs are highly educated persons, the amount may not be kept in Fixed Deposit.

37. As against this, the Insurance Company has also felt aggrieved and has

challenged the compensation and has relied on the decisions of the Apex Court in Civil Appeal No.2836 of 2015 **(Shashikala and others Vs. Gangalakshmamma and Anr.)** decided on 23.3.2015, V. **Subbalakshmi and others Vs. S. Lakshmi and Anr. (2008) 4 SCC 224 and Sangita Arya and others Vs. Oriental Insurance Co. Ltd. and others, (2020) 5 SCC 224.**

38. On considering the facts and the decisions cited by Sri K.S. Amist, learned counsel for Insurance Company, one thing is clear that even in the decision cited by Sri Amist, the compensation has been decided on the basis of Income Tax Return but which has to be relied has to be considered. In this case, just prior to the death of the deceased, his Income Tax Return for last three years has been considered by the Tribunal but his income has been taken for the period just preceding his death namely for the year of death.

39. It is submitted by Sri Amist that income at the time of death must be considered and that he was not entitled to any future loss of income. The challan of Income Tax was also not proved and that the Income Tax Return dated 14.10.2016 could not have been made the basis of granting compensation.

40. It is further submitted by Sri Amist that the factory had not even started or was started in the name of his brother and, therefore, the only income of Theka should have been considered and that the apportionment must be in proportion.

41. As far as compensation is concerned, at the outset, the submission of Sri Amist cannot be accepted as the Tribunal has rightly considered the annual income on the basis of Income Tax Return filed for the year 2014-2015 and discarding the return for the period 1.4.2015 to 31.3.2016 which was preceding the year of his death. In **Shashikala (Supra)** also, the Income Tax Return of the deceased for the assessment year 2005-06 and 2006-07 was Rs.1,55,812/-, the High Court considered the net income to be Rs.1,17,000/-. The High Court took the assessment year 2005-06 & 2006-07. Similar is the situation in our case, hence, there can be no deviation. The Apex Court in paragraph 16 has held that income of the deceased was considered for the year 2006-07. As far as decision in **V. Subhalakshmi (Supra)** is concerned, the accident took place on 7.5.1997 and the Tax Returns filed on 23.2.1997 was not made the basis . The Apex Court has held that in case of motor accident compensation, guess work is inevitable. The decision of the Apex Court in **Sangita Arya (Supra)** can be even applied for the benefit of the claimants considering later most Income Tax Returns. Similar view has been taken by the Apex Court in the decisions in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121 and National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.**

42. Hence, the compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi (Supra) is computed herein below:-

i. Annual Income: Rs.6,09,749

ii. Percentage towards future prospects : 40 % namely Rs.2,43,900/- (rounded figure)

iii. Total income : Rs.6,09,749 + 2,43,9001 = Rs.8,53,649/-

iv. Income after deduction of personal expenses of 1/3rd : Rs. 5,69,100/-

v. Multiplier applicable : 17

vi. Loss of dependency: Rs.5,69,100 x 17 = Rs.96,74,700/-

vii. Amount for filial consortium to parents = Rs. 70,000/- with 10% increase per every three years namely Rs.85,000/- as per Pranay Sethi (Supra)

viii. Amount for love, affection and consortium to widow :Rs.70,000/- with 10% increase per every three years namely Rs.85,000/- as per Pranay Sethi (Supra)

ix.Total compensation: Rs.96,74,700 + 85,000 + 85,000 = 98,44,700/-

Interest:

43. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court **in National Insurance Co. Ltd.Vs. Mannat Johat and Others, 2019 (2) T.A.C.705 (S.C.)** wherein the Apex Court has held as under:

"13.The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5%p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

Disbursement and Tax at Source

44. At this stage, it has been submitted by Sri Ram Singh, learned counsel for the claimants that several years have elapsed, the parents are at the fag end of their lives, therefore, on additional deposit being made, this Court may not direct deposit of said amounts in fixed deposits and though this Court has time and again directed the Insurance Companies not to deduct TDS, the same is being deducted.

45. We deem it fit to rely on the judgment of the Apex Court in the case of **A.V. Padma and others Vs. R. Venugopal, 2012 (3) SCC 378** wherein the Apex Court has considered the judgment rendered in **General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas and others, AIR 1994 SC 1631**. Paras 5 and 6 of A.V. Padma's Judgment read as under:-

"5. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of

semi- literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits.

However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice.

6. In this case, the victim of the accident died on 21.7.1993. The award was passed by the Tribunal on 15.2.2002. The amount of compensation was enhanced by the High Court on 6.7.2006. Neither the Tribunal in its award nor the High Court in its order enhancing compensation had directed to invest the amount of compensation in long term fixed deposit. The Insurance Company deposited the compensation amount in the Tribunal on 7.1.2008. In the application filed by the appellants on 19.6.2008 seeking withdrawal of the amount without insisting on investment of any portion of the amount in long term deposit, it was specifically stated that the first appellant is an educated lady who retired as a Superintendent of the Karnataka Road Transport Corporation, Bangalore. It was also stated that the second appellant Poornachandrika is a M.Sc. degree holder and the third appellant Shalini was holding Master Degree both in Commerce and in Philosophy. It was stated that they were well versed in managing their lives and finances. The first appellant was already aged 71 years and her health was not very good. She required money for maintenance and also to put up construction on the existing house to provide dwelling house for her second daughter who was a co-owner along with

her. The second daughter was stated to be residing in a rented house paying exorbitant rent which she could not afford in view of the spiralling costs. It was further stated in the application that the first appellant was obliged to provide a shelter to the first daughter Poornachandrika. It was pointed out that if the money was locked up in a nationalised bank, only the bank would be benefited by the deposit as they give a paltry interest which could not be equated to the costs of materials which were ever increasing. It was further stated that the delay in payment of compensation amount exposed the appellants to serious prejudice and economic ruin. Along with the application, the second and third appellants had filed separate affidavits supporting the prayer in the application and stating that they had no objection to the amount being paid to the first appellant.

7. While rejecting the application of the appellants, the Tribunal did not consider any of the above-mentioned aspects mentioned in the application. Unfortunately, the High Court lost sight of the said aspects and failed to properly consider whether, in the facts and circumstances of the case, there was any need for keeping the compensation amount in long term fixed deposit. "

46. Thus, it goes without saying that, in our case, the oral prayer of Sri Singh requires to be considered as the guidelines in A.V. Padma and others (supra) was in the larger interest of the claimants. Rigid stand should now be given way. People even rustic villagers' have bank account which has to be compulsorily linked with Aadhar, therefore, what is the purpose of keeping money in fixed deposits in banks where a person, who has suffered injuries or has lost his kith and kin, is not able to see the colour of compensation. We feel that time is now ripe for setting fresh guidelines as far as the disbursements are concerned. The guidelines in **Susamma Thomas (supra)**, which are being blindly followed, cause more trouble these days to the claimants as the Tribunals are overburdened with the matters for each time if they require some money, they have to move the Tribunal where matters would remain pending and the Tribunal on its free will, as if money belonged to them, would reject the applications for disbursements, which is happening in most of the cases. The parties for their money have to come to court more particularly up to High Court, which is a reason for our pain. Should reliance can be placed on Susamma Thomas **(supra)** in matters where claimants prove and show that they can take care of their money? In our view, the Tribunal may release the money with certain stipulations and that guidelines have to be followed but not rigidly followed as precedents. Recently, the Jammu and Kashmir High Court was faced with similar situation in the case of **Zeemal Bano and others Vs. Insurance Company, 2020 TAC (2) 118.**

47. While sitting in Single Bench of this Court, one of us (Dr. Justice Kaushal Jayendra Thaker) has held that the Insurance Company should not deduct any amount under T.D.S in the case of **Smt. Sudesna and others Vs. Hari Singh and another, F.A.F.O. No.23 of 2001**, decided on 26.11.2020, which should be strictly adhered to. Relevant part of the said Judgment is as under:-

" It is further orally conveyed that even if the amounts will be deposited, the Insurance company normally deducts TDS. The judgement is reviewed and at the end.

I. On depositing the amount in the Registry of the Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any.

II. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442, the order of investment is not passed because applicants/claimants are neither not illiterate and in New India Assurance Co. Ltd. Vs. Hussain Babulal Shaikh and others, 2017 (1) TAC 400 (Bom.).

III. View of the ratio laid down by Hon'ble Gujarat High Court, in the case of Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount (as directed in para No. II) without producing the certificate from the concerned Income-Tax Authority."

48. In view of the above, the appeals preferred by the claimants are partly allowed and the appeal preferred by the Insurance Company is dismissed. Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondents shall jointly and severally liable to pay additional amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited.

49. In view of the above, it is directed that on deposit of the amount, the Tribunal shall disburse the entire amount by way of account payee cheque or by way of RTGS to the account of the claimants within 12 weeks from the date the amounts are deposited by the respondents. Record be sent back to the Tribunal.

50. We modified the apportionment as 60% to the parents and 40% to the young widow of the additional amounts.

(2021)05ILR A67
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

FAFO No. 2517 of 2017

Lal Bahadur Patel ...Appellant
Versus
Mr. Murad Ali & Ors. ...Respondents

Counsel for the Appellant:
Sri Ram Singh, Sri Amit Kumar Singh

Counsel for the Respondents:
Sri Ashutosh Vaish

(A) Civil Law - Motor Vehicles Act, 1988 - Compensation enhancement -total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to

claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 - if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income-Tax Authority *(Hon'ble Gujarat High Court, in the case of Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291).* (Para - 15)

Claimants moved Motor Accident Claim Petition before Motor Accident Claim Tribunal claiming Rs.60,00,000/- with interest as compensation - Tribunal, awarded a sum of Rs.5,11,000/- along with 7% simple interest from the date of filing the claim petition till the date of actual payment thereof .(Para - 3,4)

HELD:- Tribunal may release the money with certain stipulations and that guidelines have to be followed but not rigidly followed as precedents . Compensation payable to the appellants is Rs.7,12,600/- . Judgment and decree passed by the Tribunal shall stand modified. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. (Para - 9,14,16)

Appeal partly allowed. (E-6)

List of Cases cited:-

1. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

2. A.V. Padma & ors. Vs R. Venugopal, (2012) 3 SCC 378

3. General Manager, Kerala State Road Transport Corporation, Trivandrum Vs Susamma Thomas & ors., AIR 1994 SC 1631

4. Zeemal Bano & ors. Vs Insurance Company, 2020 TAC (2) 118

5. Smt. Sudesna & ors. Vs Hari Singh & anr., F.A.F.O. No.23 of 2001

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. &
Hon'ble Ajit Singh, J.)

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

2. The claimants being dissatisfied with the awarded amount preferred this appeal for enhancement of the amount of compensation.

3. The claimants moved Motor Accident Claim Petition No. 628 of 2016 before Motor Accident Claim Tribunal/Additional District Judge/F.T.C., Allahabad (hereinafter referred to as the Tribunal) claiming Rs.60,00,000/- with interest as compensation. It was averred therein that deceased was carrying on animal husbandry and income of the deceased was Rs.20,000/- p.m.. She was hale and hearty and aged about 28 years at the time of accident. Facts as culled from the record are that On 2.7.2016 at about 8 a.m. deceased riding pillion seat of motorcycle bearing Registration No. UP 70 CJ 6608 was going to Bade Hanuman Temple Dam, Allahabad and when the vehicle reached Rahimapur Petrol Pump, driver of Truck bearing Registration No. UP 72 T 4339 driving rashly and negligently without blowing horn, dashed the said motorcycle as a result of which the deceased suffered severe and fatal injuries and she died on the spot itself.

4. The Tribunal after recording evidence and after hearing the learned advocates for the parties, the Tribunal, vide Judgment and award dated 26.4.2017, awarded a sum of Rs.5,11,000/- along with

7% simple interest from the date of filing the claim petition till the date of actual payment thereof.

5. The accident is not in dispute. The insurance company has accepted their liability. The only issue to be decided is, the quantum of compensation awarded.

6. Learned counsel for the appellant submitted that the deceased was earning income of Rs. 20,000/- from the milk business but the Tribunal assessed Rs. 3000/- per month as her income. The Tribunal wrongly deducted ½ in place of 1/3rd and also assessed less amount under the head of future loss of income. It is further submitted that the Tribunal has granted Rs.10,000/- for loss of estate and Rs.5,000/- for funeral expenses and Rs.10,000/- as loss of consortium of the spouse which are on lower side and inadequate.

7. Per contra, learned counsel for the respondent-Insurance Company submits that the quantum of compensation awarded by the Tribunal is just and proper and does not call for any interference of the Court. The learned counsel for the respondent has contended that the claimant is the husband of the deceased. It cannot be said to be dependent having his own income. It is further submitted that being own profession, the income assessed by the tribunal need not be interfered with.

8. After hearing the counsels for the parties and after perusing the award and order impugned, notional income of deceased can be considered to be Rs.4,500/- per month as occupation of the deceased was not proved by any cogent evidence, to which as the deceased was below 40 years of age, 40% will have to be added. Looking to the dependants of the deceased and the fact that the claimant is the husband of the deceased, deduction towards personal expenses of the deceased should be 1/2. As deceased was in the age bracket of 26-30, multiplier of 17 is applicable

9. Hence, the compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi (Supra) is computed as herein below:

i. Income Rs.4500/-

ii. Percentage towards future prospects: 40% namely Rs.1800/-

iii. Total income: Rs.4500 + 1800= Rs. 6,300/-

iv. Income after deduction of 1/2: Rs.3,150/-

v. Annual income: Rs.3150 x 12= Rs.37,800/-

vi. Multiplier applicable:17

vii. Loss of dependency: Rs.37,800 x 17=Rs.6,42,600/-

viii. Amount under non pecuniary heads: Rs.70,000/-

x. Total compensation: Rs.7,12,600/-

10. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in ***National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)*** wherein the Apex Court has held as under :-

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same

had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

11. No other grounds are urged orally when the matter was heard.

12. At this stage, it has been submitted by learned counsel for the claimants that several years have elapsed, this Court may not direct deposit of said amounts in fixed deposits and though this Court has time and again directed the Insurance Companies not to deduct TDS, the same is being deducted.

13. We deem it fit to rely on the judgment of the Apex Court in the case of **A.V. Padma and others Vs. R. Venugopal, 2012 (3) SCC 378** wherein the Apex Court has considered the judgment rendered in **General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas and others, AIR 1994 SC 1631**. Paras 5 and 6 of A.V. Padma's Judgment read as under:-

"5. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of semi- literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits.

However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper

application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice.

6. In this case, the victim of the accident died on 21.7.1993. The award was passed by the Tribunal on 15.2.2002. The amount of compensation was enhanced by the High Court on 6.7.2006. Neither the Tribunal in its award nor the High Court in its order enhancing compensation had directed to invest the amount of compensation in long term fixed deposit. The Insurance Company deposited the compensation amount in the Tribunal on 7.1.2008. In the application filed by the appellants on 19.6.2008 seeking withdrawal of the amount without insisting on investment of any portion of the amount in long term deposit, it was specifically stated that the first appellant is an educated lady who retired as a Superintendent of the Karnataka Road Transport Corporation, Bangalore. It was also stated that the second appellant Poornachandrika is a M.Sc. degree holder and the third appellant Shalini was holding Master Degree both in Commerce and in Philosophy. It was stated that they were well versed in managing their lives and finances. The first appellant was already aged 71 years and her health was not very good. She required money for maintenance and also to put up construction on the existing house to provide dwelling house for her second daughter who was a co-owner along with her. The second daughter was stated to be residing in a rented house paying exorbitant rent which she could not afford in view of the spiralling costs. It was further stated in the application that the first appellant was obliged to provide a shelter to the first daughter Poornachandrika. It was pointed out that if the money was locked up in a nationalised bank, only the bank would be benefited by the deposit as they give a paltry interest which could not be equated to the costs of materials which were ever increasing. It was further stated that the delay in payment of compensation amount exposed the appellants to serious prejudice and economic ruin. Along with the application, the second and third appellants had filed separate affidavits supporting the prayer in the application and stating that they had no objection to the amount being paid to the first appellant.

7. While rejecting the application of the appellants, the Tribunal did not consider any of the above-mentioned aspects mentioned in the application. Unfortunately, the High Court lost sight of the said aspects and failed to properly consider whether, in the facts and circumstances of the case, there was any need for keeping the compensation amount in long term fixed deposit. "

14. Thus, it goes without saying that, in our case, the oral prayer of counsel for claimant requires to be considered as the guidelines in A.V. Padma and others **(supra)** was in the larger interest of the claimants. Rigid stand should now be given way. People even rustic villagers' have bank account which has to be compulsorily

linked with Aadhar, therefore, what is the purpose of keeping money in fixed deposits in banks where a person, who has suffered injuries or has lost his kith and kin, is not able to see the colour of compensation. We feel that time is now ripe for setting fresh guidelines as far as the disbursements are concerned. The guidelines in **Susamma Thomas (supra),** which are being blindly followed, cause more trouble these days to the claimants as the Tribunals are overburdened with the matters for each time if they require some money, they have to move the Tribunal where matters would remain pending and the Tribunal on its free will, as if money belonged to them, would reject the applications for disbursements, which is happening in most of the cases. The parties for their money have to come to court more particularly up to High Court, which is a reason for our pain. Should reliance can be placed on Susamma Thomas **(supra)** in matters where claimants prove and show that they can take care of their money? In our view, the Tribunal may release the money with certain stipulations and that guidelines have to be followed but not rigidly followed as precedents. Recently, the Jammu and Kashmir High Court was faced with similar situation in the case of **Zeemal Bano and others Vs. Insurance Company, 2020 TAC (2) 118.**

15. While sitting in Single Bench of this Court, one of us (Dr. Justice Kaushal Jayendra Thaker) has held that the Insurance Company should not deduct any amount under T.D.S in the case of **Smt. Sudesna and others Vs. Hari Singh and another, F.A.F.O. No.23 of 2001,** decided on 26.11.2020, which should be strictly adhered to. Relevant part of the said Judgment is as under:-

" It is further orally conveyed that even if the amounts will be deposited, the Insurance company normally deducts TDS. The judgement is reviewed and at the end.

I. On depositing the amount in the Registry of the Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any.

II. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442, the order of investment is not passed because applicants/claimants are neither not illiterate and in New India Assurance Co. Ltd. Vs. Hussain Babulal Shaikh and others, 2017 (1) TAC 400 (Bom.).

III. View of the ratio laid down by Hon'ble Gujarat High Court, in the case of Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount (as directed in para No. II) without producing the certificate from the concerned Income-Tax Authority."

16. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the

amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited.

17. In view of the above, it is directed that on deposit of the amount, the Tribunal shall disburse the entire amount by way of account payee cheque or by way of RTGS to the account of the claimants within 12 weeks from the date the amounts are deposited by the respondents. Record be sent back to the Tribunal.

(2021)05ILR A73
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

FAFO No. 3648 of 2018

Madhuri Singh & Ors. ...Appellants
Versus
Hariyana Transport Corp. & Ors. ...Respondents

Counsel for the Appellants:
Sri Ram Singh, Sri Amit Kumar Singh

Counsel for the Respondents:
Sri Arun Kumar Shukla

(A) Civil Law - Motor Vehicles Act, 1988 - The Uttar Pradesh Motor Vehicles Rules, 1998 - Compensation enhancement - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 - if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income-Tax Authority *(Hon'ble Gujarat High Court, in the case of Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291).* (Para - 15)

The claimants moved Motor Accident Claim Petition before Motor Accident Claim Tribunal claiming Rs.1,00,40,000/- as compensation at the rate of 18% rate of interest - Tribunal awarded a sum of Rs. 33,32,000/- along with 7% simple interest from the date of filing the claim petition till the date of actual payment thereof. (Para - 3,4)

HELD:- Tribunal may release the money with certain stipulations and that guidelines have to be followed but not rigidly followed as precedents . The compensation payable to the appellants ***(in view of the decision of the Apex Court in National Insurance Company Limited Vs. Pranay Sethi & ors., 2017 0 Supreme (SC) 1050)*** is Rs.53,48,500/-. Judgment and decree passed by the Tribunal shall stand modified. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. (Para - 9,14,16)

Appeal partly allowed. (E-6)

List of Cases cited:-

1. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

2. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

3. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

4. A.V. Padma & ors. Vs R. Venugopal, (2012) 3 SCC 378

5. Manager, Kerala State Road Transport Corporation, Trivandrum Vs Susamma Thomas & ors., AIR 1994 SC 1631

6. Smt. Sudesna & ors. Vs Hari Singh & anr., F.A.F.O. No.23 of 2001

7. Zeemal Bano & ors. Vs Insurance Company, 2020 TAC (2) 118

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. &
Hon'ble Ajit Singh, J.)

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

2. This appeal challenges the award and decree though passed in favour of the claimants granting a sum of Rs.33,32,000/- from the date of filing of the claim petition till realisation with 7% simple rate of interest. The claimants have felt aggrieved as the tribunal did not grant any amount under the head of future loss of income and there is no discussion also. Why the tribunal has not followed decisions of the Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121 and National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. The claimants being dissatisfied with the awarded amount preferred this appeal for enhancement of the amount of compensation.

3. The claimants moved Motor Accident Claim Petition No. 58 of 2015 before Motor Accident Claim Tribunal/Additional District Judge-7, Aligarh (hereinafter referred to as the Tribunal) claiming Rs.1,00,40,000/- as compensation at the rate of 18% rate of interest. It was averred therein that deceased was the only bread-winner of the family. He was hale and hearty and aged about 28 years at the time of accident. Facts as culled from the record are that deceased was working in Vasaka G. Engineering Company. On 9.1.2014, at about 8 am the deceased along with his brother riding on motorbike was going to the Company situated in District Faridabad and when they reached village Sikari Chauk, P.S. Sadar Ballabhgarh, District Faridabad, driver of the bus of Hariyana Transport Corporation bearing Registration No. HR 38 S 2103 dashed the motorbike as a result of which they were badly injured and in few minutes of the accident, the deceased passed away.

4. The Tribunal after recording evidence and after hearing the learned advocates for the parties, the Tribunal, vide the Judgment and award dated 18.1.2017, awarded a sum of Rs. 33,32,000/- along with 7% simple interest from the date of filing the claim petition till the date of actual payment thereof.

5. The accident is not in dispute. The vehicle being insured by the insurance company. It is also accepted that, no appeal is preferred by the insurance company, death occurred due to accidental injury is not in dispute. The only issue to be decided is, the quantum of compensation awarded.

6. Learned counsel for the appellants submitted that the Tribunal has not granted any amount under the head of Future Loss of Income and it has wrongly deducted 1/3rd amount in place of 1/4th. It is further submitted that less amount has been awarded under the heads of funeral expenses and loss of love and affection. The Tribunal further ignored loss of estate of the deceased; loss of consortium of

spouse; loss of care and guidance of minor children and further it has granted less rate of interest than 12%.

7. Per contra, learned counsel for the respondent-Insurance Company submits that the quantum of compensation awarded by the Tribunal is just and proper and does not call for any interference of the Court. It is further submitted by counsel that the tribunal has not committed any error as the rate of interest is as per the Uttar Pradesh Motor Vehicles Rules, 1998 and that the deceased was in private employment and hence not entitled to future loss of income.

8. After hearing the counsel for the parties and after perusing the judgment and order impugned, the income of the deceased can be considered to be Rs.23000/- p.m. as deceased was employed in Kalkaji Engineering Company, to which as the deceased was below 40 years of age, 50% will have to be added, the reason being the decision in Pranay Sethi (supra) an no way distinguishing whether the employment in private and or government employment. All the distinguishing led is regarding employment and self employment, hence the future loss of income looking to the facts of the case also. Looking to the dependants of the deceased, deduction of 1/4 to which as children of 2 years and one of 7 months Kumari Alpana have loss their father at the time of accident, deduction towards personal expenses of the deceased should have been 1/4. As deceased was in the age bracket of 26-30, multiplier of 17 is applicable

9. Hence, the compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi (supra) is computed as herein below:

i. Income Rs.23000/- per month

ii. Percentage towards future prospects: 50% namely Rs.11,500/-

iii. Total income: Rs.23000+11500= Rs.34,500/-

iv. Income after deduction of 1/4: Rs.25,875/-

v. Annual income: Rs.25,875 x 12= Rs.3,10,500/-

vi. Multiplier applicable:17

vii. Loss of dependency: Rs.3,10,500 x 17=Rs.52,78,500/-

viii. Amount under non pecuniary heads: Rs.70,000/-

x. Total compensation: Rs.53,48,500/-

10. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in ***National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)*** wherein the Apex Court has held as under :-

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

11. No other grounds are urged orally when the matter was heard.

12. At this stage, it has been submitted by learned counsel for the claimants that several years have elapsed, this Court may not direct deposit of said amounts in fixed deposits and though this Court has time and again directed the Insurance Companies not to deduct TDS, the same is being deducted.

13. We deem it fit to rely on the judgment of the Apex Court in the case of **A.V. Padma and others Vs. R. Venugopal, 2012 (3) SCC 378** wherein the Apex Court has considered the judgment rendered in General **Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas and others, AIR 1994 SC 1631.** Paras 5 and 6 of A.V. Padma's Judgment read as under:-

"5. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of semi- literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits.

However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice.

6. In this case, the victim of the accident died on 21.7.1993. The award was passed by the Tribunal on 15.2.2002. The amount of compensation was enhanced by the High Court on 6.7.2006. Neither the Tribunal in its award nor the High Court in its order enhancing compensation had directed to invest the amount of compensation in long term fixed deposit. The Insurance Company deposited the compensation amount in the Tribunal on 7.1.2008. In the application filed by the appellants on 19.6.2008 seeking withdrawal of the amount without insisting on investment of any portion of the amount in long term deposit, it was specifically stated that the first appellant is an educated lady who retired as a Superintendent of the Karnataka Road Transport Corporation, Bangalore. It was also stated that the second appellant Poornachandrika is a M.Sc. degree holder and the third appellant Shalini was holding Master Degree both in Commerce and in Philosophy. It was stated that they were well versed in managing their lives and finances. The first appellant was already aged 71 years and her health was not very good. She required money for maintenance and also to put up construction on the existing house to provide dwelling house for her second daughter who was a co-owner along with her. The second daughter was stated to be residing in a rented house paying exorbitant rent which she could not afford in view of the spiralling costs. It was further stated in the application that the first appellant was obliged to provide a shelter to the first daughter Poornachandrika. It was pointed out that if the money was locked up in a nationalised bank, only the bank would be benefited by the deposit as they give a paltry interest which could not be equated to the costs of materials which were ever increasing. It was further stated that the delay in payment of compensation amount exposed the appellants to serious prejudice and economic ruin. Along with the application, the second and third appellants had filed separate affidavits supporting the prayer in the application and stating that they had no objection to the amount being paid to the first appellant.

7. While rejecting the application of the appellants, the Tribunal did not consider any of the above-mentioned aspects mentioned in the application. Unfortunately, the High Court lost sight of the said aspects and failed to properly consider whether, in the facts and circumstances of the case, there was any need for keeping the compensation amount in long term fixed deposit. "

14. Thus, it goes without saying that, in our case, the oral prayer of counsel for claimant requires to be considered as the guidelines in A.V. Padma and others (supra) was in the larger interest of the claimants. Rigid stand should now be given way. People even rustic villagers' have bank account which has to be compulsorily linked with Aadhar, therefore, what is the purpose of keeping money in fixed deposits in banks where a person, who has suffered injuries or has lost his kith and kin, is not able to see the colour of compensation. We feel that time is now ripe for setting fresh guidelines as far as the disbursements are concerned. The guidelines in **Susamma Thomas (supra)**, which are being blindly followed, cause more trouble these days to the claimants as the Tribunals are overburdened with the matters for each time if they require some money, they have to move the Tribunal where matters would

remain pending and the Tribunal on its free will, as if money belonged to them, would reject the applications for disbursements, which is happening in most of the cases. The parties for their money have to come to court more particularly up to High Court, which is a reason for our pain. Should reliance can be placed on Susamma Thomas **(supra)** in matters where claimants prove and show that they can take care of their money? In our view, the Tribunal may release the money with certain stipulations and that guidelines have to be followed but not rigidly followed as precedents. Recently, the Jammu and Kashmir High Court was faced with similar situation in the case of **Zeemal Bano and others Vs. Insurance Company, 2020 TAC (2) 118.**

15. While sitting in Single Bench of this Court, one of us (Dr. Justice Kaushal Jayendra Thaker) has held that the Insurance Company should not deduct any amount under T.D.S in the case of **Smt. Sudesna and others Vs. Hari Singh and another, F.A.F.O. No.23 of 2001**, decided on 26.11.2020, which should be strictly adhered to. Relevant part of the said Judgment is as under:-

" It is further orally conveyed that even if the amounts will be deposited, the Insurance company normally deducts TDS. The judgement is reviewed and at the end.

I. On depositing the amount in the Registry of the Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any.

II. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442, the order of investment is not passed because applicants/claimants are neither not illiterate and in New India Assurance Co. Ltd. Vs. Hussain Babulal Shaikh and others, 2017 (1) TAC 400 (Bom.).

III. View of the ratio laid down by Hon'ble Gujarat High Court, in the case of Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount (as directed in para No. II) without producing the certificate from the concerned Income-Tax Authority."

16. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited.

17. In view of the above, it is directed that on deposit of the amount, the Tribunal shall disburse the entire amount by way of account payee cheque or by way of RTGS to the account of the claimants within 12 weeks from the date the amounts are deposited by the respondents. Record be sent back to the Tribunal.

(2021)05ILR A79
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

First Appeal No. 432 of 2009

Smt. Jyotsna Verma ...Appellant
Versus
Ashok Kumar ...Respondent

Counsel for the Appellant:
In Person, Ms. Jyotsna Verma (In Person), Sri Madhur Prakash, Smt. Archana Singh

Counsel for the Respondent:
Sri B.D. Mishra, Sri Syed Fahim Ahmed

A. Family Law – Hindu Marriage Act, 1955 - Sections 24, 25; Hindu Adoption & Maintenance Act, 1956 - Application for modification in the decree .

This application is termed as an application for modification to review the order passed by this Court which, in fact, is an application for correction of an error which had crept in which can be said to be an error apparent on the face of the record. (Para 10)

The appellant was sharing the house with the husband, who passed away recently, as per the orders passed by this Court. The Court seems to have recorded her statement in order dated 30.07.2018 and disposed off the appeal (which was filed in the year 2009 challenging the decree of divorce passed in favour of the respondent-husband) as withdrawn without modifying the decree of divorce. This order has caused problem to the appellant. (Para 5, 11, 12)

The dispute was matrimonial dispute which had given rise to the litigation between the parties, which had started way back in the year 1997/1999 when the appellant had filed a complaint under sections 498-A and 323, I.P.C. against her in-laws including the plaintiff-respondent (husband) now deceased. (Para 12)

Sri Ashok Kumar (deceased) had moved the Family Court, Meerut and a decree was passed against the appellant herein, which was challenged before this Court on several grounds. The learned Judge of the Family Court while considering the said complaint case had given a finding that she had deserted the husband, but the case set up by way of the appeal before this Court as well as by way of this modification application, is that the appellant never wanted to lose the company of her husband, who is now dead. The husband after 30.7.2018 (last order passed by the Court when the appeal was disposed of as withdrawn) had never came up before the Court to complain about desertion or regarding any other matrimonial dispute. **The non-substantiation of the allegations loses all its significance in the present factual scenario of this case and a case for setting aside the impugned decree of divorce is made out.** (Para 13)

The fact that the respondent-husband and the appellant started cohabiting under the order of this Court itself as there was a consensus of ending the dispute between them. (Para 12)

B. It cannot be said that the appellant is the divorced wife. The appellant would be entitled to the maintenance as per Hindu Adoption and Maintenance Act, 1956 as she was dependent on the deceased. It is made clear that she has during a intervening period of twenty years of litigation of has never claimed what can be termed to be maintenance under sections 24 and 25 of Hindu Marriage Act, 1955 or any maintenance under section 125, Cr. P.C. (Para 15, 16, 17)

The only legal heir who are entitled to inherit the estate of the deceased are the appellant and her son, who is now major. (Para 14)

Modification application allowed. Judgment sought to be modified is set aside. Decree of divorce is set aside. (E-3)

Precedent followed:

1. Rohtas Singh Vs Sant Ramendri, AIR 2000 SC 952 (Para 16)

2. Swapan Kumar Banerjee Vs St. of W.B. & ors., AIR 2019 SC 4748; 2019 (3) HLR 392 (Para 16)

Present appeal against the judgment and decree dated 25.04.2009 passed by Family Court, Meerut.

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. &
Hon'ble Ajit Singh, J.)

1. This application was for modification. The appeal was filed in the year 2009 challenging the decree of divorce passed in favour of the respondent-husband. For a period of nine years, the appeal remained pending, wherein she had challenged the grant of divorce to the husband by the court below. Thereafter this appeal came up before the Court on 12.4.2018, this Court inquired from the appellant (in person) and learned counsel for the respondent-husband as to whether there was any chance of settlement between the parties and after taking into consideration the submissions made by the appellant as well as the learned counsel appearing on behalf of the respondent-husband, the following order was passed :

"This is an appeal by the wife against the decree of divorce dated 25.4.2009 passed by the Family Court, Meerut.

One of the submissions of the wife who is appearing in person is that the petition for dissolution of marriage was instituted by the husband on the ground of cruelty and desertion but none of those grounds were proved and the Family Court without formulating any point with regard to irretrievable brake down of marriage has routed the divorce.

The appellant is present in person. She does not want divorce and is ready and willing to live with her husband even today.

Sri Faheem Ahmad, learned counsel appearing for the respondent husband is also ready and willing to keep her with him as her wife.

It may be noted that the only son of parties is grown up and is about 25 years.

In such situation, as both sides has expressed willingness to live together as husband and wife, we are of the opinion that the decree of divorce would not survive.

Accordingly, we direct both the parties to appear in person before the Court on 3rd May 2018 so that their wishes may be verified and recorded before passing the final order in the appeal.

Let the matter be listed on 3rd May 2018. "

2. In pursuance to the above order dated 12.4.2018, the appeal was again taken up on 03.05.2018 and the following order came to be passed :

"In pursuance to the order of the court dated 12.04.2018 the appellant Smt. Jyotsna Verma and the respondent Ashok

Kumar are present before the court. They are both willing to live together as husband and wife forgetting all that has happened in the past.

There are certain reservations on part of each of them whether the husband will provide her a decent atmosphere or whether the wife will adjust in the new set up.

These are normal and routine apprehensions which possibly could be taken care of by both of them once they start living together.

The husband is living in Tejpur in Assam and the wife is presently in New Delhi. She is ready to go and live with the husband at Tejpur and the husband has proper residential accommodation available with him where they can live together.

In view of the aforesaid facts and circumstances, we direct both of them to live together for a period of 2-3 months and to try in the best possible manner to adjust with each other forgetting about the past and to revert back to us in July, 2018.

Their only son who is now major and is living in New Delhi is also free to join them or may visit them if he so desires from time to time.

In case the son is unable to join them for some reason and if on account of his some physical disability, the wife has to visit him, the husband will not take any objection to it.

Let the matter be listed on 30th July, 2018 on which date parties will appear again before the court and share their experiences so that further action in the matter if necessary on merits may be taken."

3. On 30.07.2018, this appeal again came up for consideration and the following order was passed by this Court:-

"Smt. Jyotsana Verma, appellant is present in the Court.

In compliance of the order of this Court dated 03.05.2018, it is stated that both the husband and wife have been living together for a month and now they have reached at amicable settlement between them and they are living happily together.

The appellant has made a statement that there is no dispute between her and her husband. In view of the subsequent development, she wants to withdraw the appeal.

In view of the above, the appeal stands disposed of."

4. It has also been brought to our notice that in the year 2018 pursuant to this conciliation effort the appellant moved to Assam and started staying with the husband. Pursuant to this the appellant started co-habiting and within two months she came before this Court and deposed that both them are cohabiting and on her this statement appeal was permitted to be withdrawn.

5. It is this order permitting withdrawal of the appeal without quashing the decree of divorce which has caused problem to the appellant as it is now evident that the husband with whom she had co-habited lastly, passed away recently.

6. The order dated 23.02.2021 is reproduced herein below :

"(Order on Civil Misc. (Modification) Application no. 7 of 2021)

We have been conveyed that pursuant to the order of this Court the parties have cohabited for which the following order dated 03.05.2018 came to be passed by this Court, which reads as under:

"In pursuance to the order of the court dated 12.04.2018 the appellant Smt. Jyotsna Verma and the respondent Ashok Kumar are present before the court. They are both willing to live together as husband and wife forgetting all that has happened in the past.

There are certain reservations on part of each of them whether the husband will provide her a decent atmosphere or whether the wife will adjust in the new set up.

These are normal and routine apprehensions which possibly could be taken care of by both of them once they start living together.

The husband is living in Tejpur in Assam and the wife is presently in New Delhi.

She is ready to go and live with the husband at Tejpur and the husband has proper residential accommodation available with him where they can live together.

In view of the aforesaid facts and circumstances, we direct both of them to live together for a period of 2-3 months and to try in the best possible manner to adjust with eachother forgetting about the past and to revert back to us in July, 2018.

Their only son who is now major and is living in New Delhi is also free to join them or may visit them if he so desires from time to time.

In case the son is unable to join them for some reason and if on account of his some physical disability, the wife has to visit him, the husband will not take any objection to it.

Let the matter be listed on 30th July, 2018 on which date parties will appear again before the court and share their experiences so that further action in the matter if necessary on merits may be taken."

Thereafter, on 30.07.2018, the following order was passed by this Court:-

"Smt. Jyotsana Verma, appellant is present in the Court.

In compliance of the order of this Court dated 03.05.2018, it is stated that both the husband and wife have been living together for a month and now they have reached at amicable settlement between them and they are living happily together.

The appellant has made a statement that there is no dispute between her and her husband. In view of the

subsequent development, she wants to withdraw the appeal.

In view of the above, the appeal stands disposed of."

From the above two orders, no doubt, it is proved that the lady had been in the matrimonial home with the husband. The husband and wife are peacefully staying together and their son is posted at Delhi as per the earlier order. Once, the parties decided to bury their differences the decree of divorce should have been modified. The decree itself would become non-existent. The proceedings were withdrawn by the party in person (wife) which were in continuation of the challenge to the divorce decree husband never objected to the said withdrawal of the appeal as they had started cohabiting. The purpose of withdrawal was with a vision to give an end to their matrimonial discord as they had started cohabiting together. The decree of divorce as it is now had become non-est and the grounds of divorce had extinguished.

The Apex Court recently ***in Mukesh Nayyar v. Madhu Nayyar, (2017) 11 SCC 165*** *dismissing the appeal has held that in case of any surviving grievance with regard to property or any other things, the parties can pursue the same in appropriate proceedings.*

This appeal was withdrawn in view of the statement made by the applicant (appellant) wherein the statement was recorded way back on 3.7.2018. The appellant now wants us to review/modify the said order. The reasons are as mentioned herein below :-

(i) That she was a party in person in the proceeding before the Court below and after staying together with her husband, the appellate court while permitting her to amicably settle with her husband, did not modify the decree of divorce.

(ii) She continued to stay with her husband. The recent pass port of the present applicant shows that the settlement which had taken place was being worked out, meaning thereby that they had accepted that the decree of divorce should not be acted upon. Should the mistake, which is apparent on the face of the record, work to the prejudice of the lady who has compromised with her husband, even the appeal on the face of the record, while permitting her to withdraw the same, this Court should have no hesitation to modify the decree as also in view of the statement made by the learned counsel Sri V.J. Agarwal assisted by Sri Sanjay Agarwal appointed by her today.

(iii) She had also requested the Court to join the legal heir of her husband, namely, her son named Sri Ashok Kumar as no other legal heir falling in clause 1 heirship is alive.

The amendment be carried out within a period of one week from today.

We have interacted with the son of the parties through video conferencing. He has no objection to his joinder as party in the array as heir of the respondent. After a talk having being had by us with son through video conferencing, it is appropriate to direct that the learned counsel shall carry out the amendment in

the memo of the appeal for joining the son as legal heir of the original respondent.

The personal presence of the appellant is dispensed with and she may be heard through the video conferencing. She would give her contact number to the Bench Secretary.

List the matter on 1.3.2021 at 2:00 p.m for further orders.

Meanwhile, we stay the decree of divorce.

List for further hearing on 1.3.2021."

7. The amendment has been carried out. We proceed to decide the appeal on merits.

8. Arnab, son of plaintiff-respondent, has been impleaded as respondent in place of Ashok Kumar.

9. The appellant Jyotsana Verma has appeared in person before us.

10. Though this application is termed as an application for modification to review the order passed by this Court which, in fact, is an application for correction of an error which had crept in which can be said to be an error apparent on the face of the record.

11. The appellant was sharing the house with the husband, who passed away recently as per the orders passed by this Court. Unfortunately, she is a party to this appeal but not represented by an Advocate. The Court seems to have recorded her statement and disposed off the appeal on her statement without modifying the decree of divorce. On 23.02.2021, we have directed for listing of this matter today, i.e. 10.03.2021.

12. The fact that the respondent-husband and the appellant started co-habiting under the order of this Court itself as there was a consensus of ending the dispute between them. They had given a go-bye to their dispute. The situation would have been otherwise had it been a case different than the present one that the appellant had abandoned herself from the company of the plaintiff-respondent. Here, we find that the case set up by the appellant is that she had always been wishing to have the company of the plaintiff-respondent. The co-habiting of the husband and wife and thereby giving go-bye to their dispute ought to have been reflected in the orders of the learned Division Bench, while disposing of the appeal. The dispute was regarding matrimonial dispute which had given rise to the litigation between the parties, which had started way back in the year 1997/1999 and the Complaint Case No. 536 of 2001 was instituted before the Judicial Magistrate, Family Court, Meerut where the appellant had filed a complaint under Sections 498-A and 323 I.P.C. against her in-laws including the plaintiff-respondent (husband) now deceased.

13. The said dispute is mentioned only to show that the parties were litigating with each other since long. Sri Ashok Kumar, who was aged about 35 years, had moved the Family Court, Meerut and a decree was passed against the appellant herein, which came to be challenged before this Court on several grounds. Two aspects are required to be gone into. Firstly, what would be the fate if the appeal was allowed on its merit. Secondly, the decree of annulment or divorce would have been set

aside by this Court. The main dispute was that certain allegations were made by the appellant against her husband and the learned judge of the Family Court while considering the said complaint case had given a finding that she had deserted the husband, but the case set up by way of the appeal before this Court as well as by way of this modification application, is that the appellant never wanted to lose the company of her husband, who is now dead. Once, the parties were co-habitting, may be because of the order of the Court, can it be said that the desertion was continuing between the parties, therefore, the answer is obviously 'no'. The allegation once have been not proved, could a decree of divorce have been passed on the unproved allegations, the answer is 'no' and whether we can set aside the decree of divorce even on merit or can we set aside the decree of the divorce on the modification application moved by the appellant after the disposal of the appeal on merit. The reason being a Hindu wife the appellant has condoned all the mis-deeds of the plaintiff-respondent and if her husband did not co-habit with her and has thereafter, started co-habiting with her, in that view of the matter, the decree of divorce both on merits and on cohabiting and condonation of mis-deeds, if any, both by the husband and the wife, the decree is liable to be set aside. The husband after 30.07.2018 had never came up before the Court to complain that she had again deserted him or what is the status of the matrimonial relations between them, which means he had also condoned mis-deed of the appellant (wife), if any, including all those that were levelled upon the plaintiff-respondent by his wife by the petition filed before the court below. The non substantiation of the allegations loses all its significance in the present factual scenario of this case and a case for setting aside the impugned decree of divorce is made out.

14. Now it is apparent that except the son and the appellant there is none-else to claim as the heir of the plaintiff-respondent (since deceased), and hence, the only legal heir who are entitled to inherit the estate of the deceased are the appellant and her son, who is now major.

15. It can not be said that the appellant is the divorced wife. The Apex Court has recently held that the divorced wife is also entitled to maintenance from her husband under Section 125 Code of Criminal Procedure, 1973.

16. It is made clear that she has during a intervening period of twenty years of litigation of has never claimed what can be termed to be maintenance under Sections 24 and 25 of Hindu Marriage Act, 1955 or any maintenance under Section 125 Cr.P.C. "*Now, she has claimed the maintenance under Hindu Adoption or Maintenance Act, 1956*". The status of divorced wife has been discussed by the Apex Court in the case **of Rohtas Singh Vs. Sant Ramendri, AIR 2000 SC, 952** and in the case of **Swapan Kumar Banerjee Vs. State of West Bengal and others,** (19.9.2019 SC), Manu/SC/1343/2009.

17. In view of the ratio of that very decision of the Apex Court also, the appellant would be entitled to the maintenance as per Hindu Adoption and Maintenance Act, 1956 as she was dependent on the deceased. It is further observed that we have relied on the submission made by the son of the

appellant and the appellant herself who claims themselves to be nominee/heir of the deceased.

18. We have made it clear earlier also that she may pursue her remedies which she wants for which this review is filed. Even she may file a recall application, if so advised, before the Family Court to modify the decree.

19. The decree of divorce is set aside. The judgment and decree be modified to the aforesaid extent as we have already allowed this appeal. Consequences to follow. Hence, the judgment sought to be modified is set aside.

20. The record is not before this Court.

21. A copy of this order be be sent to the court below.

(2021)05ILR A86
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.03.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Govt. Appeal No. 90 of 2021

State Of U.P. ...Appellant
Versus
Rahul Chaubey & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:

(A) Practice & Procedure - It is a settled legal position that in an appeal against acquittal the appellate court should not interfere unless there are compelling reasons to differ with the finding of the trial court and not merely because the other view is also possible. (Para 33)

The Court has placed reliance on the principle of law that the scope of interference in an appeal against acquittal is narrower, than an appeal against conviction because presumption of innocence gets further fortified by an order of acquittal and the appellate court need not substitute its finding unless there i substantial and compelling reasons to differ with the findings of the trial court, or where the finding if the trial court is perverse or against the settled position of law. (Para 28)

Government Appeal Rejected. (E-8)

List of Cases cited:-

1. C. Antony Vs K.G. Raghavan Nair (2003) 1 SCC 1

2. Sirajuddin @ Siraj Vs St. of Karn. (1990) 4 SCC 375

3. St. of M.P. Vs Ramesh & anr. (2011) 4 SCC 786

4. Mrinal Das & ors. Vs St. of Tripura (2011) 9 SCC 488

5. Mahadeo Laxman Sarane & anr. Vs St.of Mah. (2007) 12 SCC 71

6. Ramesh Babulal Doshi Vs The St. of Guj. AR 1996 SC 2035

7. Rohtash Vs St. of Har. (2012) 6 SCC 589

8. Sampat Babso Kale & anr. Vs St. of Mah. (2019) 4 SCC 739

9. Mookklah & anr. Vs State, rep. by the Inspector of Police, Tamil Nadu AIR 2013 SC 321

10. Ramesh & ors. Vs St. of Har. AIR 2016 SC 5554

11. Ram Kishan Singh Vs Harmit Kaur & anr. AIR 1972 SC 468

12. Bhajju @ Karan Singh Vs St. of M.P. (2012) 4 SCC 327

(Delivered by Hon'ble Bachchoo Lal, J.& Hon'ble Sanjay Kumar Pachori, J.)

In Re:-Criminal Misc. (Leave to Appeal) Application No. 90 of 2021, under Section 378 (3) Cr.PC.

1. We have heard learned A.G.A and have perused the leave application, the grounds of appeal and the judgment of the court below.

2. The application seeking the leave to appeal against the common judgment and order of acquittal dated 2.12.2020 passed by the Additional District and Sessions Judge/Special Judge POCSO Act1, 2012, Court no. 2, Varanasi in Special Sessions Trial No 96 of 2014 (State of UP. v. Rahul Chaube and 2 others), under Sections 363, 366, 376A, 506, 342, 386 Indian Penal Code (in short 'I.P.C.') and under sections 4, 16, 17 of the POCSO Act, 2012 and Special Sessions Trial No. 67 of 2014 (State v. Sanjay Chaube), under Sections 363, 366, 506, 342, 386 I.P.C. and under Sections 16, 17 of the POCSO Act, 2012, arising out of case crime no. 173 of 2014, Police Station Lanka, District Varanasi, has been filed on behalf of the State (the appellant).

3. The accused-respondents Rahul Chaube, Smt. Reeta Chaube and Shiv Dutt Tiwari were sent for trial on the charges under Sections 363, 366, 376A, 506, 342, 386 I.P.C. and under Sections 4, 16, 17 of the POCSO Act. The accused Sanjay Chaube died during the course of the trial, as such, proceeding against him was abated on 5.1.2018.

4. The first information report2 (Ex.Ka.-1) of the incident was lodged by Kripa Shankar Singh (PW-1/informant/father of the victim) against the accused-respondents and Sanjay Chaube (since deceased) as case crime no. 173 of 2014 has been registered on 2.5.2014 under Sections 363, 366 I.P.C. P.S. Lanka, District Varanasi, by alleging that his daughter/victim, whose date of birth is 5.7.1999, was residing at the residence of his son-in-law (PW-3) and she is the student of Ist year in Ambition Polytechnic College, Parav, Varanasi; and accused Rahul Chaube son of Sanjay Chaube, resident of Parav, P.S. Ramnagar, District Varanasi, who was also student of IIIrd year in the said college, used to visit the place of his daughter; on 27.3.2014 at about 8:00 a.m., accused Rahul Chaube, Sanjay Chaube, Grand-father of Rahul Chaube and mother of Rahul Chaube met his daughter/victim on her way to college and enticed away the victim, by a tempo.

5. During the course of investigation, the prosecutrix was recovered, on the information given by her that she was subjected to rape by the appellant Rahul Chaube, an offence under Section 376A IPC was added. Thereafter, the prosecutrix was sent for medical examination, her ossification test was conducted. Medical examination report (Ex.Ka.-4) and pathology report (Ex.Ka.-5) dated 11.06.2014 were prepared by Dr. Manju Singh (PW-4). The statements of the prosecutrix, her father (informant) and son-in-law of the informant (PW-3) were recorded under section 161 Cr.PC., viginal slides which were received from the hospital were sent to FSL. The Investigating Officer collected the victim's date of birth certificate, prepared a site plan

of the place of the incident and victim's statement under Section 164 Cr.PC. was recorded.

6. After concluding the investigating, charge sheet (Ex.Ka.-9) was submitted against Sanjay Chaube under Sections 363, 366, 506, 342, 386 I.P.C. and under Sections 16, 17 of the POCSO Act, by PW-7 S.I. Vinod Kumar Yadav. Another charge sheet (Ex.Ka.-10) was also submitted by the investigating officer against the accused-respondents under Sections 363, 366, 376A 506, 342, 386 I.P.C. and under Sections 4, 16, 17 of the POCSO Act.

7. The trial court framed the charges against Rahul Chaube under Sections 363, 366, 376A, 506, 342, 386 I.P.C. and under sections 4, 16, 17 of the POCSO Act, and against Smt. Reeta Chaube, Sanjay Chaube and Shiv Dutt Tiwari under Sections 363, 366, 506, 342, 386 read with Section 34 I.P.C. and under sections 16, 17 of the POCSO Act.

8. In order to substantiate the charges against the accused-respondents the prosecution examined as many as 8 witnesses. P.W.-1 victim, P.W.-2 Kripa Shankar Singh (Informant/father of the victim), P.W.-3 Ashutosh Kumar Singh, (son-in-law of the informant) an eye-witness of the incident, P.W.-4 Dr. Manju Singh, (who conducted medical examination of the victim), P.W.-5 Virendra Kumar Singh (Principal, Saraswati Bal Vidhya Mandir High School, Jamaniya Station, Ghazipur), P.W-.6 CP Ram Pratap Yadav, (scribe) to prove the registration of the FIR (Ex.Ka.-7) and its G.D. Report (Ex.Ka.-8), P.W.-7 Vinod Kumar Yadav (IInd Investigating officer3) and P.W.-8 Mohd. Alamgir (Ist I.O.) were examined by the prosecution to prove various stages of the investigation such as preparation of site plan.

9. Out of aforesaid eight witnesses examined from the side of prosecution P.W.-1 victim, P.W.-2 Kripa Shankar Singh and P.W.-3 Ashutosh Kumar Singh are the witnesses of facts, they did not support the prosecution case and declared hostile by the prosecution.

10. Accused-respondents stated in their statement under Section 313 Cr.PC. that they have been falsely implicated by the police. No witness was examined by the defence.

11. The learned trial court, after thorough examination of the evidence led by the prosecution observed that as per written complaint, it is stated that the victim enticed away by the accused-respondents on the way of college; no place of incident was ascertained by the informant, but in the Chik F.I.R., P.W-.6 CP Ram Pratap Yadav has mentioned the place of incident Ganeshdham colony; site plan proved by PW-8 S.I. Mohd. Alamgir, who stated that he prepared the site plan on instance of the informant, inspite of that he admitted that the informant (PW-1) was not eye-witness of the incident.

12. The trial court found that alleged the recovery of the victim on 7.6.2014 is false because recovery memo of the victim has not been prepared; PW-1 victim in her statement under Section 164 Cr.PC. stated that she returned on 26.5.2014 after one and half month of the incident; whereas PW-2 father of the victim stated that he does not know from where the police recovered his daughter on 7.6.2014.

13. The trial court further found that there is cutting and overwriting in transfer leaving certificate (Ex.Ka.-6) at the place of date of birth of the victim, as mentioned 5.7.1999. PW-1 victim stated that her parents had written her age lower in school in order to conceal her actual age. She was 18 years 6 months old at the time of the incident. PW-2 father of the victim also admitted and corroborated the above facts and stated that he had written victim's age lower in school to her actual age. She was 18 years 6 months old at the time of the incident. She was adult at the time of the incident. Learned trial court after considering testimony of PW- 5 Veerendra Kumar Singh and the radiologial age of the victim held that at the time of the incident the victim was below 18 years age.

14. The trial court further found that PW-1 victim stated that she voluntarily went to Delhi on a tour with other students. Rahul Chaube did not entice her away and so far as other accused persons are concerned, they have no concern with the alleged incident. Rahul Chaube did not commit rape with her because she was staying with other girls. She returned home after one and half month and she further stated that the statement under section 164 Cr.PC. was recorded under the pressure of the police. PW-2 Kripa Shankar Singh corroborated the above facts and stated that victim told him that she voluntarily went to Delhi on a tour with other students. Rahul Chaube and other accused persons did not entice her away. PW-3 Ashutosh Kumar Singh stated that he did not know Rahul Chaube before the incident. He was not an eye-witness of the incident. When his sister-in-law (Sali) informed him by mobile call from Mugalsarai then he gone along with police to take her from Mugalsarai.

15. The trial court, in addition to above, also noticed that there is unexplained delay of 35 days in lodging the FIR of the present case, the prosecution has not given any reason or explaination about delay of lodging the F.I.R. PW-2 Kripa Shankar Singh stated that he lodged the F.I.R. on the basis of information given by other persons. He did not know the names of the persons, who have given the information about the incident. The statement of victim under section 164 Cr.PC was recorded on 17.6.2014 after 10 days of the alleged recovery of the victim on 7.6.2014. The trial court further noticed that the statement of victim under section 164 Cr.PC. was recorded actually after 20 days after her return, during the custody of her parents.

16. Apart from this, learned trial court found that the victim (PW-1), informant (PW-2) and eye-witness (PW-3) have not supported the prosecution version, the prosecution has failed to prove the charges levelled against the accused-respondents, therefore, acquitted them.

17. Learned A.G.A. submits that as per the prosecution case, the F.I.R. of case crime No. 173 of 2014 has been lodged under section under Sections 363, 366 I.P.C. against the accused/respondents and Sanjay Chaube on 2.5.2014 at P.S. Lanka, District Varanasi.

18. Learnded A.G.A. further submitted that the prosecutix was minor at the time of the incident, as per High School certificate and there is sufficient evidence to prove the complicity of the accused-respondents in commission of offence. It is further contended that medical evidence of the victim has also been wrongly

disbelieved by the trial court. The victim was enticed away by Rahul Chaube from the lawful guardianship along with other accused-respondents and she was raped by Rahul Chaube. The learned trial court without considering the evidence on record acquitted the accused-respondents. The judgment and order impugned cannot be sustained.

19. We have given thoughtful consideration to the submissions of the learned A.G.A. and have carefully persued the judgment passed by the court below.

20. Before we proceed to examine the weight of the submissions made on behalf of the State, it would be useful to notice the law with regard to the scope of power of the appellate court in interfering with the judgment of acquittal recorded by the trial court.

21. The Supreme Court in various judgments has repeatedly laid down that unless the findings of trial court are perverse or contrary to the material on record, High Court cannot, in appeal, substitute its findings merely because another contrary view was possible on the basis of the evidence. (Vide: **C. Antony v. K.G. Raghavan Nair4**). If the view of the evidence taken by the trial court is reasonably possible, the High Court should not, as a rule of prudence, disturb the acquittal. (Vide: **Sirajuddin @ Siraj v. State of Karnataka5)**

22. In **State of Madhya Pradesh v. Ramesh And Another,6** the Apex Court, while considering the scope of intereference in appeal against acquittal observed in paragraph no. 15 of the aforesaid judgment which is reproduced herein below:

Appeal against acquittal

"15. We are fully alive of the fact that we are dealing with an appeal against acquittal and in the absence of perversity in the said judgment and order, intereference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being the final court of fact is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal."

23. In **Mrinal Das and Others v. State of Tripura,7** the Supreme Court further observed similar position of law as provided in para 14 of the aforesaid judgment which is as under:

"14. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire

evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are 'compelling and substantial reasons' for doing so. If the order is 'clearly unreasonable', it is a compelling reason for intereference. When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc., the appellate court is competent to reverse the decision of the trail court depending on the materils placed."

24. In **Mahadeo Laxman Sarane and Another v. State of Maharashtra**,8 the Apex Court has observed in para 20 of the aforesaid judgment which is as under:

".....We are conscious of the settled legal position that in an appeal against acquittal the High Court ought not to interfere with the order of acquittal if on the basis of the same evidence two views are reasonably possible- one in favour of the accused and the other against him. In such a case if the trial court takes a view in favour of the accused, the High Court ought not to interfere with the order of acquittal. However, if the judgment of acquittal is perverse or highly unreasonable or the trial court records a finding of acquittal on the basis of irrelevant or inadmissible evidence, the High Court, if it reaches a conclusion that on the evidence on record it is not reasonably possible to take another view, it may be justified in setting aside the order of acquittal....."

25. In **Ramesh Babulal Doshi v. The State of Gujarat,9** the Apex Court observed in para 7 of the aforesaid judgment which is as under:

".....This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot consitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusion arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are pulpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then - only reappraise the evidence to arrive at its own conclusion....."

26 . In **Rohtash v. State of Haryana,10** the Apex Court held in para 27 of the aforesaid judgment which is reproduced herein below:

".....The law of interering with the judgment of acquittal is well settled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the

accused and further that the trial court's acquittal bolesters the presumption of innocence. Intereference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

27. **In Sampat Babso Kale and Another v. State of Maharashtra,11** the Apex Court observed in para 8 of the aforesaid judgmnet which is reproduced herein below:

"8. With regard to the powers of an appellate court in an appeal against acquittal, the law is well established that the presumption of innocence which is attached to every accused person gets strengthened when such an accused is accquited by the trial court and the High Court should not lightly interfere with the decision of the trial court which has recorded the evidence and observed the demeanour of witnesses. This Court in Chandrappa v. State of Karnataka12, laid down the following principles: (SCC, p.432, para 42)

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc., are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourshes of language' to emphasise the reluctance of an appeallate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal recorded by the trial court."

28. The above principle of law has been reiterated and affirmed further in **Mookkiah and Another v. State, rep. by the Inspector of Police, Tamil Nadu13** and in **Ramesh and Others v. State of Haryana,14** where it has been held that the scope of intereference in an appeal against acquittal is narrower, than an appeal against

conviction because presumption of innocence gets further fortified by an order of acquittal and the appellate court need not substitute its finding unless there is substantial and compelling reasons to differ with the findings of the trial court, or where the finding of the trial court is perverse or against the settled position of law.

29. Keeping in mind the legal principles noticed above, now, we shall examine the weight of the submissions with reference to the evidence led by the prosecution and the findings returned thereon. Before that, at the outset, it may be observed that in the application seeking leave to appeal as well as in the memorandum of appeal, it has not been stated that the trial court has misread or misquoted the statement of the prosecution witnesses. We have therefore to first ascertain whether the findings of the trial court are sustainable or not. The thurst of the submission of the learned A.G.A. is that the trial court has not appreciated the statement of the victim recorded under Section 164 Cr.PC. wherein the victim has supported the prosecution version.

30. It is case in which ocular evidence of the prosecution i.e. PW-1 victim, PW-2 Kripa Shankar Singh and PW-3 Ashutosh Kumar Singh did not support the prosecution case and they declared hostile by the prosecution after leave of the court. After close scrutiny of the whole judgment, we have not found any evidence which suggests any complicity of the accused-respondents in the present case.

31. It is settled position of law that a statement under Section 164 of the Cr.PC. is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness. (Vide: **Ram Kishan Singh v. Harmit Kaur and another15**).

32. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. (Vide: **Bhajju @ Karan Singh v. State of Madhya Pradesh16**)

33. Considering the fact and circumstances of the case, and with reference to the principles goveringing the weighing of evidence, we do not find any factual or legal error in the assessment of the evidence by the court below while acquitting the accused-respondents. Hence, keeping in mind the settled legal postition that in an appeal against acquittal the appellate court should not interfere unless there are compelling reasons to differ with the finding of the trial court and not merely because the other view is also possible, we are of the considered view that no compelling reasons has been shown to us to grant leave to the State so as to entertain appeal against the judgment and order of acquittal passed by the court below. Consequently, the application seeking leave to appeal is rejected. As a result, the government appeal is **dismissed.**

34. We may put on record that according to the office report no appeal has been filed by the victim against the judgment and order of the court below.

(2021)05ILR A94
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.04.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Habeas Corpus Writ Petition No. 9996 of 2021

Sadhna Kumari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Janardan Singh

Counsel for the Respondents:
G.A.

(A) Contract Law - Indian Contract Act, 1872: Sections 10, 11 - Indian Majority Act, 1875 - Section 3 - Child Marriage Restraint Act, 1929 - Juvenile Justice (Care and Protection of Children) Act, 2015 - The Hindu Marriage Act, 1955: Section 5(iii)

The detenue petitioner and her next friend alleged to have solemnized their marriage through an agreement dated 31.07.2020. However, the said agreement executed by the petitioner (Sadhna Kumari) when she was 17 years and 4 months old, meaning thereby she could not have given valid consent at the relevant date despite the alleged agreement of her consent to cohabit with Shekhar Pandey. (Para 14)

The detenue petitioner's urge from the Court to issue a notice to produce the alleged detenue on the basis of said "agreement" will amount to giving effect to the agreement. The agreement is not enforceable in law for want of capacities of the parties to the agreement. Undoubtedly, both the parties was minor i.e., not of marriageable age when entered into the agreement to marry on 31.07.2020. (Para 16-19)

The minors agreement is void in law. The marriage is not solemnized under the Hindu Marriage Act or otherwise entered by the parties thereto according to the law, but is being claimed as an agreement to cohabit as husband and wife by virtue of agreement dated 31.07.2020. The option to ratify the agreement executed at the age of minority is allowed only when a contract is entered on behalf of a lawful authority of a minor. (Para 21, 22)

Writ Petition Rejected. (E-8)

List of Cases cited:-

1. Mohori Bibee Vs Dharmoda Ghose (1903) ILR 30 Cal. 539 (P.C.)

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case called out for virtual hearing as fresh petition.

2. Learned counsel for the petitioner, Sri Janardan Singh, Advocate and learned A.G.A for the State are connected through video conferencing.

3. The instant writ petition is filed seeking issuance of direction in the nature of habeas corpus. Allegedly, the petition is moved on behalf of 'Sadhna Kumari', aged about 18 years, through her next friend on 15.4.2021. The next friend, allegedly the husband namely Shekhar @ Shekhar Pandey aged about 19 years, is resident of District-Gonda. The opposite parties no.4 and 5 (parents of petitioner Sadhna Kumari) are resident of village Mau, with whom her unlawful detention is complained of.

4. Briefly stating the grounds for issuance of direction in the nature of habeas Corpus through the next friend Shekhar @ Shekhar Pandey, as pleaded in the petition

are the alleged detenue petitioner 'Sadhna Kumari' and the next friend 'Shekhar @ Shekhar Pandey' were legally wedded and living as husband and wife since after an agreement purported to be of marriage covenanted by them on a notary affidavit dated 31.7.2020 which shall hereinafter be referred as "agreement' only. The photocopy of the said agreement is made Annexure No.2 to the petition.

5. Para 13 of the writ petition pleads, "the detenue petitioner and Shekhar @ Shekhar Pandey solemnized their marriage and the detenue petitioner being major, she is competent to take decision about her future life". It is further pleaded that they were cohabiting in their matrimonial house situated at Village Bakhtawarpurwa, Tehsil Paraspur, District Gonda uninterruptedly, when the opposite party no.5 (father of detenue Sadhna Kumari) some time in the second week of January, 2021 requested for her "vidai" assuring her return after one week. On his assurance, the detenue petitioner was allowed to depart the matrimonial home with her father. Since then, she is detained illegally and improperly against her wish and will by the opposite parties no. 4 and 5 (parents) in their home situated at Village Bhaatkol, Post Dharauhara, Mohammadabad Gohana, District Mau. Consequently, having no option the instant writ petition under Article 226 of the Constitution of India is filed by the next friend on behalf of the detenue, to issue a writ, order or direction in the nature of habeas corpus commanding and directing the opposite parties (State of U.P, Superintendent of Police, Mau, S.H.O., P.S- Kotwali Mohammadabad Gohana, District Mau and parents of the detenue petitioner) to produce the detenue petitioner before the court so that statement as to her willingness may be recorded by the court and to set her free at her liberty.

6. Heard, the learned counsel Shri Janardan Singh Advocate for the petitioner, who emphatically argued to issue notice instantly to the opposite parties, directing them for production of the detenue before the court. Learned A.G.A. is also present on behalf of the State to protest the prayer made by the petitioner. Learned A.G.A. argued, a writ of habeas corpus when presented before the Court, if the court is prima facie satisfied that the prayer deserves to be granted, it may issue rule nisi and call upon the person or authority against whom such writ is sought, on the returnable date to show cause as to why rule should not be made absolute and the detenue should not be released from detention or confinement.

7. Before accepting the prayer made by the learned counsel to issue notice for production of the alleged detenue Sadhna Kumari in the court from the custody of the parents first of all it is to be considered by the court, whether the **prima facie** case is made up from the facts pleaded in the petition.

8. It is established by law that any detenue or a person acting on his/her behalf can move petition before the court for a writ of habeas corpus, one reason for the writ to be sought by the person other than the detenue is that he/she might be held incommunicado.

9. In the instant case the custody of parents is claimed to be illegal on the ground, the petitioner Sadhna Kumari and her next friend both though legally wedded through the 'solemnization of marriage' and

were cohabiting in their 'matrimonial house' since the date of agreement dated 31.7.2020, the petition is taken away by her father and confined in parents home against her wishes.

10. On the basis of agreement dated 31.7.2020, the aforesaid next friend is alleged to be husband of petitioner Sadhana Kumari and as such the learned counsel for the petitioner emphatically requested to issue notice to the opposite parties no. 4 and 5 and other State-opposite parties too, to produce the petitioner detenue in the court for recording her desire and wishes as to her future.

11. The entire pleading is gone through by the court and read over by the learned counsel for the petitioner also, but he failed to show material avernment as to the 'solemnization of marriage', it's date, place and time so as to establish wedding of the petitioner and her next friend the alleged husband, however, the words "solemnization of marriage" is pleaded in the para 12 and 13 vaguely. Both the paras are lacking specific pleading as to the solemnization of marriage with day, date and place of solemnization. Learned counsel when failed to establish by means of pleading and other materials placed by him on record of the petition the solemnization of marriage, he emphatically pressed in alternative on the "agreement" dated 31.7.2020 (Annexure No.2). The said agreement is on notary affidavit. It is purporting to be "Vivah Anubandh Patra" (Rajinama) means "Agreement of Marriage" (Deed of Consent). Obviously on 31.7.2020 the parties to the 'agreement' namely, Sadhna Kumari and Shekhar Pandey consented to live together as husband and wife, claiming they were already cohabiting as such for last 6 months.

12. The 'agreement' dated 31.7.2020 is pleaded as the basis of legal authority of the next friend to seek habeas corpus of petitioner Sadhna Kumari. The purpose of writ is to facilitate the next friend to cohabit with petitioner without interruption of anyone else, even the parents of Sadhna Kumari (opposite parties no.4 and 5) with whom she is presently residing. The pleading on the one hand asserts in para-7 of the petition that since the date of 'agreement' the detenue petitioner and Shekhar @ Shekhar Pandey used to live in common room as husband and wife enjoying their married life, the annexure no.2 (the agreement) on the other hand, to the contrary, claims on 31.7.2020 that they remained in cohabitation with each other as husband and wife for last 6 months. This contradiction is relevant to appreciate the vagueness of assertion of cohabitation. Further, in para 11 of the petition, it is pleaded that in second week of January 2021, Sadhna Kumari, on the request of her father permitted to depart for parental house. No specific date, as to when she went to her parental house, is pleaded in the petition. As such neither the date of solemnization of marriage when they were wedded and started cohabition nor the date when she departed the alleged matrimonial house for going to parental house is pleaded. Keeping aside this vagueness, it can be said with all certainity that the only basis of alleging marital relation as well as the matrimonial cohabitation with the next friend Shekhar Pandey is the 'agreement' (Annexure no. 2) dated 31.7.2020.

13. One other material placed before this Court, the Annexure no.3, is an First

Information Report in Case Crime No.524 of 2020 dated 6.9.2020 lodged in Police Station Gautambuddh Nagar, Phase-II at 22.01 p.m. by Smt. Gudiya w/o Mahendra, (opposite party no.4 in the petition). The said F.I.R., lodged by the police under Sections 363, 366 I.P.C. on the complaint of opposite party no.4 discloses that, her daughter Sadhna Kumari left house about 15 days ago with Shekhar @ Shekhar Pandey. Complainant suspected the said Shekhar @ Shekhar Pandey as he was living in rented house in the same locality having telephone no.8588019930 and 7703956814 was also missing at the same time and the said mobile phone numbers were kept switched off. She further apprehended danger to the life of her daughter. In the para-8 of the petition the details of the said incident under F.I.R. is pleaded but no further progress of the case is disclosed.

Legality of agreement dated 31.7.2020.

14. The material information as to the age of the petitioner Sadhna Kumari is given in para-5 of the petition. As per the High School Examination Result-2020, the date of birth of detenue petitioner is 17.3.2003. In view of the aforesaid material fact, the 'agreement' purported to be of marriage when allegedly executed by the petitioner Sadhna Kumari on 31.7.2020 she was a minor of aged about 17 years and 4 months, therefore, at the relevant date of agreement despite the alleged agreement of her consent to cohabit with Shekhar Pandey, the next friend as husband and wife, she could not be supposed to give a valid consent in law. This is pertinent to note that a criminal case under Sections 363, 366 of Indian Penal Code, 1860 is registered pursuant to the complaint of petitioner's mother against the act of the next friend Shekhar @ Shekhar Pandey. He may be criminally liable on trial in due course of procedure. As such the object and considerable for the agreement is undoubtedly unlawful.

15. The learned counsel for the petitioner further vehemently argued that at present when the petition is filed by the petitioner she is major therefore, in law she is competent to take decision on her own in respect of her future life and if the court calls her to record her wishes, she may ratify the agreement. When the learned counsel is asked about the position of law with regard to the agreement executed by minor itself and the capacity of minor to ratify the said agreement on attaining majority, he could not answer.

Agreement of which either party to it is a minor- Legal Status.

16. In the instant case, the prima facie case to issue a notice with regard to the production of petitioner Sadhna Kumari as prayed from the court in the writ of habeas corpus, through her next friend the alleged husband is absolutely based on the agreement (consent deed) dated 31.7.2020. Issuing a notice to produce the alleged detenue on the basis of said 'agreement' will amount to give the effect to the agreement. The agreement must have enforceability in law for the said purpose. The agreements which are made enforceable in law are provided under the Indian Contract Act, 1872. Section 11 of the Indian Contract Act states "every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound

mind and is not disqualified from contracting by any law to which he is subject.

17. In view of the aforesaid provisions of Contract Act, three points are to be kept in mind when enforceability of an agreement is considered-

(i) the person needs to be a major;

(ii) the person needs to be of sound mind; and

(iii) the person is not prohibited by law to enter into a contract.

18. What would be the age of majority which capacitates a person to contract is important to be kept in mind. The petitioner being a citizen of India, his/her age of majority would be considered under the Indian Majority Act, 1875, Section 3 of the said Act provides as below:

"3. Age of majority of persons domiciled in India.-

(1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.

(2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day."

19. The petitioner's date of birth is admittedly 17.3.2003, as such on the date of 'agreement' dated 31.7.2020, she undoubtedly was a minor. The definitions given in Child Marriage Restraint Act, 1929 and Juvenile Justice (Care and Protection of Children) Act, 2015 such person is termed as child. Admittedly, the petitioner was minor as well as a child also when she allegedly entered into the agreement to marry on 31.7.2020. Further, she is party to an agreement of marriage. An agreement must not be opposed to law. The law applicable to her being a Hindu, is "The Hindu Marriage Act, 1955". Section 5 (iii) of the said Act provides the marriageable age, according to which the marriage may be solemnized between any two Hindus, if the following conditions are fulfilled:-

"(iii) the bride groom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage."

20. Under both the Acts viz. The Hindu Marriage Act, 1955 and The Indian Contract Act, 1872 the petitioner had no legal capacity and competence to enter into the agreement to marry with Shekhar @ Shekhar Pandey. Even Shekhar @ Shekhar Pandey was not of marriageable age under the law.

21. The minors agreement is declared in law void, child marriage was outlawed in 1929. According to the Indian law, in marriage where either the woman is below the age of 18 years or the man is below the age of 21 years, such marriages, if solemnized by the guardians becomes voidable under Section 5 of the Hindu Marriage Act at the instance of minor. He has option to ratify the marriage also.

22. Here in the present case, the marriage is not solemnized under the Hindu Marriage Act or otherwise entered by the

parties thereto according to the law, but is being claimed as an agreement to cohabit as husband and wife by virtue of agreement dated 31.7.2020. Therefore, the question is whether on attaining the age of majority a minor is competent to ratify his/her agreement executed in the age of minority. The legal position with this regard is that:

(i) contract with minor is void and no legal obligation can ever arise on him/her therein,

(ii) the minor party cannot ratify the contract upon attaining majority unless the law specifically allows this, and

(iii) no court can allow specific permission of a contract with minor because it is void altogether.

When a contract is entered on behalf of a lawful authority of a minor then only the option is available attaining majority to the minor either to ratify or to rescind the contract entered by the person having lawful authority on his behalf. On the basis of aforesaid reasons, the argument of learned counsel that the petitioner has now become a major and she is willing to enforce her contract is not tenable.

23. Since legal capacity to enter into contract is a creation of law, when the law expressly declares a minor incompetent to contract. The agreement dated 31.7.2020 of which one of the party namely petitioner Sadhna Kumari a minor, is void, as the same is in violation of Sections 11 and 23 of the The Indian Contract Act, 1872. Sections 11 and 23 of the Indian Contract Act are quoted hereunder for easy reference:-

"11. Who are competent to contract.--Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

23. What consideration and objects are lawful, and what not.--The consideration or object of an agreement is lawful, unless--The consideration or object of an agreement is lawful, unless--" it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

It is further provided in Section 10 of the Indian Contract Act, 1872 as to what agreement are enforceable to assume the shape of a valid contract. Section 10 of the Indian Contract Act, 1872 runs as under:-

"10. What agreements are contracts.--All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. --All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and

are not hereby expressly declared to be void." Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

24. The law as applicable in India on the issue of contract with minor can be stated to have derived from the decision of the Privi Council in ***Mohori Bibee Vs. Dharmodas Ghose (1903) ILR 30 Cal. 539 (P.C.).*** In that case the Privi Council, on the wording of The Indian Contract Act, 1872 held that all contracts of minors were void and not merely voidable. The position of law would be different when a contract is made by a guardian of a minor so as to be binding on a minor and is also for the benefit of the minor, then is an enforceable contract in law and the minor can enforce it.

25. It is therefore held that the agreement dated 31.7.2020 purporting to be of marriage and consent to cohabit together, cannot be given effect so as to issue notice to opposite parties for production of petitioner in court for the purpose of recording her desire to ratify her alleged agreement to marry/consent deed, for the reason of the same being a void agreement.

26. In view of the above discussions, the petition at the very threshold is ***dismissed***.

27. However, this decision shall not impede the petitioner to enter into marital relations with person of her choice, whosoever may be, on attaining marriageable age through a lawfully solemnized marriage or otherwise by any mode prescribed by law relating to marriage.

(2021)05ILR A100
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Special Appeal Defective No. 226 of 2021

Doli ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Kishun Misra, Sri Jal Singh Yadav

Counsel for the Respondents:
C.S.C.

(A) Service Law - Where a candidate is put to notice that before uploading the data she must cross check the data with her testimonials and obtain a print-out thereof before uploading and, once it is uploaded, the question whether she should or should not be allowed to correct a mistake depends upon the existence of enabling provisions found in a statute or rule or executive instructions. A person seeking a writ of mandamus must demonstrate that a right inheres in him casts a corresponding duty/obligation upon the public authority or State or its instrumentality to perform, or desist from performing, such act for which a writ of mandamus is sought. The petitioner has failed to demonstrate that any such right inheres in her under a Statute or rule or executive instructions. (Para 8)

Special Appeal Rejected. (E-8)

List of Cases cited:-

1. Archana Chauhan Vs St. of U.P. & ors. Civil Appeal No. 3068, arising out of SLP (Civil) No. 9541 of 2020 *(distinguished)*

2. Ram Manohar Yadav Vs St. of U.P. & ors. Special Appeal No. 834 of 2013

3. Km. Richa Pandey Vs Examination Regulatory Authority & anr. Special Appeal Defective No. 117 of 2014

(Delivered by Hon'ble Manoj Misra, J)

1. This intra court appeal arises from a judgment and order of a Single Judge, dated 23.09.2020, in Writ-A No.7159 of 2020 by which though the writ petition of the appellant has been partly allowed but the prayer to allow correction in the entry relating to marks obtained by her in the Intermediate Examination filled in her form, submitted online, for Assistant Teacher Recruitment Examination, 2019, has been denied.

2. A glimpse at the facts giving rise to the appeal would be apposite. The State Government issued a notification to fill up 69,000 posts of Assistant Teacher in primary schools in various districts of the State. To that end, an Assistant Teacher Recruitment Examination, 2019 (for short ARTE, 2019) was proposed to be conducted by the Examination Regulatory Authority, Prayagraj (for short Authority). The appellant applied online with Registration No.130002862 and was assigned Roll No.12133720438. In the examination that followed, on 12.05.2020 the appellant was declared qualified. After declaration of result, U.P. Basic Shiksha Parishad (for short Parishad) invited online applications from successful candidates for counselling and appointment. The petitioner applied by feeding her registration number which reflected the data already filled by her earlier while getting registered for the ARTE, 2019. On such online submission, as per her merit, she was allotted district Shahjahanpur. Appellant's case is that when she discovered that in her online submission two entries were incorrect, namely, total marks of her graduation course, which were shown as 1300 in place of 1350, and marks obtained in Intermediate Examination, which were shown as 289 in place of 287 marks, she made representation to the Secretary, Authority and the Secretary, Parishad. When no action was taken on her representations, she filed Writ A No.7159 of 2020 before a Single Judge Bench of this Court, which was partly allowed by the impugned judgment and order to the extent correction was sought in the grand total of graduation marks.

3. Before the learned Single Judge a decision of the Apex Court in the case of **Archana Chauhan versus State of UP & others (Civil appeal No.3068 of 2020, arising out of SLP (Civil) No.9541 of 2020, dated 2.9.2020)** was cited by which the Apex Court allowed rectification of a mistake committed by a candidate, who had appeared in ARTE, 2019, in filling the total marks of all the papers of the Intermediate examination passed by the candidate. In that case, the candidate had secured certain marks against a total of 500 marks but, by mistake, this total was entered as 5000. The Apex Court upon finding that the erroneous entry of which correction was sought had been to the candidate's detriment, and that the candidate had not taken any advantage of that error, allowed rectification. The learned Single Judge following the judgment of the Apex Court allowed rectification to the extent prayed for in the total marks of the graduation course, that is the learned Single Judge allowed increase in the total marks of the graduation course from 1300 to 1350. But the learned Single Judge refused correction in the

entry of marks alleged to have been obtained in the Intermediate Examination on the ground that the disclosed marks were higher than what the candidate actually obtained and, therefore, it had a bearing on the selection process. While rejecting that prayer, the learned Single Judge noticed clause 17 of the Government notification, which instructed the candidate to cross check the data fed from the testimonials, and to obtain a printout of that data, before uploading. Sub-clauses (5) and (6) of clause 17, specifically warned the candidate that after the data is uploaded, no correction/ alteration would be allowed under any circumstances.

4. We have heard learned counsel for the appellant and the learned standing counsel for the respondents and have perused the records.

5. The learned counsel for the petitioner submitted that reduction of the marks obtained would come to the detriment of the appellant therefore, applying the principle deducible from the decision of the Apex Court in **Archana Chauhan's case (supra),** correction ought to be allowed and, under the circumstances, there is no justification to deny an opportunity to the appellant to correct an obvious human error. He further submitted that admittedly the appellant had qualified the written examination and for appointment she would have had to show her testimonials therefore correction, to make the marks in sync with her testimonials, would cause no prejudice to the other participating candidates.

6. *Per contra*, the learned standing counsel submitted that the instructions in the notification had put the candidate on notice that any mistake would not be allowed to be corrected and, therefore, the instructions had warned that before feeding the data a cross check of the data with the testimonials be made. Under the circumstances, no mandamus ought to be issued to the authorities to deviate from their avowed policy decision which applies universally to all candidates. He also submitted that the Apex Court has not laid down as a law that all errors arising out of human error be allowed to be corrected even if a candidate is put to notice that he will not be allowed to correct mistake once the data is uploaded. He also cited a decision of a Division Bench of this Court in **Special Appeal No.834 of 2013 (Ram Manohar Yadav v. State of U.P. & others, decided on 30.05.2013).**

7. We have given our anxious consideration to the rival submissions. Before we proceed to weigh the respective submissions, it would be useful to notice the decision of this Court in **Special Appeal No.834 of 2013 (Ram Manohar Yadav v. State of U.P. & others, decided on 30.05.2013).** In that case, the appellant, who had applied for selection on the post of a teacher, had not filled the online application form correctly. He, therefore, applied for rectification of the mistake, which was not accepted. Thereafter, he filed a writ petition which was dismissed by a Single Judge Bench of this Court. Aggrieved therewith, he filed Special Appeal before a Division Bench of this Court. While dismissing the appeal, the Division Bench observed: "if prospective teacher can not even correctly fill up the simple on line application form for his employment, it is obvious what he is going to teach, if appointed. There are certain decisions cited on this issue. But none of them deal with this aspect whether under the discretionary jurisdiction of the Court under article 226 of the Constitution of India such incompetent persons should be allowed to

play with the future of the next generation." In a different context, the above decision of this Court was noticed with approval by another Division Bench of this Court in **Special Appeal Defective No.117 of 2014 (Km. Richa Pandey v. Examination Regulatory Authority and another, decided on 18.02.2014).** There the petitioner had not filled the column of language in which she had attempted answers in the OMR answer sheet. The learned Single Judge found that in absence of mention of language in which the answers were attempted, OMR sheet would not be acceptable for evaluation and, therefore, the writ petition is liable to be dismissed. The Division Bench, on appeal, called for the records and found that there were clear instructions that if requisite columns are not filled correctly, the answers will not be evaluated. Thus, while affirming the decision of the learned Single Judge, the Division Bench observed:

"The OMR sheets are provided to the candidates to speed up evaluation through help of computer. In case we accept the argument of learned counsel for the petitioner that the language in which the petitioner had written essay could be checked up by the examiner before feeding answer book into computer, the entire process of expediting the results will be lost. Where OMR sheets are to be examined with the aid of the computer, it is not advisable and practical to direct that each OMR sheet should be checked by the examiners and the columns, which have not been filled up may be filled up by the examiner himself with the aid of the language used by the candidates for writing essay. We are informed by Standing Counsel that about seven lacs candidates had appeared in the test.

With such large number of candidates appearing in TET Examination 2013 it would not have been possible nor it was feasible for examiners to look into the answer sheets individually before feeding them into computer for correcting any mistakes.

We agree with the reasoning given by the learned Single Judge that where the applicant is not capable of correctly filling up the form, she is not entitled to any discretionary relief from the Court." (Emphasis Supplied)

8. Having noticed the two Division Bench decisions of this Court, the issue which arises for our consideration is whether a candidate who is put to notice that before uploading the data she must cross check the data with her testimonials and obtain a print-out thereof before uploading and, once it is uploaded, she would not be allowed to correct a mistake, could seek a writ of mandamus upon the authorities to allow her to correct the mistake. The answer to it would depend upon existence of enabling provisions found in a statute or rule or executive instructions. No statutory provision or rule or instruction has been shown to us which may allow such correction despite clear instructions to the contrary in the notification. It has also not been shown to us that the authorities have allowed such corrections to other candidates. It is well settled that a mandamus is ordinarily to be issued upon a public authority to perform its duty or obligation cast upon it by law. A person seeking a writ of mandamus must therefore demonstrate that a right inheres in him that casts a corresponding duty / obligation upon the public authority or State or its instrumentality to perform, or

desist from performing, such act for which a writ of mandamus is sought. That right may be derived, inter alia, from the Constitution of India, a statute or a rule or an executive instruction. The petitioner has failed to demonstrate that any such right inheres in her under a Statute or rule or executive instructions. Whether such right inheres in her under the Constitution of India needs to be examined. Interestingly, the petitioner has not challenged the instructions contained in clause 17 of the notification as violative of Part III of the Constitution of India or any statutory provision or rule. Otherwise also, in matters relating to public examinations, such strict instructions as are found in clause 17 of the notification are desirable to prevent foul play and to ensure expeditious conclusion of the recruitment process, inasmuch as if candidates are allowed to correct/alter data their merit position would alter accordingly, resulting in utter confusion. Therefore, ex facie, such instructions do not appear arbitrary. In these circumstances, we are of the considered view, the appellant has failed to make out a case for issuance of a writ in the nature of mandamus commanding the respondents to rectify the mistake made by her in her online submission.

9. The decision of the Apex Court in **Archana Chauhan's case (supra**) does not lay down as a law that all rectifications of any nature must be allowed. Moreover, in **Archana Chauhan's case (supra),** the information of which correction was allowed was not in respect of the marks obtained by a candidate but was in respect of an obvious error of adding a zero to the total marks for which the candidate had appeared in the Intermediate examination. Thus, in our considered view, the learned Single Judge rightly observed that the second correction sought would not be covered by the decision in **Archana Chauhan's case**. For all the reasons mentioned above, we find no good ground to interfere with the judgment and order passed by the learned Single Judge. The appeal is **dismissed.**

(2021)05ILR A104
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2021

BEFORE

THE HON'BLE SANJAY YADAV, J.
THE HON'BLE PRAKASH PADIA, J.

Special Appeal Defective No. 318 of 2021
AND
Special Appeal Defective No. 319 of 2021
AND
Special Appeal Defective No. 320 of 2021
AND
Special Appeal Defective No. 321 of 2021

Nishant Yadav & Ors. ....Petitioners
Versus
The Registrar General & Ors.
...Respondents

Counsel for the Petitioners:
Sri Shailendra Srivastava, Sri Shailendra (Senior Advocate)

Counsel for the Respondents:
Sri Harendra Prakash Dwivedi, Sri Ashish Mishra

A. Civil Law - U.P. District Court Service Rules, 2013 – Ch. II, R. 9 – Post of Clerk and Stenographer – Recruitment – Stage II examination – Application of subsequent criteria to the selection already initiated – Retrospective Effect – Held, the approach of learned Single Judge to adjudge the efficiency of respective candidates by incursing the resolution of 2019, which laid down the

criteria of minimum marks, for the recruitment of 2014, cannot be given the stamp of approval – No irregularity or infirmity of pervasive nature were brought on record as would establish that the entire process of recruitment got vitiated. (Para 30 and 32)

B. Interpretation of Statute – Service Jurisprudence – Systemic flaw – Meaning – It mean the irregularities in the recruitment process having taken place on a systemic level i.e. where the procedure laid down by the Rules or otherwise, such as the Advertisement, is violated resulting in vitiation of entire process, because of the percolation of such flaw down the process (Para 26)

Special Appeal allowed. (E-1)

Cases relied on :-

1. Civil Appeal Nos. 639-640 of 2021; Sachin Kumar & ors. Vs Delhi Subordinate Service Selection Board (DSSSB) & ors. decided by the Supreme Court on 03.03.2021

2. U.O.I. & ors. Vs Rajesh P.U., Puthuvalnikathu & anr.; (2003) 7 SCC 285

3. Shri Durgacharan Misra Vs St. of Orissa & ors.; AIR 1987 SC 2267

(Delivered by Hon'ble Sanjay Yadav, J. & Hon'ble Prakash Padia, J.)

Shri Shailendra, learned Senior Counsel assisted by Shri Shailendra Shrivastava appears on behalf of the appellants and Shri H.P. Dwivedi, learned counsel appears on behalf of respondents no. 2 to 6 in Special Appeal Defective No. 318 of 2021.

Shri H.N. Singh, learned Senior Counsel assisted by Shri Kamal Kumar Kesharwani appears for the appellants and Shri Saurabh Singh and Shri Rajesh Kumar Shrivastava, learned counsel appears on behalf of private respondents in Special Appeal Defective no. 319 of 2021.

Shri Radha Kant Ojha, learned Senior Counsel assisted by Shri Shivendu Ojha appears for the appellants and Shri Saurabh Singh, learned counsel appears on behalf of respondents no. 2 to 6 in Special Appeal Defective no. 320 of 2021.

Shri Anil Bhushan, learned Senior Counsel assisted by Shri N.N. Mishra appears for the appellants and Shri H.P. Dwivedi and Shri Amit Saxena, learned counsel appears on behalf of respondents no. 2 to 6 in Special Appeal Defective no. 321 of 2021.

Shri Ashish Mishra, learned Counsel appears on behalf of the respondent no. 1-Registrar General, High Court in all the appeals.

1. These batch of Special Appeals under Chapter VIII Rule 5 of the High Court Rules, 1952 take exception to order dated 17.03.2021 passed by learned Single Judge in batch of Writ petitions with leading writ petition Writ A No. 29665 of 2015 (Vineet Kumar and 4 others V. The Registrar General, High Court of Judicature At Allahabad). With the consent of learned counsel for the contesting parties the matter is finally heard.

2. The relevant facts briefly are that under The Uttar Pradesh Civil Court Staff Centralised Recruitment Scheme 2014 applications were invited for appointment of Category "C' clerical cadre and the Stenographer; vide: Advertisement No. 1 /Sub.Court /Category "C' /Clerical Cadre/2014 and Advertisement No. 1 /Sub.Court /Stenographer /2014.

3. The relevant Rules which governs recruitment are The Uttar Pradesh District Court Service Rules, 2013. Chapter II whereof laid down the procedure for Recruitment. That Rule 9 provides for the manner of appointment through Direct Recruitment, stipulating therein:

"9. Direct Recruitment:-

(1) The appointing Authority shall intimate the Selecting Authority in the month of July every year the number of vacancies existing and likely to occur during the year of recruitment for direct recruitment in different category of posts. The Selecting Authority shall invite applications by giving vide publicity indicating the total number of vacancies notified for recruitment and the number of vacancies reserved for different reserved categories.

(2) The Selecting Authority may short-list the candidates to be called for the written examination equal to twenty five times the number of vacancies notified on the basis of the marks obtained in the qualifying examination given in Schedule 'B'or by a preliminary objective test.

(3) Notwithstanding anything to the contrary in these Rules, the Appointing Authority and the Selecting Authority with regard to conduct of examination and selection shall act in accordance with general or special orders issued by Hon'ble Chief Justice of the High Court, from time to time.

That Rule 10 of the Rules of 2013 inter alia provided for the eligibility of candidate for the interviews, stipulating therein :

10. Eligibility of candidates for the interview-

(1) For the purpose of selection of the candidates for the interview, the appointing authority shall prepare a list of names of candidates on the basis of percentage of the total marks secured in the written examination in the order of merit and if two or more candidates have secured equal percentage of total marks in the written examination, the order of merit in respect of such candidates shall be fixed on the basis of their age, the person or persons older in age being placed higher in order of merit. From among the candidates whose names are included in such list, as far as may be, such number of candidates as is equal to five times the number of vacancies notified, selected in the order of merit, shall be eligible for the interview:

(2) For the purpose of this rule,-

''Written examination' means the competitive examination held by the ***Selecting Authority as per syllabus given in Schedule 'C'.***

4. That Clause 6 of the Advertisement laid down the procedure for selection :

"6. **SELECTION PROCEDURE**: The Selection procedure shall include one common offline examination (Written examination on O.M.R. sheet for all the posts. Selection procedure shall consists of following stages:

(1) Off-line examination (objective type written examination on O.M.R. Sheet) for Group "C 'posts. The selection process for the post of junior

Assistant and Paid Apprentices shall be same.

(2) **Computer Type Test**: Hindi/English Computer type test for Group "C' Posts shall be held on a later date after declaration of result of the Offline examination (Written Examination on O.M.R. sheet). Five candidates in order of merit against each post category-wise shall be shortlisted for appearing in Computer Type test

(3) Interview shall not be part of the selection process

(4) A combined merit list for Class-III posts (except the post of Driver and Stenographer) shall be prepared on the basis of marks obtained by the candidates in Offline examination and Hindi/English type test on computer.

Notwithstanding anything to the contrary in these rules the Appointing Authority and the Selecting Authority with regard to conduct of examination and selection shall act in accordance with general or special orders issued by Hon'ble Chief Justice of High Court from time to time.

Syllabus for off-line examination (objective type on OMR sheet) for the post of Class ''C' Clerical Cadre

Syllabus for off-line examination shall be as follows:

Test - 1 Offline Examination (Duration 90 Minutes) Examination will carry 100 questions	SUBJECTS		Marks
	(A)	Hindi	100 Marks
	(B)	English	
	(C)	General Studies	
	(D)	Mathematics	
Test-2 Hindi/English Computer Type Test 25/30 words per minute for Hindi/English typewriting on computer			25 Marks (For Hindi Typing 25 Marks for English Typing)

Note: There shall be no negative marking on wrong answers in Objective type test

Date, Time, Venue and shifts of Examination:- Date, time and venue of examination shall be intimated to the candidates through E-Admit Cards which can be downloaded from the website www.allahabadhighcourt.in.

The Selection Committee has discretion to fix minimum qualifying marks in any or all parts of papers for off-line examination (Test 1) Hindi/English Computer Type test (Test 2)."

5. That Clause 7 of said advertisement made provision for preparation of Select list stipulating therein :

"7. **Lists of Selected Candidates**- (1) A combined merit list for Class III posts shall be prepared on the basis of marks obtained by the candidates in off-line examination (Test 1), Hindi/English Computer Type test (Test 2). The Selecting Authority on the basis of the aggregate of the percentage of the total marks secured in the off-line examination, the marks secured in the Hindi/English Computer Type test (Test 2) and taking into consideration, the order in force relating to reservation of posts for Scheduled Castes, Scheduled Tribes, Other Backward Classes and other categories prepare in the order of merit, a list of candidate eligible for appointment to the category of the posts and if the aggregate of the percentage of total marks secured in the written examination and of the marks secured in the Hindi/English Computer typing skill test, of two or more candidates is equal, the order of the merit in respect of such candidates shall be fixed on the basis of their age, the person or persons older in age being placed higher in the order of the merit. The number of the names of the candidates to be included in such list shall be equal to the number of the vacancies notified for the recruitment. If the selected candidates could not be offered the judgeships applied for in order of priority in which they wish to be posted, he/she can be recommended against any other post advertised in any District. After the completion of the selection process, the list of the selected candidates shall be forwarded to the District Judgeships against the available vacancies. The District Judge will be at liberty to post the candidates on any of the post mentioned at Serial No. 1 and 2 of the above mentioned table as per the availability of the posts and requirement in the judgeship.

(2) The Selecting Authority shall in accordance with the provisions of sub-rule(1) also prepare an additional list of names of candidates not included in the list prepared under sub-rule (1) in which the number of candidates to be included shall, as far as possible, be 10% of the number of vacancies notified.

(3) **Duration of operation of Lists**:- The list of the names of the candidates published by the Selecting Authority under Rule 12 in respect of any cadre shall cease to be operating on appointment of the last advertised vacancy or one year whichever is earlier."

6. Apparent it is from the relevant Rules and the stipulations contained in the Advertisement that for Clerical Cadre and Stenographers, two stages/three stages, respectively, were set in for drawing merit list, viz, offline examination and Hindi/English Computer Type Test. There was no negative marking on wrong answers in objective type test i.e. Stage I and that the aggregate of the percentage of the total marks secured in the off-line examination, the marks secured in Hindi/English Computer Type Test was the foundation for preparing merit list. It is also evident from the stipulation in the advertisement that the Selection Committee had the discretion to fix minimum qualifying marks in any or all

parts of papers for off-line examination (Test 1) and Hindi/English Computer Type Test (Test 2).

7. That against 2341 posts approximately Twelve Thousand Candidates applied for recruitment. These figures, pertinent it is to mention, were adverted during course of hearing.

8. That after first stage test, i.e. off line examination, certain participants like the respondent petitioners approached this High Court, raising grievance against the nature of test-2. Precise contention raised by them was use of "Mangal' font. The specific relief sought by them in the petition was that they may be permitted to appear in Hindi Type Test Examination with "Kruti Dev II font" in place of "Mangal font" and to consider their candidature for appointment by judging them by conducting typing test on Kruti Dev II font.

9. That by an interim order dated 21.05.2015, it was directed that "the selection may go on but the result in respect of five petitioners herein shall not be declared till next date of listing. The petitioners are at liberty to appear in the examination without prejudice to their right." Apparently the writ court at the interim stage did not accede to the prayer made by the petitioners to permit them to attempt the Test with "Kruti Dev II font'.

10. That during pendency of writ petition final select list was published which led the petitioners amend the petition whereby they sought quashment of entire select list, which led the writ court on 6.5.2019, taking note of the fact that the Selectees who may be effected with the order were not made parties, to be apprised of the pendency of the petition through respective District Judge, who is so choose to contest the petition.

11. In these factual background the batch of writ petition came to be heard and decided by the impugned order.

12. Learned Single Judge recorded following facts which were borne out from records and are not disputed before us :

"7. So far as the conduct of first stage examination both in Stenographer and Clerical Cadre is concerned, there are no issues.

8. It is admitted on record that the impugned select list has been drawn on the basis of merit list drawn by adding the marks secured by a candidate in all three stages for Stenographers and the two stages for the Clerical Cadre.

9. From the records it is apparent that no marking/evaluation criteria was specified in the advertisement, nor any such stipulation exists in the rules. No minimum marks were fixed for the type test or the shorthand exam. It is also admitted that prior to conduct of aforesaid examination, the High Court or the Recruitment and Appointment Cell of the High Court had not finalized any marking or evaluation criteria for appointment(s) in question. The marking and evaluation process, therefore, was evolved exclusively by the outsourced agency i.e. TCS. The criteria for evaluation and marking, as determined by TCS has been placed on record by the respondents in their second supplementary counter affidavit as Annexure SCA-1. This document is a communication sent by TCS

in response to a letter sent by the Recruitment Cell of the High Court, which is extracted hereinafter:-

"2. Exam Process for Stenographer Grade III - Category C (Response to para no. 8)

There was total three stages in examination:

Stage 1: Offline Examination (Maximum Marks: 100)

Stage 2: Computer Typing Test (English and Hindi) (Maximum Marks: 50)

Stage 3: Hindi/English Shorthand Test (Maximum Marks: 50)

Agency has conducted the STAGE 1 offline exam for all the candidates appearing for Stenographer Grade III-Category C. Candidates were evaluated as per evaluation criteria attached as annexure 1. Five candidates in order of Merit against each post category-wise were shortlisted for appearing in stage 2 Computer Typing Test and stage 3 Hindi/English Shorthand Test.

Agency has conducted the STAGE 2 Computer Typing Test (English and Hindi) for candidates selected in stage 1 examination. Hindi/English Typing test was conducted and score was evaluated as per evaluation criteria attached as annexure 2. As no marking/evaluation criteria was mentioned in advertisement neither shared by High Court, so Marking for Hindi/English Typing test was done with provision for negative marking. Cut off marks for this test was not defined in the Advertisement hence score was calculated which may be positive, zero or negative.

Agency has conducted the STAGE 3 Hindi/English Shorthand Test for candidates selected in stage 1 examination. Hindi/English Shorthand Test was conducted and score was evaluated as per evaluation criteria attached as annexure 3. As no marking/evaluation criteria was mentioned in advertisement neither shared by High Court, so Marking for Hindi/English Shorthand test was done with provision for negative marking. Cut off marks for this test was not defined in the Advertisement hence score was calculated which may be positive, zero or negative.

Final score considered for Merit List was prepared after consolidation of marks of all appeared candidate in Stage 1, Stage 2 and Stage 3 Examination hence combined score calculated may be positive, zero or negative. Final Merit List was prepared based on criteria mentioned in advertisement."

10. So far as the examination for the Clerical Cadre is concerned, the communication specifies following process for recruitment:-

"Agency has conducted the STAGE 1 offline exam for all the candidates appearing for Clerical Cadre-Category C. Candidates were evaluated as per evaluation criteria attached as annexure 1. Five candidates in order of Merit against each post category-wise were shortlisted for appearing in stage 2 Computer Typing Test.

Agency has conducted the STAGE 2 Computer Typing Test (English and Hindi) for candidates selected in stage 1 examination. Hindi/English Typing test was conducted and score was evaluated as per evaluation criteria attached as annexure 2.

As no marking/evaluation criteria was mentioned in advertisement neither shared by High Court, so Marking for Hindi/English Typing test was done with provision for negative marking. Cut off marks for this test was not defined in the Advertisement hence score was calculated which may be positive, zero or negative.

Final score considered for Merit List was prepared after consolidation of marks of all appeared candidate in Stage 1 and Stage 2 Examination hence combined score calculated may be positive, zero or negative. Final Merit List was prepared based on criteria mentioned in advertisement."

13. The submissions put forth before learned Single Judge on behalf of the petitioners were that the Selection has been made without following any objective criteria for determining the inter se merit and even the candidates who secured "zero' or "negative' marks in the shorthand and typing test were selected. It was also contended that the persons who acquired eligibility qualifications after commencement of recruitment were also permitted to participate and that though 2220 candidates appeared in the type test, but 2369 candidates were shown to have qualified.

14. The respondents defended the recruitment contending inter alia that the selection was held as per the procedure laid down in the Rules of 2013 and the stipulations contained in the respective advertisement. It was contended that all the candidates were subjected to uniform process and same font has been used for adjudging the proficiency of all the candidates. As regard to numbers of candidates adverted by the petitioners, it was urged by the respondents that some of the candidates since applied for both Hindi and English stenographer as a result whereof the total number of candidates, which included 149 candidates who applied for both English and Hindi stenographers, was shown on the higher side. It was further contended that the recruitment which took place in 2015, in furtherance therewith appointments were made and the incumbents appointed are satisfactorily performing their duties. It was further contended that the persons who were ineligible on the last date of filing of application due to their eligibility qualifications being of a later date have already been removed.

15. Learned Single Judge while not disputing that there was no minimum marks fixed for passing the typing or short hand test, in other words, the marks obtained in Stage 2 since was to be averaged with the marks obtained in Stage 1, lost its significance as there was no cut off passing marks of Stage 2 examination. However, observing that the skill/proficiency of a candidate is judged by accounting for his positive attributes vis-a-vis negative attributes and if the later outweighs earlier, then the proficiency of a candidate is under cloud. And further observing that "failure to fix minimum marks has allowed entry into service to those who do not meet the minimum bench mark expected of a stenographer/clerk." Furthermore, comparing with the examinations held in subsequent years wherein minimum cut off marks were fixed, learned Single Judge faulted with the Stage-2 examination. While not disputing the preposition that "it is always open for the employer to specify the font for testing the typing skill of a candidate" and without setting aside the criteria fixed by the

employer of Type Testing the candidate through Mangal font, yet faulted with the procedure that the candidate did not get fair opportunity to practice on it and compete. With these reasoning learned Single Judge opined that "the ends of Justice would be met if the respondents are directed to conduct Stage II and III of the recruitment process afresh, as applicable, by subjecting all candidates who have qualified Stage I of the two recruitments and have participated in Stage II and III as applicable, to appear in it."

16. Learned Single Judge further directed that the criteria for holding of typing and stenography test would be such as is already approved by the Recruitment Committee in its subsequent minutes dated 02.04.2019 approved by the Chief Justice on 03.04.2019. In other words, the resolution of 02.04.2019 were directed to be made applicable retrospectively for the recruitment of 2014.

17. The correctness of these reasonings and the conclusion are being questioned vide present batch of Appeals at the instance of the Clerks as well as the Stenographers who were appointed and are working for over five years.

18 . It is urged that fixing of criteria for recruitment being the prerogative of the employer who having chosen not to fix the cut off passing marks for Stage 2 examination, it was beyond the competence of a court under Article 226 of the Constitution to have adjudged the selection of 2014 on the basis of criteria subsequently laid down in the year 2019.

19. It is further contended that since as per stipulation contained in Clause 6 of the Advertisement that the candidate has to be adjudged eligible for interview on the basis of combined merit list for Class III posts prepared on the basis of marks obtained by the candidate in offline examination i.e. Stage I Test and Hindi/English Type Test on computer i.e. State II Test, in absence of cut off marks were rightly not adjudged ineligible and learned Single Judge erred in assuming such candidate as ineligible on the basis of the criteria laid down in the year 2019. It is urged that since there was no complaint about the procedure adhered as such there was no systemic flaw in the recruitment and that after appointment, respective appointees having satisfactorily worked without any complaint cannot be subjected to re-examination with changed criteria. It is further contended that only 19 of the Selectees were found to have obtained no marks in Stage 2 examination and for that instead of weeding them out learned Single Judge faltered with the entire selection at the instance of few.

20. On these contention, the appellants seek indulgence.

21. Contesting Respondents on their turn besides supporting the impugned judgement raise an objection as to maintainability of the Appeal on the ground of non-joinder of necessary parties.

22. It is urged that with Writ A No. 29665 of 2015 being the lead case, 40 writ petitions were decided by the common order and irrespective of the fact that the challenge is to an order in Writ A No. 29665 of 2015 incumbent it is upon the Appellants to have impleaded the petitioners of respective petition as respondents. Instead, it is urged that, only the petitioners of Writ A No. 29665 of 2015 are impleaded as respondents; therefore, the petition is not maintainable.

23. It be noted that the challenge in the writ petition filed by five persons was the use of "Mangal font' in the second stage of the recruitment wherein none of the prospective candidates were made respondent. Further during pendency of the said writ petition which was filed in the year 2015 a final list was published whereon through amendment the entire select list was challenged; however, the persons in the select list were impleaded only in a representative capacity through present appellant who were impleaded as respondents No. 2 to 15. Subsequently multiple petition came to be filed and the writ court realising that the remaining selectees who were not impleaded parties were only a proper parties directed on 21.10.2019 to apprise all the selectees through respective District Judges as to pendency of lis. The Writ A 29665 of 2015 was all along treated as main case and the argument were heard therein by connecting other writ petitions subsequently filed. In a litigation as the present one wherein entire selection for appointment of 2341 clerk/stenographer is questioned and a lead petition is heard and decided, the petitioner(s) of such petitions are necessary party(ies) being representative in nature whereas the petitioners of connected petitions are only proper party (ies) which may entitle them to file a caveat; however, their non impleadment in the intra court appeal against the main order, in our considered opinion, will not lead to non maintainability of the Appeal.

24. In view whereof the preliminary objection as to maintainability of Appeal is negatived. The Appeal is held to be maintainable.

As to merit.

25. After considering the submissions of respective parties, the sole issue which crops up for consideration is that in the given facts wherein there is no dispute that there is no systemic flaw and the entire recruitment of Clerks/Stenographers was in accordance with the stipulation contained in the Rules of 2013 and the parameters stipulated in the advertisement, whether learned Single Judge has justified in causing indulgence with the selection on the basis of the criteria subsequently laid down and the fact that only fraction of incumbents, (i.e. 19 in numbers) were found to have received no marks in the second stage Test.

26 . By systemic flaw we mean the irregularities in the recruitment process having taken place on a systemic level i.e. where the procedure laid down by the Rules or otherwise, such as the Advertisement, is violated resulting in vitiation of entire process, because of the percolation of such flaw down the process. This principle is recently adverted at to adjudge the challenge to the recruitment process as the present one in ***Civil Appeal Nos. 639-640 of 2021 (arising out of Special Leave Petition (C) Nos. 5785-5786 of 2020: Sachin Kumar & Ors. Vs Delhi Subordinate Service Selection Board (DSSSB) & Ors***. decided on 03.03.2021; wherein their Lordships observed :

" 33. In deciding this batch of SLPs, we need not re-invent the wheel. Over the last five decades, several decisions of this Court have dealt with the fundamental issue of when the process of an examination can stand vitiated. Essentially, the answer to the issue turns upon whether the irregularities in the process have taken place at a systemic level

so as to vitiate the sanctity of the process. There are cases which border upon or cross-over into the domain of fraud as a result of which the credibility and legitimacy of the process is denuded. This constitutes one end of the spectrum where the authority conducting the examination or convening the selection process comes to the conclusion that as a result of supervening event or circumstances, the process has lost its legitimacy, leaving no option but to cancel it in its entirety. Where a decision along those lines is taken, it does not turn upon a fact-finding exercise into individual acts involving the use of mal-practices or unfair means. Where a recourse to unfair means has taken place on a systemic scale, it may be difficult to segregate the tainted from the untainted participants in the process. Large scale irregularities including those which have the effect of denying equal access to similarly circumstanced candidates are suggestive of a malaise which has eroded the credibility of the process. At the other end of the spectrum are cases where some of the participants in the process who appear at the examination or selection test are guilty of irregularities. In such a case, it may well be possible to segregate persons who are guilty of wrong-doing from others who have adhered to the rules and to exclude the former from the process. In such a case, those who are innocent of wrong-doing should not pay a price for those who are actually found to be involved in irregularities. By segregating the wrong-doers, the selection of the untainted candidates can be allowed to pass muster by taking the selection process to its logical conclusion. This is not a mere matter of administrative procedure but as a principle of service jurisprudence it finds embodiment in the constitutional duty by which public bodies have to act fairly and reasonably. A fair and reasonable process of selection to posts subject to the norm of equality of opportunity under Article 16(1) is a constitutional requirement. A fair and reasonable process is a fundamental requirement of Article 14 as well. Where the recruitment to public employment stands vitiated as a consequence of systemic fraud or irregularities, the entire process becomes illegitimate. On the other hand, where it is possible to segregate persons who have indulged in mal-practices and to penalise them for their wrong- doing, it would be unfair to impose the burden of their wrong-doing on those who are free from taint. To treat the innocent and the wrong-doers equally by subjecting the former to the consequence of the cancellation of the entire process would be contrary to Article 14 because unequals would then be treated equally. The requirement that a public body must act in fair and reasonable terms animates the entire process of selection. The decisions of the recruiting body are hence subject to judicial control subject to the settled principle that the recruiting authority must have a measure of discretion to take decisions in accordance with law which are best suited to preserve the sanctity of the process. Now it is in the backdrop of these principles, that it becomes appropriate to advert to the precedents of this Court which hold the field."

Thus unless an infirmities of all pervasive nature is established, the recruitment process cannot be set aside with a direction to hold fresh selection.

27. In the case at hand the Rules applicable are the Rules of 2013 whereunder Rule 9 mandates that the Appointing Authority shall intimate the Selecting Authority in the month of July

every year the number of vacancies existing and likely to occur during the year of recruitment for direct recruitment in different category of posts. The Selecting Authority shall invite applications by giving vide publicity indicating the total number of vacancies notified for recruitment and the number of vacancies reserved for different reserved categories. Sub-Rule (3) of Rule 9 of the Rules of 2013 which starts with non obstante clause stipulates that "Notwithstanding anything to the contrary in these Rules, the Appointing Authority and the Selecting Authority with regard to conduct of examination and selection shall act in accordance with general or special orders issued by Hon'ble Chief Justice of the High Court, from time to time." Further, in the advertisement which was issued in the year 2014 the Selection Procedure was carved vide Clause 6 of the advertisement stating therein that the Selection Procedure shall include one common offline examination (written examination on OMR sheet) for all posts and the selection procedure consisted of following stages:

"(1) Off-line examination (objective type written examination on O.M.R. Sheet) for Group "C' posts. The selection process for the post of junior Assistant and Paid Apprentices shall be same.

(2) ***Computer Type Test****: Hindi/English Computer type test for Group "C' Posts shall be held on a later date after declaration of result of the Offline examination (Written Examination on O.M.R. sheet). Five candidates in order of merit against each post category-wise shall be shortlisted for appearing in Computer Type test*

(3) Interview shall not be part of the selection process

(4) A combined merit list for Class-III posts (except the post of Driver and Stenographer) shall be prepared on the basis of marks obtained by the candidates in Offline examination and Hindi/English type test on computer.

Notwithstanding anything to the contrary in these rules the Appointing Authority and the Selecting Authority with regard to conduct of examination and selection shall act in accordance with general or special orders issued by Hon'ble Chief Justice of High Court from time to time."

28. It further stipulated that notwithstanding anything contrary in the Rules the Appointing Authority and the Selecting Authority with regard to conduct of examination and selection shall act in accordance with general or special orders issued by the Chief Justice of the High Court from time to time. And that the Selection Committee has discretion to fix minimum qualifying marks in any or all parts of papers for off-line examination (Test 1) Hindi/English computer Type Test (Test-2).

29. Evidently, and its been duly noted by learned Single Judge that no such discretion as vested in the Selection Committee or any direction by the Chief Justice was issued in respect of Selection in question fixing minimum qualifying marks in any or all parts of papers for Test 1 and Test 2.

30. Evidently no irregularity or infirmity of pervasive nature were brought

on record as would establish that the entire process of recruitment got vitiated. In ***Union of India and Others Vs Rajesh P.U., Puthuvalnikathu and Another (2003) 7 SCC 285,*** it is held:

"6. ....There seems to be no grievance of any malpractices as such in the process of written examination-either by the candidates or by those who actually conducted them." "...In the light of the above and in the absence of any specific or categorical finding supported by any concrete and relevant material that widespread infirmities of all pervasive nature, which could be really said to have undermined the very process itself in its entirety or as a whole and it was impossible to weed out the beneficiaries of one or the other of irregularities, or illegalities, if any, there was hardly any justification in law to deny appointment to the other selected candidates whose selections were not found to be, in any manner, vitiated for any one or the other reasons. Applying an unilaterally rigid and arbitrary standard to cancel the entirety of the selections despite the firm and positive information that except 31 of such selected candidates, no infirmity could be found with reference to others, is nothing but total disregard of relevancies and allowing to be carried away by irrelevancies, giving a complete go bye to contextual considerations throwing to the winds the principle of proportionality in going farther than what was strictly and reasonably to meet the situation. In short, the Competent Authority completely misdirected itself in taking such an extreme and unreasonable decision of cancelling the entire selections, wholly unwarranted and unnecessary even on the factual situation found too, and totally in excess of the nature and gravity of what was at stake, thereby virtually rendering such decision to be irrational."

31. In the present case as borne out from the facts unfurled that, only grievance by few participant was against the use of Mangal font who claimed that the Stage 2 test be conducted on Kruti Dev II font. The said claim though has rightly not been acceded to by learned Single Judge observing that it is the prerogative of the employer. Yet an interference is caused observing that "it ought to have been done in a manner such that all candidates get a fair opportunity to practice on it and compete." Evidently learned Single Judge glossed over the fact that the petitioners were already on notice as to the nature of font and that the petitioners were only fraction out of more than two thousand candidates who qualified the Stage 1 examination but did not complain of as to nature of font applied for adjudging their proficiency.

32. Furthermore, even the approach of learned Single Judge to adjudge the efficiency of respective candidates by incursing the resolution of 2019, which laid down the criteria of minimum marks, for the recruitment of 2014, cannot be given the stamp of approval. The record reveals that all appointments were made in the year 2015. There is no complaint from any of the District as to performance of any of the selectees. The incumbents who were otherwise ineligible are already removed from service. Therefore, adjudging the selectees of 2014-15 on the basis of criteria laid down in the year 2019, is totally irrelevant and impermissible.

33. As regard to obtainment of no marks by some candidates (which as stated during the course of hearing were 19) in Stage 2 examination. In our considered opinion since there is no cut off marks, an incumbent therefore, cannot be adjudged as

ineligible as the merit list is drawn on the basis of the aggregate of the percentage of the total marks secured in the off-line examination, the marks secured in the Hindi/English Computer Type Test (Test 2).

34. In ***Shri Durgacharan Misra v. State of Orissa and others, AIR 1987 SC 2267,*** it is held :

"9. This is the mandate of Rule 18. The Commission shall add the two marks together, no matter what those marks at the viva-voce test. On the basis of the aggregate marks in both the tests, the names of candidates will have to be arranged in order of merit. The list so prepared shall be forwarded to the Government. The Commission has no power to exclude the name of any candidate from the select list merely because he has secured less marks at the viva-voce test.

10. Similar pattern of selection is generally found in all the rules of recruitment which prescribe written examination and also viva-voce test. There are two authorities of this Court in this aspect of the matter. In P.K. Ramchandra Iyer v. Union of India, [1984] 2 SCR 200 : (AIR 1984 SC 541) this Court considered the scope of recruitment rules governing the selection of candidates to various disciplines under the Indian Council of Agricultural Research. There the Agricultural Scientists Recruitment Board (ASRB) was required to select candidates by holding competitive examination and viva-voce test. ASRB prescribed a minimum qualifying marks which a candidate must obtain at the viva-voce test before his name could be included in the merit list. The question that fell for consideration was whether the ASRB was competent to prescribe such a minimum? Accepting the contention, that ASRB has no such power, this Court observed (at p. 244): (at p. 562 of AIR)

"Neither Rule 13 nor Rule 14 nor any other rule enables the ASRB to prescribe minimum qualifying marks to be obtained by the candidate at the viva-voce test. On the contrary, the language of Rule 14 clearly negatives any such power in the ASRB when it provides that after the written test if the candidate has obtained minimum marks, he is eligible for being called for viva-voce test and the final merit list would be drawn up according to the aggregate of marks obtained by the candidate in written test plus viva-voce examination. The additional qualification which ASRB prescribed to itself namely, that the candidate must have a further qualification of obtaining minimum marks in the viva-voce test does not find place in Rules 13 and 14, it amounts virtually to a modification of the Rules. By necessary inference, there was no such power in the ASRB to add to the required qualifications. If such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the rules is likely to cause irreparable and irreversible harm."

11. The closest to the fact of this case is the recent decision of this Court in Umesh Chandra Shukla etc. etc. v. Union of India, [1985 Supp. (2) SCR 367 : (AIR 1985 SC 1351). There the scope of Delhi Judicial Service Rules, 1970 came up for consideration. Rules 17 and 18 of the Delhi Judicial Service Rules, 1970 are similar to Rules 16 and 18 of Orissa Judicial Service

Rules, 1964. The Selection Committee constituted under these Rules consisted among others of Judges of the High Court of Delhi. The Selection Committee apparently thought that it has got power to exclude candidates securing less than 600 marks in the aggregate as not being suitable for appointment to the Judicial Service. Accordingly it excluded all such candidates from the select list. It was contended before this Court that the Selection Committee would be competent to prescribe a minimum standard to be crossed by candidates at the vive-voce test in order to be suitable for appointment to judicial posts. Repelling that contention this Court observed (at pp. 382-383 of SCR) : (at pp. 1358-1359 of AIR) :

"With regard to the second contention, namely, that the High Court had no power to eliminate the names of candidates who had secured less than 600 marks in the aggregate after the viva-voce test, reference has to be made to Rules 17 and 18 of the Rules which provide that the Selection Committee shall call for viva-voce test only such candidates who are qualified at the written test as provided in the Appendix and that the Selection Committee shall prepare the list of candidates in order of merit after the viva-voce test. There is no power reserved under Rule 18 of the Rules for the High Court to fix its own minimum marks in order to include candidates in the final list. It is stated in paragraph 7 of the counter affidavit filed in Writ Petition No. 4363 of 1985 that the Selection Committee has inherent power to select candidates who according to it are suitable for appointment by prescribing the minimum marks which a candidate should obtain in the aggregate in order to get into the Delhi Judicial Service. It is not necessary to consider in this case whether any other reason such as character, antecedents, physical fitness which may disqualify a candidate from being appointed to the Delhi Judicial Service may be taken into consideration by the Selection Committee while preparing the final list. But on going through the Rules, we are of the view that no fresh disqualification or bar may be created by the High Court or the Selection Committee merely on the basis of the marks obtained at the examination because clause (6) of the Appendix itself has laid down the minimum marks which a candidate should obtain in the written papers or in the aggregate in order to qualify himself to become a member of the Judicial service. The prescription of the minimum of 600 marks in the aggregate by the Selection Committee as an additional requirement which the candidate has to satisfy amounts to an amendment of what is prescribed by cl. (6) of the Appendix. The question whether a candidate included in the final list prepared and forwarded by the Selection Committee may be appointed or not is a matter to be considered by the appointing authority. In the instant case the decision that a candidate should have secured a minimum of 600 marks in the aggregate in order to be included in the final select list is not even taken by the High Court but by the Selection Committee. Moreover, recruitment of persons other than District Judges to the Judicial Service is required to be made under Article 234 of the Constitution in accordance with the Rules made by the Governor as provided therein, in consultation with the High Court. Art. 235 which vests in the High Court the control over the District Courts and Courts subordinate thereto, cannot include the power of making rules with regard to recruitment of persons other than District Judges to the judicial service as it

has been expressly dealt with in Article 234 of the Constitution. We are of the view that the Selection Committee has no power to prescribe the minimum marks which a candidate should obtain in the aggregate different from the minimum already prescribed by the Rules in its Appendix. We are, therefore, of the view that the exclusion of the names of certain candidates, who had not secured 600 marks in the aggregate including marks obtained at the viva-voce test from the list prepared under rule 18 of the Rules is not legal."

12. In the light of these decisions the conclusion is inevitable that the Commission in the instant case also has no power to prescribe the minimum standard at viva-voce test for determining the suitability of candidates for appointment as Munsifs.

13. ....

14. ....

15. But the crux of the matter is whether the Judge present at the viva-voce test has the power to add anything to the Rules of recruitment. He may advice the Commission as to the special qualities required for judicial appointments. His advice may be in regard to the range of subjects in respect of which the viva-voce shall be conducted. It may also cover the type and standard of questions to be put to candidates; or the acceptance of the answers given thereof. But his advice cannot run counter to the statutory Rules."

35. For these reasons, we do not approve the decision taken by learned Single Judge directing to conduct Stage II and III of the recruitment process afresh.

36. Consequently the impugned order dated 17.03.2021 passed in Writ A No. 29665 of 2015 is set aside. The writ petitions filed by the petitioners are dismissed.

37 . The Appeals are **allowed** to the extent above. No Costs.

38. All interlocutory applications stand disposed of.

(2021)05ILR A119
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Special Appeal Defective No. 494 of 2020

Shiv Prasad Duvey & Ors. ....Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Satyaveer Singh

Counsel for the Respondents:
C.S.C, Sri A.K.S. Parihar.

(A) Service Law - In case of clear and categorical instructions that in an erroneous entry in the OMR sheet in respect of certain fields of information sought, including Roll number, would render the answer sheet invalid. (Para 11-12)

Special Appeal Rejected. (E-8)

List of Cases cited:-

1. Ram Manohar Yadav Vs St. of U.P. & ors. Special Appeal No. 834 of 2013

2. Km. Richa Pandey Vs Examination Regulatory Authority & anr. Special Appeal Defective No. 117 of 2014

3. Archana Rastogi (km) Vs St. of U.P. & ors. 2012 (3) ADj 219 (DB)

4. Karnataka Public Service Commission Vs B M Vijay Shankar (1992) 2 SCC 206

5. Jai Karan Singh & 52 ors. Vs St.of U.P. & 4 or. Special Appeal No. 90 of 2018

6. Ramesh Chandra & 17 ors. Vs The St. of U.P. & 2 ors. Special Appeal No. 247 of 2020

(Delivered by Hon'ble Manoj Misra, J)

1. This intra court appeal arises from a judgment and order of a Single Judge, dated 7.12.2019, passed in Writ-A No.19486 of 2019 by which the writ petition filed by the appellants along with 36 others for a direction upon the U.P. Secondary Education Service Selection Board, Prayagraj (for short the Board) to declare their result of written examination held, for the post of Trained Graduate Teacher, has been dismissed.

2. In the office report dated 04.02.2020, the appeal is reported to be beyond time by 29 days. However, it appears, there were other defects also, which were removed later.

3. As in the meantime Covid-19 pandemic had set in, we deem it appropriate to condone the delay. The delay condonation application No.1 of 2020 is thus allowed. The delay in filing the appeal is condoned. Office to assign regular number to the appeal.

4. The facts giving rise to this appeal, in a nutshell, are that the writ petitioners (i.e. who filed Writ A No.19486 of 2019), out of which four are before us as appellants, had not correctly darkened/ filled the bubbles/ circles of the OMR sheets, either in respect of their roll number or booklet series number or both, even though it was mandated by the instructions provided therein. Consequently, their OMR sheets were not evaluated. The appellants 2 to 4 before us are those who had filled their roll number correctly in numerals, in the rectangular box provided in the OMR sheet, but had not correctly darkened/ filled the bubbles/ circles below to confirm the roll number filled in the rectangular box. Whereas appellant no.1, in addition to the above-noted mistake committed by the appellants 2 to 4, had also committed a mistake in respect of filling the Booklet series number. As a consequence whereof, their answers in the OMR sheets were not evaluated. The learned Single Judge dismissed the writ petition by observing that the controversy in issue is squarely covered by a Division Bench decision of this Court in Special Appeal No.834 of 2013 and Special Appeal Defective No. 117 of 2014.

5. We have heard the learned counsel for the appellants; the learned standing counsel for the respondent no.1; and Sri A.K.S. Parihar for the respondent no.2 (the Board).

6. Before we proceed to notice and evaluate the submissions made before us, it would be appropriate to examine as to what was held in the two decisions relied by the learned Single Judge in the impugned judgment. In **Special Appeal No.834 of 2013 (Ram Manohar Yadav v. State of U.P. & others, decided on 30.05.2013),** the appellant who had applied for selection on the post of a teacher had not filled the online application form correctly. He

applied for rectification of the mistake which was not accepted. Thereafter, he filed a writ petition which was dismissed. Aggrieved therewith, he filed Special Appeal before a Division Bench of this Court. While dismissing the appeal, the Division Bench observed: "if prospective teacher can not even correctly fill up the simple on line application form for his employment, it is obvious what he is going to teach, if appointed. There are certain decisions cited on this issue. But none of them deal with this aspect whether under the discretionary jurisdiction of the Court under Article 226 of the Constitution of India such incompetent persons should be allowed to play with the future of the next generation."

7. In **Special Appeal Defective No.117 of 2014 (Km. Richa Pandey v. Examination Regulatory Authority and another, decided on 18.02.2014),** the petitioner had not filled the column of language in which she had attempted answers in the OMR answer sheet. The learned Single Judge found that in absence of mention of language in which the answers were attempted, OMR sheet would not be acceptable for evaluation. The Division Bench, on appeal, called for the records and found that there were clear instructions that if requisite columns are not filled correctly, the answers will not be evaluated. Thus, while upholding the decision of the learned Single Judge, the Division Bench observed:

"The OMR sheets are provided to the candidates to speed up evaluation through help of computer. In case we accept the argument of learned counsel for the petitioner that the language in which the petitioner had written essay could be checked up by the examiner before feeding answer book into computer, the entire process of expediting the results will be lost. Where OMR sheets are to be examined with the aid of the computer, it is not advisable and practical to direct that each OMR sheet should be checked by the examiners and the columns, which have not been filled up may be filled up by the examiner himself with the aid of the language used by the candidates for writing essay. We are informed by Standing Counsel that about seven lacs candidates had appeared in the test.

With such large number of candidates appearing in TET Examination 2013 it would not have been possible nor it was feasible for examiners to look into the answer sheets individually before feeding them into computer for correcting any mistakes.

We agree with the reasoning given by the learned Single Judge that where the applicant is not capable of correctly filling up the form, she is not entitled to any discretionary relief from the Court."

8. The learned counsel for the appellants has contended that the facts of the two cases noticed above were different inasmuch as here the appellants have correctly mentioned their roll numbers in the numeral form within the column provided in the OMR sheet though the bubbles/ circles of the OMR sheet were not correctly darkened/ filled, which was just a human error and for which the appellants are not to be penalised. He placed reliance on a Division Bench decision of this Court in **Archana Rastogi (Km) v. State of U.P. and others, 2012 (3) ADJ 219 (DB)** in

which though the applicant had incorrectly filled up marks obtained in the High School Examination but had enclosed the marks-sheet with the application, therefore, upon finding that the marks disclosed were less than what she had produced certificate of, applying the principle of human error, in equity, the Court allowed correction. The learned counsel for the appellant submits that the same principle would apply here and, therefore, the appellants were entitled to the relief sought in their petition.

9. ***Per contra***, Sri Parihar, the learned counsel for the respondents, submitted that there were clear instructions that if any of the fields, including relating to roll number, is incorrectly filled then the OMR sheet would not be evaluated. He submits that OMR sheets have been universally adopted by examining bodies that conduct public examinations at a large-scale with a view to expedite the process of evaluation. Data, including answers rendered by darkening the circles or bubbles appearing on an OMR sheet, is scanned by scanners and the scanned data is evaluated with the aid of software. In case, there is a mistake or mismatch of the data furnished, the software rejects the OMR sheet. Therefore, a candidate has to take full and complete care not only in reading the instructions but also in following them because it is not feasible for an examining body, in an examination of such magnitude, to manually evaluate each answer sheet. He submitted that where mistakes occur in filling of OMR sheets, the mistakes are not condonable. The view of this Court as well as the Apex Court has been consistent in this regard. In support of his submission, in addition to the decisions relied upon by the learned Single Judge in the impugned judgment, Sri Parihar has cited the following decisions: **(a) (1992) 2 SCC 206 : Karnataka Public Service Commission v. B M Vijay Shankar; (b) Jai Karan Singh and 52 others v. State of UP and 4 others: Special Appeal No.90 of 2018, decided on 25.4.2018; (c) Ramesh Chandra & 17 others v. The State of UP & 2 others: Special Appeal No.247 of 2020, decided on 09.06.2020.**

10. We have given our thoughtful consideration to the rival submissions. Upon perusal of the record, we find that in so far as the appellants 2, 3 and 4 are concerned, on their part, there appears a solitary mistake, that is with regard to erroneous darkening/ filling of the circles/ bubbles, relating to their Roll number, in the OMR sheet. In respect of appellant no.1, in addition to above, there is erroneous filling of booklet series number as well. The argument on behalf of the appellants is that this a pure human error and as there existed a roll number column in the OMR sheet to be filled in numerals, and the numerals were written correctly, therefore, if there is a manual check of their Roll numbers, their result can easily be declared.

11. No doubt, it does appear to be a hard case, at least for the appellants 2, 3 and 4. But the issue here is whether the writ court should interfere in such matters, particularly when instructions are clear and categorical that an erroneous entry in the OMR sheet in respect of certain fields of information sought, including Roll number, would render the answer sheet invalid. The said issue is no longer res integra. In Jai Karan Singh's case (supra), a Division Bench of this court, dealing with a similar issue, observed:

"The writ petitioners had admittedly given incorrect information in the

OMR Answer sheet relating to either the Registration Number, the Roll Number or Question Booklet Series and the Language attempted and that is why their results have not been declared. The manual check can be conducted but the larger issue before the Court is whether such a direction should be given at all. In our opinion, it is for the examining body to work out a method for the recruitment process and the manner in which Answer Sheets is evaluated and once clear instructions have been given to the candidates that incorrect information relating to Registration Number, Roll Number, Question Booklet Series and Language attempted would lead to non-declaration of the result, the examining body should not be directed to conduct a manual check..... This would take substantial time and ultimately result in causing delay in the declaration of the result. It is this delay that was sought to be eliminated by requiring the candidates to give reasons in the OMR Answer Sheet so that they could be scanned by electronic means.

.....The error committed by the candidates cannot be said to be minor in nature. It is the Registration Number, Roll Number that determines identity of the candidates. The candidates who appeared in the examination were mature students and were to be appointed as Assistant Teachers in institution. They should have read the instructions that was issued time and again and should have correctly filled the entries relating to Roll Number, Registration Number, Question Booklet Series and Language attempted. The entries were, however, inaccurately filled as a result of which the scanner has not been able to process the result." (Emphasis Supplied)

Similar view has been taken by another Division Bench of this Court in **Ramesh Chandra's case (supra)** by observing: "if this Court permits the appellants and persons alike to have manual corrections in the OMR sheet, then that will frustrate the entire purpose of using technology for expeditious completion of the process of selection."

12. The submission of the learned counsel for the appellants that Roll Number was written correctly in numerals therefore there was no justification to reject the answer sheet only because the circles/ bubbles were not filled correctly does not appeal to us. Because, it is from the colouring or darkening of circles/ bubbles in the OMR sheets that the scanner is able to process the information. The mention of Roll Number in numerals might be to keep a double-check on foul play. However, whatever the purpose might be, we need not speculate on that. The fact remains that once the instructions were clear and were to apply universally to all candidates, if the error as per the instructions is fatal, a hands-off approach by the Writ Court is justified, hence we find no good reason to interfere in the matter. Consequently, the appeal is **dismissed.**

(2021)05ILR A123
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2021

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ -A No. 6939 of 2020

Prashant Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Uma Dutt Shukla, Sri B.D. Pandey, Sri Ratnakar Upadhyay, Sri Shivendu Ojha, Sri Radha Kant Ojha (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri M.N. Singh, Sri Nisheeth Yadav

A. Service law – Candidature – Physically Handicapped Certificate – Requirement to submit before cutoff date – Non-compliance – Effect – Certificate could not be submitted at the time of written examination, but at the time of interview – Held, for successful completion of any competitive examination, which are having candidates of different categories based upon many factors like physically handicapped, vertical or horizontal reservation etc, it is necessarily required to submit all relevant documents well within the cutoff date prescribed by the Commission/Selection Body – In case of failure of the same, there is no illegality in rejecting their candidature or transferring them into general category. (Para 46)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Dheerender Singh Paliwal Vs UPSC; (2017) 11 SCC 276

2. Writ-A No. 40159 of 2016; Smt. Rajni Shukla Vs U.O.I. & 3 ors. decided by Allahabad High Court on 8.3.2017

3. Ram Kumar Gijoriya Vs Delhi Subordinate Services Selection Board & anr.; (2016) 4 SCC 754

4. Writ-A No. 5383 of 2020; Prashant Kumar Dwivedi & anr. Vs St. of U.P. & 2 ors. decided by Allahabad High Court on 28.8.2020

5. Writ-A No.7401 of 2015; Rajendra Patel Vs St. of U.P. & anr. decided by Allahabad High Court on 14.8.2015

6. Special Appeal No. 762 of 2016; Arvind Kumar Yadav Vs U.P. Recruitment & Promotion Board & 2 ors. decided by Allahabad High Court on 5.12.2016

7. Special Appeal Defective No. 136 of 2017; Pravesh Kumar Vs St. of U.P. & 2 ors., , decided by Allahabad High Court on 1.3.2017

8. Writ Petition No. 748 (S/B) of 2014; Shubham Gupta Vs Indian Overseas Bank Office, Chennai & ors. , decided on 8.7.2016

9. Gaurav Sharma Vs St. of U.P. & anr.; 2017 (5) ADJ 494 (FB)

10. Civil Appeal No. 6669 of 2019; St. of T.N. & ors.s Vs G. Hemalatha & anr. decided by Supreme Court on 28.8.2019

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Radha Kant Ojha, learned Senior Advocate assisted by Sri B.D. Pandey, learned counsel for the petitioner, learned standing counsel for the respondent no.1 and Sri Nisheeth Yadav, learned counsel for the respondent no.2.

2. Sri Radha Kant Ojha, learned Senior Advocate submitted that Uttar Pradesh Public Service Commission (*hereinafter referred to as "Commission*") has advertised the vacancies vide advertisement No. A-2/E-1/2018 dated 6.7.2018. Petitioner is physically handicapped candidate and in this regard, a certificate was issued to him from the office of Chief Medical Officer, Sultanpur on 10.9.2015, therefore, he had applied against the said advertisement under physically handicapped category. Accordingly, he deposited examination fee of Rs. 25/-, which was prescribed for physically handicapped candidate. He next submitted that he had appeared in preliminary examination, result of which declared on 30.3.2019 and he was found successful. He was issued marksheet of preliminary examination showing him under general/physically handicapped category. After being successful in preliminary examination, petitioner had

filled up main examination form mentioning his category as physically handicapped. Thereafter, admit card was issued to petitioner showing him as physically handicapped candidate. He was also declared successful in the main examination and appeared in interview. At that time, he was required by respondent no.2 to fill up certain forms and he again mentioned his category as physically handicapped candidate. He also submitted an old medical certificate dated 10.9.2015 for treating himself under the category of physically handicapped candidate.

3. Learned Senior Advocate appearing on behalf of the petitioner further submitted that when the final result was declared, petitioner was not shown successful as he was not treated under the category of physically handicapped candidate. He next submitted that after being inquired from the "Commission", he was orally informed that he has not submitted his physically handicapped certificate at the time of filling of main examination form, which is contrary to the condition mentioned in the advertisement. Therefore, his candidature cannot be treated under the category of physically handicapped candidate and he has not been declared successful. He also submitted that though he could not submit certificate at the time of main examination, but he has submitted the same at the time of interview. Therefore, his candidature should not be treated as general candidate, but it should have been treated as physically handicapped candidate and accordingly, result should also be declared on the basis of minimum cut off marks of physically handicapped candidate.

4. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matter ***of Dheerender Singh Paliwal Vs. UPSC reported in (2017) 11 SCC 276*** decided on 21.04.2016. Replying upon the paragraph nos. 4, 5, 14 & 15 of judgment, he submitted that if the petitioner is fully qualified though he could not submit his application form, his candidature should not be transferred into general category candidate, but it should be treated under the category of physically handicapped candidate.

5. Paragraph nos. 4, 5, 14 & 15 of the aforesaid judgments relied by learned Senior Advocate are quoted hereinbelow:-

"4. In the instructions and additional information to candidates for recruitment by selection at SI. No.3 under the head "Minimum educational qualifications" it was stipulated that all the applicants must fulfil the essential requirements for the post. It was further mentioned therein that the candidate should mention all the qualifications and experience in the relevant field over and above the minimum qualification and should attach attested/self-certified copies of the certificates in support thereof.

5. In Note III of the said paragraph it is specifically mentioned "in regard to educational qualifications, the marksheet in lieu of educational certificate will not be accepted by the Commission." In the same instructions in SI. No.7 the requirements of certificate to be attached, it is mentioned at Serial (ii) "Degree or diploma certificate or other certificates in support of their educational qualifications to be attached either by way of attested copies or self-certified copies". By way of Note III, it is mentioned that if no copies of above certificates are sent with the

application, it is liable to be rejected an no appeal against its rejection would be entertained.

14. Having considered the respective submissions and having noted the dictum of this Court as noted above, we are of the view that in the light of the prescription noted in the advertisement, the particulars furnished by the appellant in response to the said advertisement and the production of the degree certificate for having secured the Bsc degree with Zoology as the subject at a later point of time there was substantial compliance with the requirement to be fulfilled in the matter of the essential qualifications possessed by the appellant. Therefore, applying the principle set down by this Court, the respondent Commission ought to have considered the application and more so when the appellant was already in the services of the Forensic Science Laboratory as Senior Scientific Assistant and his essential qualifications were very much on record in the form of resume and therefore pursuant to the direction of the Tribunal when the respondent Commission interviewed the appellant and found him fit to be selected and appointed for the post of Senior Scientific Officer in all fairness should have appointed the appellant.

15. In the first place, it must be stated that it is not a case of the appellant not possessing the required essential qualification but was of only not enclosing the certificate in proof of the added qualification of Zoology as one of the subjects at Bsc level, from a recognized University. In the application when once the appellant, marked '1' against Column 9 and thereby confirmed that he possesses the essential qualification, namely, the postgraduate qualification as well as the degree level qualification, if at all there was any doubt about any of the qualification, the appellant should have been called upon to produce the required certificate in proof of such essential qualification. In fact in this context, when we refer to the interview proceedings of the appellant as well as two other candidates we find that the appellant produced the original Bsc/MSc degree in Zoology and also submitted the attested photocopy of Bsc Zoology degree. The outcome of the said interview was that the appellant should be cleared of his selection. Insofar as other two candidates, namely, Miss Babyto and Miss Imrana, are concerned, we find that the production of their caste certificate was not in the prescribed pro forma initially, nevertheless those candidates were allowed to produce the original caste certificate issued by the competent authority and after verifying the same by accepting the attested photocopies of such caste certificates, their cases were cleared. Therefore, when such a course was adopted by the respondent Commission in regard to those two candidates there is no reason why the candidature of the appellant alone was kept in suspension, though he also cleared interview process. Even assuming such clearance was not made awaiting the outcome of the order of the Tribunal, when the Tribunal upheld his selection and directed the respondent to issue necessary orders for appointment, in all fairness the respondent Commission should have issued the order of appointment. We are of the view that such an approach of the respondent Commission was unfair having regard to the very trivial issue, namely, a non-production of an added qualification as part of the essential qualification at the degree level which the appellant did possess and for mere asking, the appellant could have readily produced the same through his employer."

6. He next placed reliance upon the judgment of Division Bench of this Court in the matter of ***Smt. Rajni Shukla Vs. Union of India and 3 others*** passed in ***Writ-A No. 40159 of 2016*** decided on 8.3.2017. After relying upon the judgment of *Dheerender Singh Paliwal* (supra), in that case too, Court was of the same view that in case of non-submission of certificate, candidature cannot be rejected or transferred to any other category.

7. Relevant paragraph of the aforesaid judgment relied by learned Senior Advocate is being quoted hereinbelow:-

"The facts and circumstances of the case in hand are similar to that of Dheerender Singh Paliwal's case (supra). The petitioner was having required degree of post graduation on the relevant date and she had mentioned in her application form that she was possessing the required degree of post graduation. Petitioner should have been called upon to produce the required certificate in proof of her essential qualification, if there was any doubt about her qualification. It is not in dispute that no other candidate was higher in rank to the petitioner for being considered to be appointed on the post of Statistical Investigator, Grade-III. Considering the facts and circumstances of the case, denial of appointment to the petitioner for the post of Statistical Investigator, Grade-III, merely on the ground that she did not attach the required certificate of master degree alongwith application form, can not be justified in the eyes of law."

8. Further, he placed reliance upon the judgment of Apex Court in the matter of ***Ram Kumar Gijoriya vs. Delhi Subordinate Services Selection Board and Another*** reported in ***(2016) 4 SCC 754*** decided on 24.02.2016. He next submitted that this case is squarely covered with the judgment where OBC candidate could not submit certificate after last date mentioned in the advertisement and ultimately Supreme Court allowed the appeal accepting the certificate after that.

9. Relevant paragraph nos. 2 & 18 of the aforesaid judgment relied by the learned Senior Advocate are being quoted below:-

"2. The important question of law to be decided in these appeals is whether a candidate who appears in an examination under the OBC category and submits the certificate after the last date mentioned in the advertisement is eligible for selection to the post under the OBC category or not?

18. In our considered view, the decision rendered in Pushpa is in conformity with the position of law laid down by this Court, which have been referred to supra. The Division Bench of the High Court erred in reversing the judgment and order passed by the learned Single Judge, without noticing the binding precedent on the question laid down by the Constitution Benches of this Court in Indra Sawhney and Valsamma Paul wherein this Court after interpretation of Articles 14, 15, 16 and 39-A of the directive principles of State Policy held that the object of providing reservation to the Scs/STs and educationally and socially backward classes of the society is to remove inequality in public employment, as candidates belonging to these categories are unable to complete with the candidates belonging to the general category as a

result of facing centuries of oppression and deprivation of opportunity. The constitutional concept of reservation envisaged in the Preamble of the Constitution as well as Articles 14, 15, 15 and 39-A of the directive principles of State Policy is to achieve the concept of giving equal opportunity to all sections of the society. The Division Bench, thus, erred in reversing the judgment and order passed by the learned Single Judge. Hence, the impugned judgment and order passed by the Division Bench in Letters Patent Appeal No. 562 of 2011 is not only erroneous but also suffers from error in law as it has failed to follow the binding precedent of the judgments of this Court in Indra Sawhney and Valsamma Paul. Therefore, the impugned judgment and order passed by the Division Bench of the High Court is liable to be set aside and accordingly set aside. The judgment and order dated 24.11.2010 passed by the learned Single Judge in Ram Kumar Gijoriya v. Govt (NCT of Delhi) is hereby restored.

The appeals are allowed. No costs."

10. Lastly, he placed reliance upon the judgment of this Court in the matter of ***Prashant Kumar Dwivedi and Another vs. State of U.P. And 2 others*** passed in ***Writ-A No. 5383 of 2020*** decided on 28.8.2020. In that case, in the same examination, "Commission" itself has granted certain considerations to the candidates, who were required to submit experience certificate alongwith signature of Competent Authority. In that case, certificate was submitted without countersign of Competent Authority. "Commission" has given another chance to the candidates to submit their certificates alongwith countersign of Competent Authority. He next submitted that "Commission" has itself accepted this fact before the Court that decision has already been taken to this effect by its orders dated 27.7.2001, 7.6.2011 and 9.8.2019 to grant such relief and it was confined only to those students, who had uploaded the form of experience, but in the certificate of experience, signature of the Joint Director could not be obtained. He further submitted that under such acceptance of fact and also law laid down by the Courts, petitioner is also entitled to be declared successful under category of physically handicapped candidate.

11. Mr. Nisheeth Yadav, learned counsel for the respondent no.2 has vehemently opposed the submissions made by the learned counsel for the petitioner and submitted that in paragraph 7 of the advertisement, it was clearly mentioned that candidates are required to enclose self-attested copies of all the certificates alongwith the application forms of main examination in support of the claims made by them in their application forms of preliminary examination regarding eligibility and category/sub category, failing which their claims shall not be entertained.

12. Relevant paragraph no.7 of the advertisement is being quoted hereinbelow:-

"It is mandatory for the candidates to enclose self-attested copies of all the certificates along with the application forms of Main Examination in support of the claims made by them in their application forms of Preliminary Examination regarding eligibility and category sub category, failing which their clams shall not be entertained."

13. Learned counsel for the respondents further submitted that after completion of written examination, another notification dated 7.5.2019 was issued by the "Commission" and again applicants were informed to submit all certificates alongwith main examination form. Paragraph 3 of the said notification is being quoted hereinbelow:-

ष्आनलाइन भरे गये फार्म सेट ;आवेदन–पत्रद्ध को मुद्रित करके उसके साथ समस्त संलग्नकों ;प्रत्येक वर्ष की अंक तालिकाओं, उपाधियों तथा अन्य सभी दावों से सम्बन्धित प्रमाण–पत्रों की स्वाप्रमाणित प्रतियॉद्ध सहित एक लिफाफे में भरकर तथा उक्त लिफाफे पर मुद्रित पता पर्ची ; ।ककतमे ैसपचद्ध चस्पा कर दिनांक 29 डंले 2019 को 5:00 च्ड तक अथवा उसके पूर्व सचिव, उ0प्र0 लोक सेवा आयोग, ;परीक्षा अनुभाग–3द्ध, 10–कस्तूरबा गांधी मार्ग, प्रयागराज, पिन कोड–नं–211018 को पंजीकृत डाक द्वारा अथवा व्यक्तिगत रूप से आयोग के गेट संख्या–3 पर स्थिति डाक अनुभाग के काउन्टर ;पूछ–ताछ काउन्टरद्ध पर अवश्य उपलब्ध करा दें। उक्त अन्तिम तिथि के बाद प्राप्त होने वाले आवेदन–पत्र किसी भी दशा में स्वीकार नहीं किए जाएंगे।ष्

14. He next submitted that this fact is undisputed that alongwith main examination form, petitioner could not submit his certificate of physically handicapped candidate.

15. In support of his contention, he placed reliance upon the judgments of Apex Court as well as this Court. He first placed reliance upon the judgment of Full Bench of this Court in the case ***of Rajendra Patel Vs. State of U.P. And another*** passed in ***Writ-A No.7401 of 2015*** decided on 14.8.2015.

16. Relevant paragraph of the said judgment relied by learned counsel is being quoted hereinbelow:-

"For these reasons, we hold that where the Commission requires the submission of a hard copy of the online application together with all accompanying documents by a prescribed last date and has clearly placed the candidates on notice of the fact that an application which is submitted beyond the last date together with the prescribed documents would result in the invalidation of the candidature, the condition which has been imposed by the Commission would have to be scrupulously observed. It would not be open to the Court to hold that notwithstanding such a clear condition, an application which has not been received by the last date should be entertained. The Commission has given an option to candidates of submitting their applications in the hard copy by either of the two modes, namely by registered post or by personal delivery. A candidate who has opted for one of the two modes, is required to comply with the condition that all the requisite four stages are completed within the time stipulated."

17. He further submitted that similar issue was again before this Court in the matter of ***Arvind Kumar Yadav vs. U.P. Recruitment & Promotion Board and 2 others*** passed in ***Special Appeal No. 762 of 2016*** decided on 5.12.2016, Court has clearly held that in case of non submission of requisite certificate within the cut off date, treating the general category candidates no error has been committed by the learned Single Judge while rejecting the claim set up by the petitioner.

Relevant paragraph of the aforesaid judgment relied by the learned counsel is being quoted hereinbelow:-

"Since the petitioner had failed to satisfy the requirements of the advertisement, as were prescribed by submitting the certificate, we are more than satisfied that the learned Single Judge is right in coming to the conclusion that petitioner is liable to be treated as a General category candidate. No error has been committed by the learned Single Judge while rejecting the claim set up by the petitioner.

18. He further submitted that similar issue again came before the Division Bench of this Court in the matter of ***Gaurav Sharma*** and Court was having conflict of opinion with regard to judgments rendered by two other Division Benches in the matter ***of Pravesh Kumar v. State of U.P. And two others, Special Appeal Defective No. 136 of 2017,*** decided on 1.3.2017 ***and Shubham Gupta v. Indian Overseas Bank Office, Chennai and others, Writ Petition No. 748 (S/B) of 2014*** decided on 8.7.2016 and in the matter of ***Arvind Kumar Yadav*** (supra). Therefore, Full Bench was constituted in the matter of ***Gaurav Sharma Vs. State of U.P. And others*** which has decided the issue and reported as ***2017 (5) ADJ 494 (FB).*** The Full Bench has framed three issues out of which two relevant issues are being quoted hereinbelow:-

"A. Whether the candidature of an OBC candidate is liable to be rejected on the ground of the caste certificate having been submitted after the last date for submission of applications?

"B. Whether the decision in Arvind Kumar Yadav lays down and represents the correct position of law."

19. He submitted that while considering the first question, the Full Court in the matter of ***Gaurav Sharma*** (supra) has observed as follows:-

"Having noticed the statutory position, we then proceed to consider whether such a concession or exemption can be said to flow from Articles 14 or 16 of the Constitution as contended. Upon a thoughtful consideration, we find ourselves unable to accept the broad proposition as canvassed by the learned counsels. We are of the considered view that no such right of exemption can possibly be said to reside in or flow from Article 16 of the Constitution. Insofar as infraction of Article 14 is concerned, we presume that the same has been urged as a corollary to the contention that the prescription is superfluous. We are afraid that we find ourselves unable to sustain this submission either. As noted above the prescription of a cut off date in an advertisement serves more than one salutary purpose. By requiring all applicants to adhere to this date, the State is not practicing any discrimination nor can it be said to be acting unfairly. The absence of such a requirement would quagmire the entire selection process in a state of complete uncertainty. One of the primary purposes which such a stipulation serves is enabling the selecting body to identify the number of candidates constituting the field of eligibility. Judging whether a particular candidate is entitled to the benefits of reservation or has rightly claimed as falling in the said category is an essential exercise liable to be undertaken. For the purposes of undertaking this exercise the selecting body must be in a position to adjudge for itself whether a particular candidate is entitled to the benefits and exemptions as claimed. If this were not read as being an inherent power in the selecting body, the process of

selection itself may be completely derailed."

20. Court replied the same and held that it cannot be said that the requirement of submission of such certificate by a particular date is not attracted to the case of an OBC candidate, meaning thereby it is required to submit the certificate before the last date for submission of application form or time granted for submitting any certificate, documents etc.

21. He next submitted that while considering the second question, Full Court in the matter of ***Gaurav Sharma*** (supra), is of the view that in case of ***Ram Kumar Gijoriya*** (supra), no last date of submission of OBC certificate is prescribed in advertisement and OBC certificate was only required after completion of examination whereas in the present case last date was very well mentioned in advertisement dated 6.7.2018 as well as notification dated 7.5.2018.

22. Relevant paragraph of the aforesaid judgment relied by learned counsel are quoted hereinbelow:-

"We then proceed to address the second question framed for our consideration and which pertains to the correctness or otherwise of the judgment of the Division Bench in Arvind Kumar Yadav. As noted above, the sheet anchor of the case of the appellant and the writ petitioners was the judgment of the Supreme Court in Ram Kumar Gijroya. It becomes relevant to note that in the said case, the Supreme Court was called upon to consider the correctness of a judgment rendered by the Delhi High Court which had overturned a judgment rendered by a learned Single Judge of the said Court who had followed two earlier precedents to hold that the candidature of a Scheduled Castes/Scheduled Tribes candidate could not be turned down only on the ground that the caste certificate was submitted after the last date prescribed in the advertisement. The two prior precedents which the Delhi High Court considered were Pushpa Vs. Govt. (NCT of Delhi)9 and Tej Pal Singh V. Govt. (NCT of Delhi)10 . In the appeal of Ram Kumar Gijroya, the learned Single Judge of the Delhi High Court following the two precedents referred to above had directed the respondents therein to accept the OBC certificate of the appellant. One of the significant and distinguishing features of Ram Kumar Gijroya, which immediately springs to light is that the advertisement did not prescribe a cut off date at all. The requirement of submitting the OBC certificate was introduced only by a notice issued by the Delhi Subordinate Services Selection Board while declaring the final results.

We are therefore of the considered view that the Division Bench in Arvind Kumar Yadav rightly noted the distinct factual backdrop in which Ram Kumar Gijroya came to be rendered. The aspect of there being no consideration of the impact of a negative stipulation in an advertisement in the said judgment of the Supreme Court clearly escaped the Division Benches which pronounced judgments in Pravesh Kumar and Shubham Gupta."

23. Court after detail discussion, replied the second question of law and held that law laid down by the ***Arvind Kumar Yadav*** (supra) is correct.

24. He next submitted that Full Bench replied both the questions in favour of

respondent "Commission" and taken clear view that every candidate is required to submit their original certificates within the last date fixed and further cannot be exempted from the rigours of a cut off or last date prescribed in an advertisement or recruitment notice. Finally, Full Court has held that law laid down in the matter of ***Arvind Kumar Yadav*** (supra) is correct law.

25. Lastly, he placed reliance upon the judgment of Apex Court in the matter of ***State of Tamil Nadu and others Vs. G. Hemalatha and another*** passed in ***Civil Appeal No. 6669 of 2019*** decided on 28.8.2019. Supreme Court has held that instructions issued by the "Commission" are mandatory, having the force of law and they have to be strictly complied with.

26. Paragraph nos. 7 and 12 of the said judgment relied by the learned counsel are being quoted below:

"7. We have given out anxious consideration to the submissions made by the learned Senior Counsel for the Respondent. The instructions issued by the Commission are mandatory, having the force of law and they have to be strictly complied with. Strict adherence to the terms and conditions of the Instructions is of paramount importance. The High Court in exercise of powers under Article 226 of the Constitution cannot modify/relax the instructions issued by the Commission."

12. After giving a thoughtful consideration, we are afraid that we cannot approve the judgment of the High Court as any order in favour of the candidate who has violated the mandatory instructions would be laying down bad law. The other submission made by Ms. Mohana that an order can be passed by us under Article 142 of the Constitution which shall not be treated as a precedent also does not appeal to us."

27. He also submitted that so far as judgment of ***Prashant Kumar Dwivedi*** (supra) is concerned, for the facts involved in that case, there is no pleadings in the present case, therefore, cannot be replied.

28. Mr. Radha Kant Ojha, learned Senior Advocate in his rejoinder argument submitted that judgment of ***State of Tamil Nadu*** (supra) would not be applicable in the case of petitioner for the reason that in that case there was violation of instruction of the Commission upon answer sheet as well as OMR sheet and not in submission of application form or any other certificate, therefore, this judgment would not help the respondents. Similarly, he also submitted that judgment of Full Court in the case ***Rajendra Kumar Patel*** (supra) as in that matter after submission of application form through online, there is requirement of submission of hard copies of application form or relevant certificate and here the case is different. There is no case of submission of application form through online, therefore, this judgment is also not come in the rescue of respondents.

29. So far as Full Bench of this Court in the matter of ***Gaurav Sharma (supra)*** is concerned, Mr. R.K. Ojha, learned Senior Advocate submitted that "Commission" cannot take two different stands against its advertisements as in the matter of ***Prashant Kumar Dwivedi*** (supra), Commission is coming with another stand and wherein in the matter of ***Gaurav Sharma*** (supra) Commission has taken a different stand.

30. Learned Standing Counsel appearing for the State has also supported the case of "Commission" and adopted the

argument raised by Sri Nisheeth Yadav, learned counsel for the respondent no. 2.

31. I have considered the rival submissions advanced by the learned counsel for the parties and perused the judgments as well as records.

32. Undisputed facts of the case are that in paragraph 7 of the advertisement No. A-2/E-1/2018 dated 6.7.2018, it is mentioned that candidates are required to enclose self-attested copies of all certificates in support of claims made by them in their application forms of Preliminary Examination regarding eligibility and category, sub-category along with the application forms of Main Examination. It is also mentioned that in case self-attested copies of all certificates alongwith Main Examination Forms are not enclosed, claims shall not be entertained. It is also not disputed that after completion of written examination, in paragraph 3 of another notification dated 7.5.2019 issued by Commission, same fact of submission of certificates within a cut off date was reiterated. It is also undisputed that against the said advertisement, petitioner had applied under physically handicapped category and also deposited examination fee of Rs. 25/-, which was prescribed for physically handicapped candidate. Result of preliminary examination was declared on 30.3.2019 and in his marksheet, he was shown under general/physically handicapped category. In his main examination, he has filled up his category as physically handicapped and accordingly, admit card was issued to petitioner showing him as physically handicapped candidate. After declaration of result of main examination, while appearing in interview, he again mentioned his category as physically handicapped candidate. This fact is also undisputed that alongwith main examination form, petitioner could not submit his certificate of physically handicapped category as required by the Commission.

33. Therefore, the issue before this Court is that as to whether physically handicapped certificate of the petitioner could be accepted beyond the cut off date or not.

34. Two sets of judgment have been cited before this Court. One by learned Senior Counsel for petitioner, which are judgments of ***Dheerender Singh Paliwal*** (supra), ***Smt. Rajni Shukla*** (supra) and ***Ram Kumar Gijoriya*** (supra). In these judgments, more or less Courts are of the view that if candidates are having qualification, mere non production of certificate at relevant point of time cannot be a ground for rejection of candidature or change of category from a particular sub category to general category.

35. Another sets of judgment were cited by the learned counsel for the respondents, which are judgments of ***Rajendra Patel*** (supra) and Arvind Kumar Yadav (supra), ***Gaurav Sharma*** (supra) and ***State of Tamil Nadu*** (supra). As per these judgments, Courts are of the view that its mandatory requirement to submit all certificates for claiming any benefit within the cut off date fixed by Commission/Selection Body. For completion of selection process within the particular time and for equal opportunity to the candidates of same category having their rankings just below to the petitioner/candidate, it is mandatory to produce all relevant documents mentioned

within the cut off date fixed by Commission/Selection Body in the advertisement.

36. The judgment of ***Dheerender Singh Paliwal*** (supra) was based upon two facts. First of all, appellant was already in the services of the same department i.e. Forensic Science Laboratory as Senior Scientific Assistant and certificates for his essential qualifications were very much available on record in the form of resume and he was again appointed in the same department on the post of Senior Scientific Officer. Secondly, for the very same selection, two other candidates, who had not produced their caste certificates at the time of interview have been given time, but petitioner was denied for the same. Therefore, considering all these facts, Apex Court directed the selection body to issue appointment letter after accepting the certificate, whereas in the present case, no such discrimination is available or done by the "Commission", therefore, the facts of the case of **Dheerender Singh Paliwal** (supra) are different from the present case. Relying upon the very same judgment of ***Dheerender Singh Paliwal***, (supra), this Court has allowed the Writ Petition No. 40159 of 2016 (Rajni Shukla Vs. Union of India and 3 others). Therefore, the same would also be not helpful for the very same reasons.

37. Another judgment of ***Ram Kumar Gijoriya*** (supra), Apex Court has taken view in the matter of OBC candidate, if caste certificate is not submitted within time, that cannot be a ground for rejecting the candidature. Court is of the view that if a person is OBC by birth and not by acquisition of this category because of any other event happening at a later stage, a certificate issued by competent authority to this effect is only an affirmation of fact, which is already in existence. This judgment was subject matter of Full Bench of this Court in the matter of ***Gaurav Sharma*** (supra) and for reasons discussed would not be helpful for petitioner.

38. So far as second sets of judgment are concerned, Court has taken different view that candidate is required to submit the application form/certificate or any other documents or on before the cut off date fixed by the Commission/ Examination Authority and no relaxation can be granted

39. The Full Bench of this Court in the matter of ***Rajendra Patel*** (supra) with regard to submission of a hard copy of the online application within the cut off, has taken the same view and held that all conditions should have been completed within the stipulated time given by the competent authority.

40. Again in the matter of ***Arvind Kumar Yadav*** (supra) came before this Court for adjudication and after considering the case of ***Ram Kumar Gijoriya*** (supra), Court has taken different view and upheld the judgment of learned Single Judge with the observations that since the petitioner had failed to satisfy the requirements of the advertisement and not submitted the certificate within time, he has rightly been treated as general category candidate.

41. Later on, Full Bench in the matter of ***Gaurav Sharma*** (supra) was also constituted and while interpreting the judgment of ***Ram Kumar Gijoriya*** (supra), Full Court has framed issues. First issue was as to whether the candidature of an OBC candidate is liable to be rejected on the ground of the caste certificate having been submitted after the last date of submission of

applications and answer was in negative. While giving the answer, Court has considered so many judgments and given detailed findings that prescription of a cut off date in an advertisement serves more than one salutary purpose. Absence of any such requirement would be an unending process for completion of selection and further it would deprive to all other candidates, who are below in merit than petitioner/candidate, but otherwise eligible and also submitted their all requisite certificates of a particular category within the cut off date. They would only be benefited after removal of such candidates/petitioner, who had not submitted their requisite certificates within the cut off time prescribed. In fact, Commission/Selection Body must be in position to decide as to whether a particular candidate is entitled to the benefits or any other exemption as claimed by him only by fixing cut off date to enable itself to transfer the said benefits to candidates lower in marks in case of failure of submission of certificates by any other candidate having higher marks in that category. Therefore, in the present case too, "Commission" has not committed any error while transferring the candidature of petitioner into general category in lack of submission of relevant certificate within the cut off date.

42. In light of discussed hereinabove and further considering this fact that in the case of ***Ram Kumar Gijoriya*** (supra), no cut off date was prescribed in an advertisement for submission of OBC certificate as declared in ***Arvind Kumar Yadav*** (supra) correctly articulates the law on the issue and overrule Pravesh Kumar and Shubham Gupta.

43. It is also necessary to point out here that as per settled provisions of law, once a interpretation is made by Full Bench of High Court that would have binding affect over the Court in the similar matter.

44. The Apex Court in the matter of ***State vs. Tamil Nadu and others*** (supra) has taken clear cut view that instructions issued by Commission are mandatory and having force of law, therefore, they have to be strictly complied with. The High Court in exercise of powers under Article 226 of the Constitution cannot modify/relax the instructions issued by the Commission. Not only this, Court refused to pass an order under Article 142 of the Constitution of India.

45. Mr. R.K. Ojha, learned Senior Counsel relied upon the judgment of ***Prashant Kumar Dwivedi*** (supra), but the facts of the case as argued by learned Senior Counsel was not the part of pleading and Commission was not in position to rebut the same. Therefore, without specific pleading any case based upon certain facts can not be taken into consideration. Further that case was having different facts too. In that matter, required certificate was submitted without signature of one of the authority for which additional time was granted by the Commission to remove the deficiency. In the present case, undisputedly, certificate of physically handicapped candidate has not been submitted alongwith main examination form, which was absolutely in violation of terms and conditions of advertisement.

46. Therefore, considering the facts of the case as well as law laid down by the Courts, I am of the firm view that for successful completion of any competitive examination, which are having candidates

of different categories based upon many factors like physically handicapped, vertical or horizontal reservation etc, it is necessarily required to submit all relevant documents well within the cut off date prescribed by the Commission/Selection Body. In case of failure of the same, there is no illegality in rejecting their candidature or transferring them into general category. In fact, if such major is not taken by the Commission/Selection body, the process of selection would be unending and also deprive many other candidates, who are otherwise eligible and also submitted all certificates well within time prescribed by the Commission, but below in merit than the petitioner/candidate.

47. Further, in light of judgment ***of State of Tamil Nadu*** (supra), High Court in exercise of powers under Article 226 of the Constitution of India cannot modify/relax instructions issued by the Commission provided it is in violation of natural justice or any provision of Constitution of India. Therefore, it is necessarily required to complete all formalities and submit certificates well within time prescribed by the Commission/Selection Body. In present case, there is no violation of natural justice or any provision of Constitution of India and undisputedly, petitioner has not submitted certificate of physically handicapped within the prescribed time fixed by the Commission.

48. Therefore, in light of facts mentioned hereinabove as well as law laid down by the Apex Court and this Court, applicant is not entitled for any relief from this Court, petition lacks merit and is accordingly **dismissed.**

49. No order as to costs.

(2021)05ILR A136
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ -A No. 9594 of 2020

Anuj Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Juvenile Jurisprudence – Constitution of India – Articles 14 – Fundamental Right – Right against arbitrariness – UP Public Examinations (Prevention of Unfair Means) Act, 1998 – Sections 3 and 4 – Public employment – Suitability – No plea of juvenility before the trial court – Non disclosure of criminal prosecution faced as a juvenile – Effect – Held, using criminal prosecution faced by a candidate as a juvenile to form an opinion about his suitability for appointment, is arbitrary illegal and violative of Article 14 of the Constitution of India. (Para 17 and 42)

B. Juvenile Jurisprudence – Constitution of India – Articles 21 – Fundamental Right – Right to Privacy – Right to reputation – Non-disclosure of Criminal prosecution faced as a Juvenile – Appointment denied – Validity – The requirement to disclose details of criminal prosecutions faced as a juvenile is violative of the right to privacy and the right to reputation of a child guaranteed under Article 21 of the Constitution of India. It also denudes the child of the protection assured by the Juvenile Justice Act – Held, the employer cannot ask any candidate to disclose details of criminal prosecution faced as a

juvenile – Prosecution and imposition of penalty upon the petitioner by the Lok Adalat cannot be the basis of denial of appointment to the petitioner. (Para 42 and 44)

C. Juvenile Jurisprudence – The Juvenile Justice (Care and Protection of Children) Act, 2015 – Scope and Applicability – Public employment – Consideration of Child's criminal antecedents – Validity – Rajiv Kumar's principle followed – The consideration of a past prosecution of a child in a criminal case will prevent reintegration of the child in the mainstream of the society – It will pose an impediment in the reformation of the child and the growth of the child into a responsible adult. It will disable the all around development of the child into a law abiding citizen. It will preclude realization of the mandate of Article 39 of the Constitution of India – These circumstances will violate the child rights regime and the 'life' of a child as guaranteed under Article 21 of the Constitution of India will be devoid of meaning. (Para 34)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Rajiv Kumar Vs St. of U.P. & anr. ; 2019 (4) ADJ 316,

2.Shivam Maurya Vs St. of U.P. & ors.; (2020) 5 ADJ 6

3. Kishan Paswan Vs U.O.I. & ors.; 2020 (11) ADJ 254

4. Avtar Singh Vs U.O.I. & ors.; (2016) 8 SCC 471

5. Sumpurnanand Vs St. of U.P.; 2018 (11) ADJ 550

6. K.S. Puttaswamy Vs U.O.I.; (2017) 10 SCC 1

7. Sahadeb Ghosh Vs St. of W.B.; 2012 Lab IC 2469

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The petitioner has assailed the order dated 03.09.2020 passed by respondent no. 3-Commandant, 43 Battalion, Provincial Armed Constabulary (PAC), Etah, whereby the competent authority has found that the petitioner is not suitable for appointment on the post of Constable in the PAC.

2. Sri Arvind Kumar Singh, learned counsel for the petitioner contends that the respondent No.3 was misdirected in law by overlooking the fact that the petitioner was tried for an offence as a juvenile. The case of the petitioner is covered by the law laid down by this Court in ***Rajiv Kumar Vs. State of U.P. and another,*** reported at ***2019 (4) ADJ 316, Shivam Maurya Vs. State of U.P. and Others*** reported at ***(2020) 5 ADJ 6*** and in Kishan Paswan Vs. Union of India and others reported at ***2020 (11) ADJ 254***. The impugned order is arbitrary, illegal and violative of fundamental rights of the petitioner guaranteed under Articles 14, 16 and 21 of the Constitution of India.

3. Per contra, learned Standing Counsel submits that the pendency of a criminal case and the suppression of the same in the Attestation Form by the petitioner are admitted. The offence against the petitioner was not of a trivial nature, and moreover the petitioner had been convicted by the learned trial court. He is not suitable for appointment in a disciplined force like the Provincial Armed Constabulary (PAC) and his candidature was lawfully invalidated. The impugned order is not liable to be interfered with.

4. Heard learned counsels for the parties.

5. The petitioner applied for appointment on the post of Constable in the Civil Police and Provincial Armed Constabulary (PAC) in response to an advertisement issued by the Uttar Pradesh Police Recruitment and Promotion Board, Lucknow, on 14.01.2018.

6. The petitioner was successful in the written examination and also qualified the physical standard test. The petitioner was selected for appointment to the post of Constable in the PAC and his name was shown at serial no. 1350 of the select list taken out by the respondent authority.

7. After the selection of the petitioner, an enquiry was made by the Senior Superintendent of Police, Etah, into the criminal antecedents of the petitioner and his suitability for appointment to the post of Constable in the PAC. The aforesaid enquiries revealed that the petitioner had faced criminal prosecution consequent to registration of Case Crime No. 104 of 2011, under Sections 3/4 of U.P. Public Examinations (Prevention of Unfair Means) Act, 1998. On account of the aforesaid criminal case faced by the petitioner, the petitioner was refused appointment as Constable in the PAC.

8. Aggrieved by the aforesaid denial of appointment, the petitioner instituted a writ petition before this Court, registered as Writ A No. 4270 of 2020, Anuj Kumar Vs. State of U.P. and Others. The writ petition was decided by a judgment rendered on 15.06.2020. The operative portion of the aforesaid judgment in Anuj Kumar (supra), is extracted hereinunder:

"In view of the above, as no useful purpose would be served in keeping the matter pending, with the consent of parties the matter is being decided at this stage. It is directed that in case petitioner approaches the respondent no. 3 through a comprehensive representation alongwith certified copy of this order within fifteen days from today, the respondent no. 3 shall consider and decide the same, in accordance with law, keeping in mind the guidelines issued by Apex Court in case of Avtar Singh (Supra), preferably within a period of two months from the date of receipt of representation of petitioner.

Writ petition stands disposed of."

9. In compliance of the direction issued by this Court, the case of the petitioner for appointment was reconsidered by the competent authority in the impugned order dated 03.09.2020.

10. The facts relevant for the adjudication of the controversy are established beyond the pale of any dispute in the impugned order. The facts being undisputed, the controversy turns on pure questions of law. No useful purpose will be served by exchange of pleadings and prolonging the litigation. The matter is being decided finally with consent of parties.

11. The undisputed facts necessary for adjudication for this controversy can be prised out from the impugned order dated 03.09.2020.

12. The impugned order dated 03.09.2020 after extracting the operative portion of the judgment of this Court dated 15.06.2020 in Anuj Kumar (Supra), records that the petitioner has submitted a representation in support of his candidature. The impugned order thereafter finds that the perusal of the records reveal

that the petitioner had successfully qualified the written examination as well as the physical standard test in the selection proceedings for direct recruitment of PAC Constable. An enquiry into the criminal antecedents and character verification was initiated by the local police at Etah.

13. The letter of the Senior Superintendent of Police, Etah, dated 27.12.2019, is referenced in the impugned order. The said letter discloses that Case Crime No. 104 of 2011, under Sections 3/4 of U.P. Public Examinations (Prevention of Unfair Means) Act, 1998, was registered against the petitioner and a chargesheet was submitted in the learned trial court on 09.04.2011. The matter was finally decided by the Lok Adalat on 28.08.2011 upon payment of penalty by the petitioner. The report of the Senior Superintendent of Police, Etah, contains a recital to the effect that the offence is of a trivial nature and the current reputation of the petitioner is good.

14. The contents of the communication dated 27.12.2019 sent by the Senior Superintendent of Police, Etah are stated. Thereafter the opinion of the District Magistrate, Etah, sought in regard to the suitability of the petitioner for appointment is discussed.

15. The District Magistrate Etah in the letter dated 15.01.2020, opined that in the aforesaid criminal case the petitioner had confessed to his crime. Use of unfair means is an offence which comes within the ambit of "moral turpitude" as described in the Government Order dated 28.04.1958. The petitioner had already been punished by the trial court by imposition of penalty. On the foot of the aforesaid reasoning, the District Magistrate opined that the petitioner is not suitable for appointment on the post of Constable in the PAC. In view of the aforesaid opinion of the District Magistrate Etah the petitioner was not issued an appointment letter.

16. The impugned order then proceeds to quote the opinion of the Joint Director Prosecution, District Etah on 31.08.2020. The aforesaid opinion cites various holdings in the case of ***Avtar Singh v. Union of India and Others1***, as set out in paragraph nos. 38.4.1, 38.4.2, 38.4.3 and 38.8.

17. The opinion records that the petitioner had not raised a plea of juvenility before the learned trial court by asserting that he was a juvenile at the time of the institution of criminal case. Further the petitioner has deposited the penalty of Rs. 250/- imposed by the learned trial court and thus admitted to his guilt. The provision of the Uttar Pradesh Public Examinations (Prevention of Unfair Means) Act, 1998, provides for two categories of punishments namely imposition of penalty and imprisonment.

18. On the foot of the aforesaid reasoning, it is opined that the petitioner was found guilty by the learned trial court. After setting out the aforesaid material in the impugned order, the competent authority agrees with the same. The competent authority finally holds the petitioner unsuitable for appointment on the post of Constable in PAC on account of the penalty of Rs. 250/-, imposed by the learned trial court as a punishment.

19. The date of birth of the petitioner is 13.07.1995. The offence for which the petitioner was prosecuted occurred on

25.03.2011. On the date of the offence for which the petitioner was prosecuted, he was 15 years 8 months 12 days old. The petitioner was juvenile within the meaning of the Juvenile Justice (Care and Protection of Children) Act, 2015.

20. These undisputed facts raise the following questions of law for consideration:

I. Whether the petitioner can be denied appointment on the footing of the prosecution and the conviction of the petitioner by the Lok Adalat by order dated 05.11.2019, in Case Crime No. 104/2011, under Sections 3/4 of U.P. Public Examinations (Prevention of Unfair Means) Act, 1998.

II. Whether the respondents authorities erred in law by requiring the petitioner to disclose details of criminal prosecution faced by him as a juvenile in the Attestation Form?

21. The said questions were also posed for determination before this Court in ***Rajiv Kumar Vs. State of U.P. and another2.***

22. I find that the Rajiv Kumar (supra) is squarely applicable to the facts of this case. The judgment of ***Rajiv Kumar (supra***) is of some length. However, some parts of the judgment can be usefully extracted.

23. The judgment of this Court in ***Rajiv Kumar (supra)*** found that the aforesaid questions which arose for consideration, involved an interface between various branches of law:

"17. The controversy is defined by an interplay of different branches of law and competing rights of individuals and institutions. The interface of employers' rights, child rights and employees' rights and a composite view and concerted implementation of different branches of law, constitutional rights, Juvenile Justice Acts, child rights regime, service law will provide the way for the resolution of the controversy."

24. The creation of children as a separate class in the Constitution was looked at in light of relevant constitutional provisions :

"20. The constitution makers understood the special needs of children and envisaged a distinct place for children in the Constitution. The children are constituted into a separate class of citizens under the Constitution. Various provisions devoted to the child in the text of the Constitution attest the paramount importance accorded to the welfare of the child in our Constitutional scheme."

25. Articles 15 (3), 21(a), 45, 47, 39(e) and 39(f) of the Constitution of India were specifically invoked.

26. ***Rajiv Kumar (supra)*** entrenched the right to reputation of a child as a fundamental right flowing from Article 21 of the Constitution of India relying on the law laid down by this Court in ***Sumpurnanand Vs. State of U.P.3***. Similarly, the fundamental right to privacy of the child was also engaged by applying the holding of the Hon'ble Supreme Court in ***K.S. Puttaswamy v. Union of India4 .***

27. Various international instruments in regard to children in conflict with law were considered:

"38. The condition of children in conflict with law engaged the concerns of the world community. The concerns were put in the consciousness of the international community by the adoption of the Beijing Rules in 1985 and the UN Standard Minimum Rules for Administration of Juvenile Justice.

39. The United Nations Standard Minimum Rules For The Administration of Juvenile Justice is a document which reflects the consensus of international opinion and convergence of values amongst civilized nations. In fact, the United Nations Standard Minimum Rules For The Administration of Juvenile Justice is a statement of universal values. The Juvenile Justice Acts in India trace their origin to the aforesaid international standards and other UN Conventions on the subject. As will be seen the courts have readily incorporated the international treaties and conventions into the corpus of our case law jurisprudence."

28. The Juvenile Justice (Care and Protection of Children) Acts (enacted from time to time) were examined in the context of various international instruments on child rights:

"52. The child rights jurisprudence reached the next stage in its evolution, with the UN Convention on Rights of Child, 1989 and UN Juvenile Protection Rule, 1990. In the comity of civilized nations, the state of children in conflict with law was elevated from international consciousness to international conscience, from conception of philosophy to agenda for action. India honoured its international obligations and cemented its international standing by promulgating The Juvenile Justice Act, 2000 and then The Juvenile Justice Act, 2015.

53. The Juvenile Justice Act 1986 , the Juvenile Justice Act 2000 and the Juvenile Justice Act 2015 are in consequence of and in consonance to the international covenants on child rights in general and children in conflict with law in particular. The enactments represent a conceptual shift from a strict retributive approach to benign rehabilitative justice. The enactments are a turning away of law from exclusion by penalizing to assimilation by reintegration. The objects of the legislations have been constant. The provisions have been amended to cope with needs of the times and benefit from the fruits of experience."

29. A survey of various provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 was made thus:

"Section 2.13 "child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence;

Section 2.33 "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more;

Section 2.45. "petty offences" includes the offences for which the

maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years;"

Section 15 of the Act which contemplates a preliminary assessment into heinous offences by the court and the distinction created between heinous and non heinous offences under the scheme of the Act was part of the discussion.

59. Of course, it needs to be clarified that the Juvenile Justice Act, 2015 is prospective in its application. However, the fundamental principles of Child Rights Jurisprudence or position of law in regard to children in conflict with law which are incorporated in the Act infact predate the statute.

60. Sections 74 and 99 of the Juvenile Justice Act, 2015 provide for protecting the identity of a child who has faced criminal prosecution under the Juvenile Justice Act, 2015. Section 24 much likeSections 74 and 99, has been a consistent theme in the preceding enactments relating to children in conflict with law. Section 24 removes any disqualification of a child on the findings of an offence under the Act. Sections 24, 74 and 99 of the Juvenile Justice Act 2015 are as follows."

30. Other aspects of the Juvenile Justice (Care and Protection of Children) Act, 2015, supported the discussion in the following manner:

"24. Removal of disqualification on the findings of an offence.

1. Notwithstanding anything contained in any other law for the time being in force, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attached to a conviction of an offence under such law:

Provided that in case of a child who has completed or is above the age of sixteen years and is found to be in conflict with law by the Children's Court under clause (i) of sub-section (1) of section 19, the provisions of sub-section (1) shall not apply.

2. (2) The Board shall make an order directing the Police, or by the Children's court to its own registry that the relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period as may be prescribed:

(emphasis supplied) Provided that in case of a heinous offence where the child is found to be in conflict with law under clause (i) of sub-section (1) of section 19, the relevant records of conviction of such child shall be retained by the Children's Court.

74. Prohibition on disclosure of identity of children.

1. No report in any newspaper, magazine, news-sheet or audio-visual media or other forms of communication regarding any inquiry or investigation or judicial procedure, shall disclose the name, address or school or any other particular, which may lead to the identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime, involved in such matter, under any other law for the time being in force, nor shall the picture of any such child be published:

Provided that for reasons to be recorded in writing, the Board or

Committee, as the case may be, holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the best interest of the child.

2. The Police shall not disclose any record of the child for the purpose of character certificate or otherwise in cases where the case has been closed or disposed of.

3. Any person contravening the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months or fine which may extend to two lakh rupees or both.

99. Reports to be treated as confidential.

1. All reports related to the child and considered by the Committee or the Board shall be treated as confidential:

Provided that the Committee or the Board, as the case may be, may, if it so thinks fit, communicate the substance thereof to another Committee or Board or to the child or to the child's parent or guardian, and may give such Committee or the Board or the child or parent or guardian, an opportunity of producing evidence as may be relevant to the matter stated in the report.

2. Notwithstanding anything contained in this Act, the victim shall not be denied access to their case record, orders and relevant papers."

61. Rule 14 of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 has relevance to the controversy. The Rule provides for destruction of records. The intention of legislature to efface the records of prosecution of a child is clearly evident in the said provision:

14. Destruction of records.-

The records of conviction in respect of a child in conflict with law shall be kept in safe custody till the expiry of the period of appeal or for a period of seven years, and no longer, and thereafter be destroyed by the Person-in-charge or Board or Children's Court, as the case may be:

Provided that in case of a heinous offence where the child is found to be in conflict with law under clause (i) of sub section (1) of section 19 of the Act, the relevant records of conviction of such child shall be retained by the Children's Court.

62. The Hon'ble Supreme Court in Jitendra Singh v. State of U.P. reported at (2013) 11 SCC 193, considered various aspects of child rights jurisprudence in the context of Juvenile Justice Act 2000 and also the International Convention on the Rights of the child and the Beijing Rules. The right to privacy and confidentiality of a juvenile, the inability of a child to know its rights, the imperative of rehabilitation and safeguards of law were issues on which the Hon'ble Supreme Court ruled that:

41. The Rules, particularly Rule 3, provide, inter alia, that in all decisions taken within the context of administration of justice, the principle of best interests of a juvenile shall be the primary consideration. What this means is that "the traditional objectives of criminal justice, that is retribution and repression, must give way

to rehabilitative and restorative objectives of juvenile justice". The right to privacy and confidentiality of a juvenile is required to be protected by all means and through all the stages of the proceedings, and this is one of the reasons why the identity of a juvenile in conflict with law is not disclosed. (emphasis supplied)

Following the requirements of the Convention on the Rights of the Child, Rule 3 provides that institutionalisation of a child or a juvenile in conflict with law shall be the last resort after a reasonable inquiry and that too for the minimum possible duration. (emphasis supplied)

42. Rule 32 provides that:

"32.Rehabilitation and social reintegration.--The primary aim of rehabilitation and social reintegration is to help children in restoring their dignity and self-worth and mainstream them through rehabilitation within the family where possible, or otherwise through alternate care programmes and long-term institutional care shall be of last resort."

43. It is quite clear from the above that the purpose of the Act is to rehabilitate a juvenile in conflict with law with a view to reintegrate him into society. This is by no means an easy task and it is worth researching how successful the implementation of the Act has been in its avowed purpose in this respect.

44. As regards procedurally dealing with a juvenile in conflict with law, the Rules require the State Government concerned to set up in every district a Special Juvenile Police Unit to handle the cases of juveniles or children in terms of the provisions of the Act (Rule 84). This Unit shall consist of a juvenile or child welfare officer of the rank of Police Inspector having an aptitude and appropriate training and orientation to handle such cases. He will be assisted by two paid social workers having experience of working in the field of child welfare of which one of them shall be a woman.

45. Rule 75 of the Rules requires that while dealing with a juvenile or a child, except at the time of arrest, a police officer shall wear plain clothes and not his uniform.

46. The Act and the Model Rules clearly constitute an independent code for issues concerning a child or a juvenile, particularly a juvenile in conflict with law. This code is intended to safeguard the rights of the child and a juvenile in conflict with law and to put him in a category separate and distinct from an adult accused of a crime. (emphasis supplied)

31. It needs to be mentioned that the Juvenile Justice (Care and Protection of Children) Acts were amended from time to time. However, fundamental principles of child rights jurisprudence and constitutional rights of a child which have remained constant also guided the decision in **Rajiv Kumar (supra).**

32. The consideration of the scheme of the enactments is concluded in the following paragraphs:

"65. The diminished culpability of children rests on the premise of lack of maturity and an underdeveloped sense of responsibility in children and that the deficiencies are reversible which will be reformed with advancing age and neurological development. The heightened

capacity for change in juvenile delinquents holds the promise of a new sunrise.

67. From the features and the scheme of the Juvenile Justice Act (as amended from time to time) and law laid down by various courts, both the legislative intent and the position of law can be deduced with clarity. **Intention of the legislature is to treat children as a separate class in prosecution of offences committed by the children.**

68. Rigors of the prosecution have been diluted in the criminal procedure. The legislature and the law has gone the whole length to protect the identity of children who have faced prosecution. Non disclosure of the details of the crime committed by the child is another feature which reflects a sensitive approach of the legislature to children in conflict with law. ***(emphasis supplied)***

69. Finally the legislations culminate in the overarching aim of rehabilitating children who had trouble with the law by assimilating them in the social mainstream.

70. **By removing all disqualifications accruing from the finding of guilt or a conviction of a juvenile under the Acts, the final hurdle in the reintegration of a child in the society has been removed."** ***(emphasis supplied)***

33. The scope of the rights of the State as an employer to ascertain the criminal antecedents of its perspective employees were then adverted to:

"Rights of an employer:

80. The State employer examines the criminal antecedents of its employees prior to their induction in government service.

81. Criminal antecedents are an accepted criteria to form an opinion on criminal traits in an individual and his suitability for employment. A person may be denied entry into government service or removed from government service if found in possession of such criminal traits.

85. A false declaration on oath regarding past prosecution in a criminal case or a conviction in a criminal offence or pendency of a criminal case could invalidate the appointment and entail termination of services. Some authorities would have it that such false affidavit would ipso facto result in the termination of the services of the employee. The other view took mitigating circumstances into account. The divergence in judicial views was finally resolved by a three Judge Bench of the Hon'ble Supreme Court in the case of Avtar Singh v. Union of India and Others, reported at (2016) 8 SCC 471.

89. **Clearly the right of the State as an employer to know the criminal antecedents of its employees is unexceptional. But the rights are not unrestricted in case of children. The rights of the employer are limited by three constraints. The rights of an employer have to be reconciled to provisions of the Constitution and the propositions of Constitutional law. Thirdly the employer's rights are also circumscribed by the statutory regimes of child rights."** ***(emphasis supplied)***

34. The interface of the rights of the State as an employer and a child's fundamental rights was made in the following enquiry:

"90. The rights of an employer are hedged, by the constitutional rights of a child. The interplay of the employer's rights with the constitutional rights of a child may now be considered.

91. A nuanced approach is required to understand the ambit of the right to reputation of a child and right to privacy of a child guaranteed under Article 21 of the Constitution of India.

92. In the wake of the preceding narratives, certain fundamental precepts can be distilled from the range of statutes and pronouncements of courts which form the first principles of child rights jurisprudence. These fundamental principles of child rights jurisprudence would lend perspective and aid the understanding of Constitutional rights of children under Article 14 and Article 21 of the Constitution of India.

93. The vulnerability of a child is an attribute of childhood which is recognized by all legislatures. The incapacity of a child to know its rights is a given in child rights' jurisprudence. The inability of a child to assert its rights is a disability which is understood by all courts. The aim of the legislatures and the endeavour of the courts is to insulate the child from the cruel vagaries of life which it cannot comprehend and lacks the capacity to defend against. Reform of children in conflict with law, their reintegration in society and creation of a salutary environment for children to grow and realize their potentialities is the high purpose to which the legislatures and the courts have directed their efforts. Children have special needs in life and require special protection in law. The indispensable feature of all child rights' legislations is the special protection to children provided by the legislature in a given field.

As an old writer observed on the incapacity of infants-

"The law protects their persons, preserves their rights and estates, excuseth their laches and assists them in their pleadings, the judges are their counsellors, the jury are their servants and law is their guardian.

94. As we have seen that fate of children in conflict with law has engaged the attention of the legislature, the courts and the larger comity of nations and international organizations. The collective endeavours have been guided by common purpose. Children in conflict with law need special care. The criminal justice system has to be sensitized to deal with the class of children in conflict with law. The child has to be protected from harsh treatment and should not be exposed to the rough edges of the criminal justice system. The child has to be shielded from all aspects and consequences of the criminal justice system which can cast a lasting trauma or precludes it from leading a normal life free from blemish and prevents the reintegration of the child in the society.

95. **One most critical feature of child rights regime is the issue of the taint caused by criminal prosecution and the disability accruing from criminal conviction. The consequent impediments in the reintegration of the delinquent child in the society are issues which are**

addressed by the legislatures and the courts alike. Some measures like restricted access to records of trials sealing and destruction of records of prosecution of juvenile delinquents are finding acceptability among legislatures across the world. Courts have been anonymising trials of children conflict with law to protect their identities.

96. All these issues and first principles thus lie at the heart of child rights jurisprudence, animate the purpose of child rights legislation and engage the "life" of a child under Article 21 of the Constitution of India.

(emphasis supplied)

97. Of course, persons between 16-18 years of age prosecuted for heinous crimes, have been put in a separate class by the legislature. They may be denied the protective cover of the child rights regime as per provisions of law.

98. **A past prosecution of a child in a criminal case which remains in public records pertaining to employment becomes part of public discourse. In public employment, past prosecution of a child in a criminal case is often made a criteria for forming an opinion of the child's criminal antecedents. Such criteria revives the taint of a past prosecution to blight the prospects of future employment. A reference to a past prosecution will tarnish the reputation of a child and become a permanent stigma in his life. Consideration of a past prosecution of child in a criminal case for any purpose or in any discourse, will create a perpetual disability for the child. The practice of making the past prosecution a criteria for forming an opinion of the child's criminal antecedents or even making it a consideration in public employment will provoke consequences which the child rights regime seeks to prevent. The consideration of a past prosecution of a child in a criminal case will prevent reintegration of the child in the mainstream of the society. It will pose an impediment in the reformation of the child and the growth of the child into a responsible adult. It will disable the all around development of the child into a law abiding citizen. It will preclude realization of the mandate of Article 39 of the Constitution of India. These circumstances will violate the child rights regime and the "life" of a child as guaranteed under Article 21 of the Constitution of India will be devoid of meaning.**

99. The right of privacy of a child would be meaningful if such prosecution is not made part of public discourse as a criteria for appointment to public posts or admission to any institution of learning or for that matter any other transaction in life.

100. Similarly, the right to privacy in the context of a child would include his right to deny information relating to his prosecution as a child under the Juvenile Justice Act and for offences which do not come in the category of heinous offences under the said Act.

101. The prerequisite for realizing the Fundamental Rights of a child vested by Article 21 of the Constitution of India, is to create all conditions essential for reintegration of

the child in the social mainstream and to open opportunities for self development and self fulfillment, free from the taint of the past. The fact of the prosecution has to be purged from public records to rid the child of the taint. ***(emphasis supplied)***

102. The wide consensus of such values helps us in determining the rights of a child. The endeavours of the courts and the legislatures alike is to protect the identity of the child offender, and to shield the child in conflict with law from suffering lasting and traumatic consequences of criminal prosecution. **A child who has been prosecuted for criminal offence is entitled to a fresh chance in life. The child has to begin life as an adult on a clean state, as if no such criminal prosecution happened. This is possible when the fact of such criminal prosecution is purged from public discourse and is not a consideration for appointment to an office. The denial of public space and legitimacy to the fact of such criminal prosecution is the sheet anchor of the right to privacy and right to reputation of a child. An employer cannot elicit any information from any candidate or employee regarding the prosecution of the latter in a criminal case as a minor child for non heinous offences. An employer is precluded from seeking a declaration from a candidate or an employee regarding the prosecution of the latter in a criminal case as a child.** ***(emphasis supplied)***

103. These prerequisites create an environment which fosters a balanced growth of a child and enables it to realize its full potentialities**. These prerequisites accord meaning to the life of a child as contemplated under Article 21 of the Constitution of India. This is the essence of the fundamental right guaranteed to a child by Article 21 of the Constitution of India.** ***(emphasis supplied)***

104. The Directive Principles of State Policy enshrined in Article 39 of the Constitution of India are infact the mandatory requirements of law to bring the rights of a child vested by Article 21 of the Constitution of India to fruition.

105. The meaning of life for children contemplated in Article 21 would be fruitful, if conditions of life for children envisaged under Article 39 are created."

35. The requirement posed by the State employer to a candidate to disclose the details of criminal prosecution faced as a minor / juvenile was also tested on the anvil of Article 14 of the Constitution :

"109. Legislative enactments treat children differentially from adults. Children are constituted in a separate class from adults in law. **The treatment accorded to children in law is different from that of adults. This differential treatment underlies the sensitive approach to children in law. The criminal prosecution of a child is not at par with the prosecution of an adult for a similar crime. The said prosecution and the consequences of such prosecutions cannot be treated alike. Law ensures that the adverse consequences of prosecution of child are not only mitigated but are completely obviated.**

110. Children in conflict with law are a well defined class. This class cannot be treated like adults. Children are not "miniature adults".

111. It has been held by good authority that treating unequals as

equals will militate against the mandate of Article 14 of the Constitution of India.

112. The criteria of past criminal prosecution for forming an opinion about considering a criminal antecedents of a candidate is a valid one. This criteria which is valid for adults, would be flawed if applied to children. This would amount to treating unequals as equals. A logical sequitor is that fact of a past criminal prosecution of a child is not a relevant consideration for appointment to a public post or office and is violative of Article 14 of the Constitution of India.*(emphasis supplied)*

113. Arbitrariness is another facet of Article 14 of the Constitution of India. Arbitrary action or criteria is negated by Article 14. This aspect of Article 14 is also engaged in the instant controversy. Some facts stated in detail in the preceding part of judgment are reproduced in substance hereunder:

114. **The personality of a child is in constant evolution and his (sic) character traits are not permanent. The causes which impel a child to be on the wrong side of law or commit deviant acts are often traceable to his (sic) environment. A child has no control over his (sic) environment and his (sic) deviant behaviour is reversible. A child's conduct is capable of correction and a child is reformed over the years. Good authority in law and the field of child psychology has concluded that the character traits which impelled a child into a criminal act are transient and will be reformed with age.**

115. In such a situation, the criteria of considering the past crimes committed by an employee as a child do not form a reliable, rational and a just basis for making an assessment of criminal traits and to determine suitability for employment. This criteria would be an irrelevant consideration for appointment to a public post. Above all such criteria is wholly arbitrary and flagrantly violates Article 14 of the Constitution of India."

(emphasis supplied)

36. The line of enquiry then shifted to the restrictions created on the rights of an employer by various Juvenile Justice (Care and Protection of Children) Acts, which produced the undermentioned limitations:

"(B). Employers' Righs and Juvenile Justice Act, 1986 and Juvenile Justice Act, 2015

116. The critical feature and the guiding philosophy of child rights jurisprudence and Juvenile Justice Act, 1986 and also Juvenile Justice Act, 2015 is to prevent the child from reoffending and to reintegrate the child in the society, to enable the child to grow into a reformed and a responsible adult and a law abiding citizen. The aim can be achieved if the taint of a past criminal prosecution does not blight the future prospects of a child. A past aberration as a child cannot define his future life as an adult. The aim of reintegrating the child in the society would be defeated in detail if the fact of a past prosecution stigmatizes the future life of the child. Not only conviction but the criminal prosecution itself carries a stigma.

117. The future of a child, in conflict with law will be secure and the reintegration of child will be complete, only if the taint of a past criminal prosecution is purged from his life. The legislature, the prosecution agencies, the employers and the courts have a responsibility in this regard. The legislature has gone the whole length by providing that disqualification will result from a conviction of the child under the Juvenile Justice Act 1986 as well as the Juvenile Justice Act, 2015.

118. Salient features of the Juvenile Justice Act, 1986 protect the child not only from the rigor of the criminal prosecution but also from the consequences of conviction under the said Act.

119. As we have seen earlier that the Juvenile Justice Act, 1986 also provides for non disclosure of details of the child who faced prosecution and restricts access to the records relating to such prosecution. Destruction of records of prosecution faced by the child is another provision reflecting a clear intent of the Legislature.

120. Section 25 of the Juvenile Justice Act, 1986 quoted earlier, protects the child from the consequences accruing from the conviction under the Act and mandates that such conviction under the Act cannot operate as a disqualification against such child.

121**. If the conviction of a child under the Juvenile Justice Act, 1986 is not a disqualification for appointment, it stands to reason that prosecution of a child in a criminal case cannot operate as a disqualification too. The important logical corollary is that the criminal prosecution faced by an employee as a child cannot become the criteria for forming an opinion about criminal antecedents and suitability for appointment. It is an irrelevant consideration. The material considered and standards adopted to form an opinion about the antecedents and suitability of adults for appointment on public posts cannot be applied to children who had trouble with the law or to a candidate who faced criminal prosecution as a child."**

125. **The Constitutional rights of a child and statutory rights of a child guaranteed under the Juvenile Justice Act 1986 cannot be implemented in silos. Every agency of governance including State employers are under an obligation to implement the rights of a child guaranteed by the constitution and protected by the Juvenile Justice Act, 1986."** ***(emphasis supplied)***

37. The current case falls in the ambit of Juvenile Justice (Care and Protection of Children) Act, 2000, but the above said reasoning would fully apply here.

38. Finally in **Rajiv Kumar (supra)** the holdings were summed up as follows:

"157**.....The insistence of the State employer on a disclosure of criminal prosecution faced as a child reflected an impersonal attitude and a rote response to child rights. This is not an environment which fosters a healthy development of children and where rights of children flourish.**

158. The requirement posed by the respondents to the petitioner to make a declaration disclosing details of criminal prosecution faced by the latter,

insofar as it included the criminal prosecution faced by the petitioner as a minor child of 10 years was in violation of the fundamental rights of the petitioner guaranteed by Article 14 and 21 of the Constitution of India and in the teeth of Section 25 of the Juvenile Justice Act, 1986.

159. The details of past prosecution faced by the petitioner as a child was not a valid criteria nor a lawful consideration to judge his suitability for appointment. Such criteria was arbitrary and illegal.

160. The declaration made by the petitioner was not a relevant consideration in the appointment of the petitioner. Hence, even the falsity of the declaration made by the petitioner could not invalidate his appointment.

161. The petitioner in defence of his fundamental rights vested by Article 14 and 21 of the Constitution of India, could hold his silence or decline to disclose details of the prosecution in a criminal trial faced by him as a minor child of 10 years. Such action or declaration of the petitioner cannot be faulted with. The services of the petitioner cannot be terminated on the foot of such action or declaration."

(emphasis supplied)

39. A similar view was taken by a Division Bench of this Court ***in Shivam Maurya Vs. State of U.P. and others,*** reported at ***2020 (5) ADJ 5:***

"14. The said Act is a beneficial legislation. The principles of such beneficial legislation are to be applied only for the purpose of interpretation of this statute. The concealment of the pendency of criminal case against the appellant-petitioner was of no consequence. As per the requirement of law a conviction in an offence will not be treated as a disqualification for a juvenile. The records of the case pertaining to his involvement in a criminal matter are to be obliterated after a specified period of time. The intention of the legislature is clear that in so far as juveniles are concerned their criminal records is not to stand in their way in their lives. The cancellation of the candidature of the appellant-petitioner was thus bad. The authority concerned failed to appreciate the fact that the appellant-petitioner was entitled to benefit of the provisions of Act of 2000. The cancellation of the candidature of the petitioner goes contrary to the object sought to be achieved by the Act of 2000. Section 19 of the Act of 2000 protects a juvenile and any stigma attached to his conviction is also removed. The Act of 2000 does not envisage incarceration of a juvenile which clearly shows that the intention and object was not to shut the doors of a disciplined and decent civilised life. It provides him an opportunity to mend his life for the future.

15. We thus hold that the authority concerned fell in complete error in not extending the benefit of Act of 2000 to the appellant-petitioner particularly when there are specific provisions provided therein to take care of a juvenile being implicated, tried and / or convicted in a criminal matter. We thus extend the benefit provided under Section 19 of the Act of 2000 to the appellant-petitioner."

40. While construing the provisions of Section 19 of the Juvenile Justice (Care

and Protection of Children) Act, 2000, insofar as they remove any disqualification attaching to a conviction under the said Act, the Division Bench of the Calcutta High Court in the case of ***Sahadeb Ghosh Vs. State of West Bengal5*** held thus:

"Section 19 of the said Act of 2000 clearly says that, notwithstanding anything contained in any other law, a juvenile, who, has committed an offence and has been dealt with under the provisions of the said Act of 2000, shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

Therefore, if conviction does not become a bar and/or disqualification, it is unacceptable that pendency of a proceeding against a juvenile can be a bar.

A benefit sought to be given by the legislature under section 19 of the said Act of 2000 cannot be obliterated. Logical corollary of the said provision is that even if a juvenile is convicted, such conviction would not act as disqualification. Even, under sub-section (2) of section 19 of the said Act of 2000 records of such conviction are to be removed after the period of expiry of appeal or alter a reasonable period as prescribed under the rules.

We are of the opinion that inactions on the part of the authorities are against the provisions of the said Act of 2000. It goes contrary to the object sought to be achieved by the said Act of 2000. Section 19 of the said Act of 2000 protects a juvenile and any stigma attached to his conviction is, also, removed. The approach should be to condone minor indiscretions made by young people than to brand them as criminal for the rest of his life. The said Act of 2000 does not envisage incarceration of a juvenile nor wants to shut on him the doors of a decent and disciplined civilised life. On the contrary, it opens for him such a vista by providing him an occasion to amend and regulate his delinquency. The Courts are not to thwart such a course for him by either caprice, bias or any impractical or unimaginable reason.

We hold that benefits sought to be given to a convicted person under section 19 of the said Act of 2000 read with the said Rules of 2007 shall equally apply to a person against whom a case is pending before the Juvenile Justice Board. Thus, the authorities cannot refuse to give appointment to the writ petitioner on the sole ground of pendency of a criminal case before the said Board.

We are unable to accept the contention of Mr. Majumdar that this Court in exercise of the power of judicial review is unnecessarily interfering with the managerial functions of the State by extending the benefits of section 19 of the said Act of 2000 to the writ petitioner. We are simply extending the benefits provided under section 19 of the said Act of 2000 as provided by the legislatures in their wisdom.

We, therefore, set aside the order of the tribunal and direct the authorities to complete the police verification of the petitioner irrespective of pendency of his case before the Juvenile Justice Board and to consider his case for appointment for the post of constable of police on the basis of such report, keeping in mind the intention of the legislature as enshrined in section 19 of the said Act of 2000."

41. The said judgements rendered by this Court and Calcutta High Court in

Rajeev Kumar (supra), Shivam Maurya (supra) and ***Sahadeb Ghosh (supra)*** respectively were also followed in ***Kishan Paswan Vs. Union of India and others6***. The holdings of the Courts are consistent in successive cases in point.

42. From the preceding legal narrative, the following position of law emerges:

I. Juveniles and adults form separate classes. Criminal prosecution of an adult is a lawful basis for determination of suitability of a candidate for appointment to public office. However prosecution of juveniles is in a separate class. Using criminal prosecution faced by a candidate as a juvenile to form an opinion about his suitability for appointment, is arbitrary illegal and violative of Article 14 of the Constitution of India.

II. The requirement to disclose details of criminal prosecutions faced as a juvenile is violative of the right to privacy and the right to reputation of a child guaranteed under Article 21 of the Constitution of India. It also denudes the child of the protection assured by the Juvenile Justice Act, 2000 (as amended from time to time). Hence the employer cannot ask any candidate to disclose details of criminal prosecution faced as a juvenile.

III. The candidate can hold his silence or decline to give information about the criminal prosecution faced as a juvenile. Denial of such information by the candidate will not amount to a false declaration or a willful suppression of facts.

IV. The conviction by a Juvenile Justice Board under the Juvenile Justice Act, 2000 of a juvenile is not a disqualification for employment. As a sequitor prosecution faced as a juvenile is not a relevant fact for forming an opinion about the criminal antecedents and suitability of the candidate for appointment. Such prosecution cannot be made a basis for denial of appointment. Non disclosure of irrelevant facts is not "deliberate" or willful concealment of material facts. Hence non-disclosure of such criminal cases cannot invalidate the appointment of the said person.

V. Clarification:

These holdings shall not apply to cases beyond the ambit of Juvenile Justice Act, 2000 (as amended from time to time) and also in cases of heinous crimes committed by persons in the age group of 16 to 18 years.

43. The undisputed facts narrated in the preceding part of the discussion establish the fact that the petitioner was a juvenile within the meaning of the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended from time to time), on the date of the commission of the alleged offence. He is entitled to the protection of th said Act considering the nature of the offence he was prosecuted for. Merely because the petitioner did not raise the plea of juvenility before the learned trial court, does not denude him of the protection conferred upon him by law. The offence in issue is not a heinous crime. Further the impugned order is vitiated by its failure to consider the unimpeached report of the police authorities that the petitioner enjoys a good social reputation.

44. The questions posed earlier are answered in terms of the preceding holdings.

A. Prosecution and imposition of penalty upon the petitioner by the Lok Adalat in the judgment dated 05.11.2019, rendered in Case Crime No. 104/2011, under Sections 3/4 of U.P. Public Examinations (Prevention of Unfair Means) Act, 1998, cannot be the basis of denial of appointment to the petitioner. The said proceedings are not relevant criteria for purposes of appointment of the petitioner. I find that the respondents authorities have acted in a manner contrary to law by requiring the petitioner to disclose criminal prosecution faced by him as a juvenile.

45. The competent authority had misdirected itself in law by finding the petitioner unsuitable for appointment and him appointment on the post of Constable in PAC.

46. The impugned order dated 03.09.2020 is arbitrary and illegal. The order dated 03.09.2020 passed by the respondent No.3-Commandant, 43 Battalion, Provincial Armed Constabulary (PAC), District Etah, is liable to be set aside and is set aside.

47. A writ in the nature of mandamus is issued commanding the respondents to execute the following directions:

i. The appointment of the petitioner shall be processed in light of the observations made in this judgment.

ii. The appointment letter shall be issued to him in accordance with law.

iii. The petitioner shall be given the seniority, he would have been entitled to but for cancellation of his candidature by the impugned order.

48. The writ petition is allowed.

(2021)05ILR A154
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ -A No. 11964 of 2018

Mohan Swaroop & Anr. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Pankaj Srivastava

Counsel for the Respondents:
C.S.C.

A. Service law – Class IV employee – Initial engagement on daily wage – Minimum pay-scale – Payment as per 7th Pay Commission Report – Entitlement – Break in service and Non-working for certain periods – Effect – During the last about 28 years the petitioners had worked for about 20 years and the dispute was only about 7-8 years – Continuous working for the last more than 10 years was almost undisputed – No charge of petitioner's appointment having been made on the basis of forged and fabricated documents – Held, factual issues in this regard may have had some relevance for the purposes of passing orders of regularization, but it would not be a relevant consideration for withdrawal of minimum of pay scale already granted for the last several years – No error apparent of face on the record was found to review the impugned judgment directing the State to pay minimum pay-scale as per 7th Pay Commission Report. (Para 15, 18 and 29)

B. Civil Procedure Code – O XLVII R 1 – Review petition – Scope – Review cannot

be an appeal in disguise – It has to be confined to errors apparent on the face of the record – Principle laid down in Kamlesh Verma's case followed. (Para 28)

Review Petition dismissed. (E-1)

Cases relied on :-

1. St. of U.P. Vs Putti Lal, reported in 2002 (2) UPLBEC 1595: 2006 (9) SCC 337

2. Civil Appeal No.10956 of 2018; Sabha Shanker Dube Vs Divisional Forest Officer & ors.), decided by Supreme Court on 14.11.2018

3. St.of Punj. & ors. Vs Jagjit Singh & ors.; (2017) 1 SCC 148

4. Kamlesh Verma Vs Mayawati & ors.; (2013) 8 SCC 320

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Review has been sought by the respondent State of Uttar Pradesh and its officials of the judgment and order dated 17.11.2018, passed by this Court in Writ Petition No.11964 of 2018 and in two other connected cases, relying upon an order passed by the Hon'ble Supreme Court of India in Special Leave Petition (Civil) Diary No(s). 35935/2019, dated 8.1.2020. The order of Supreme Court dated 8.1.2020 is reproduced hereinafter:-

"By referring to the affidavit filed on behalf of the State, the learned Solicitor General submits that the initial engagement of the petitioners in the said writ petition was obtained on the basis of fabricated documents. The Government did not get an opportunity to file counter affidavit in the other writ petitions which were disposed of in terms of the judgment dated 14.11.2018 of this Court passed in Sabba Shanker Dubey versus Divisional Forest Officer (Civil Appeal No.10956 of 2018 etc.).

He submits that the point pertaining to the initial engagement/entitlement of the Respondents being improper has not been considered by the High Court. He seeks leave to withdraw these Special Leave Petitions with liberty to approach the High Court by filing review petitions.

Permission is granted.

The Special Leave Petitions are dismissed as withdrawn with the aforesaid liberty.

We are informed that a contempt has been filed by the Respondents. Contempt proceedings shall not be taken up till the review petitions are decided by the High Court."

2. It is after expiry of 11 months of the aforesaid order of the Hon'ble Supreme Court of India that the review application alongwith application for condonation of delay has been filed on 20th November, 2020. The delay condonation application has been allowed by a separate order of the date, passed on the delay condonation application.

3. A counter affidavit alongwith misc. applications have been filed by the writ petitioners opposing the prayer made by State in the review petition. The writ petitioners contend that filing of the review application is actually a fraud played on the Court and various submissions are made to substantiate such plea. The review petition has been heard and the records have been

minutely scrutinized so as to maintain sanctity of the Court proceedings.

4. I have heard Sri Arimardan Singh Rajput and Ms. Monika Arya, learned Additional Chief Standing Counsels for the State and its authorities, and Sri Pankaj Srivastava for the writ petitioners.

5. In order to appreciate the rival contentions advanced by the parties, it would be necessary to notice essential facts in light of which the present petition came to be decided earlier and for appreciating the arguments raised in review matter.

6. Writ Petition No.11964 of 2018 came to be filed by Mohan Swaroop (writ petitioner no.1) and Jwala Prasad (writ petitioner no.2), seeking following reliefs:-

"(i) issue a writ, order or direction in the nature of Certiorari quashing the impugned orders dated 08.03.2018, 27.03.2018 and 02.04.2018 passed by the respondent nos.1, 2 and 3 respectively (Annexure Nos.18, 19 & 20 to this writ petition);

(ii) issue a writ, order or direction in the nature of Mandamus directing the respondents to continue to pay Rs.18,000/- as minimum of pay scale to the petitioner which they were getting prior to the aforementioned impugned orders during the pendency of the present writ petition;

(iii) issue any other or further writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case; &

(iv) award costs of the writ petition in favour of the petitioners."

7. A counter affidavit was filed by the Principal Chief Conservator of Forest on 19.7.2018 in the writ petition, running into 166 pages, followed with a supplementary counter affidavit filed by the Principal Chief Conservator of Forest on 16.8.2018. The matter was heard and this Court found as a fact that both petitioners were working since 1991 and were already granted minimum of pay scale admissible to a Class-IV employee in view of the orders passed by the Supreme Court in the case of State of U.P. Vs. Putti Lal, reported in 2002 (2) UPLBEC 1595. Both the petitioners were receiving minimum of pay as per Vth, VIth and VIIth pay commission report and it was only vide orders impugned that minimum pay as per VIIth pay commission report (Rs.18,000/- without any emoluments) was withdrawn and the petitioners were restored minimum of VIth pay commission report (Rs.7,000/- without any emoluments). Facts, as were brought on record of writ petition and the counter and supplementary counter affidavits were taken note of and a further opportunity was given to the State and its authorities to examine their stand in the matter. The Additional Chief Secretary of the Forest Department was called upon to clarify as to how the benefit of minimum of pay scale previously granted in light of the orders of Supreme Court in the case of Putti Lal (supra) could be unilaterally withdrawn and why the direction of the Supreme Court be not enforced? The order passed by this Court on 16.8.2018 contains necessary facts of the case and also prima facie observations of the Court, and therefore, is extracted hereinafter in its entirety:-

"This petition, along with connected writ petitions, have been filed by the petitioners, who claim to be working in the Forest Department of the State since

prior to 29.06.1991, and therefore, they have rendered more than 28 years of service to the Forest Department of the State. They allege that they are discharging work which is specifically assigned to them in the respective Forest Divisions by the competent authorities. According to the petitioners, specific orders of posting are passed for them and charge is also delivered to them of the work allotted to them and except for denial of designation, they are performing work at par with other employees of the Forest Department who have been regularized.

They complaint that the State has been rather unfair in dealing with their plight; in as much as, even after having worked for nearly three decades, they are yet to be regularized and even minimum of pay scale, which was being granted to them for the last many years, has been arbitrarily withdrawn. Petitioners have asserted, in paragraph 14 of the writ petition, that pursuant to the orders passed by the Hon'ble Supreme Court on 21.02.2002 in State of U.P. Vs. Putti Lal reported in 2002 (2) UPLBEC 1595, they were allowed to draw minimum of pay scale, except allowances, etc. which was, otherwise, admissible to their counterparts in the Government. The direction of the Hon'ble Supreme Court in Putti Lal (supra), as is contained in paragraph no. 5, is relied upon, and is reproduced hereinafter:-

"5. In several cases, this Court, applying the principle of equal pay for equal work has held that a daily-wager, if he is discharging the similar duties as those in the regular employment of the Government, should at least be entitled to receive the minimum of the pay-scale though he might not be entitled to any increment or any other allowance that is permissible to his counterpart in the Government. In our opinion, that would be the correct position and we, therefore, direct that these daily-wagers would be entitled to draw at the minimum of the pay-scale being received by their counter-part in the Government and would not be entitled to any other allowances or increment so long as they continue as daily-wager. The question of their regular absorption will obviously be dealt with in accordance with the statutory rule already referred to."

Petitioners contend, in paragraph no. 14 of the writ petition, that they were paid minimum of pay scale on month-to-month basis as per the reports of the Pay Commission enforced from time to time. According to the petitioners, they were initially allowed pay scale of Rs. 2,550/- per month as per the 5th Pay Commission report from 2002 to 2009; whereafter, minimum of pay scale, admissible as per the 6th Pay Commission report, was extended to them from 11th March, 2010 to December, 2016. The minimum of pay scale for a Class - D employee was Rs. 7,000/- per month. After the 7th Pay Commission report has been enforced in the State vide Government Order dated 22.12.2016, these petitioners were paid minimum of pay scale admissible to a Class - D employee @ Rs. 18,000/- per month from March, 2017 onwards. Specific averment, made in that regard in paragraph 14 of the writ petition, has not been controverted in paragraph no. 26 of the counter affidavit. What is stated in reply is that reports of the Pay Commission are meant only for full time government servants and have nothing to do with the daily wagers. It is also stated that the status

and work of the petitioners are akin to seasonal labourers, who are engaged for few months only in a year without completing 240 days in the said year. The fact, however, that petitioners were receiving minimum of pay scale as per 5th, 6th & 7th Pay Commission reports, since long is not denied. Along with the writ petition, petitioners have annexed passbooks of their Bank Accounts in Bank of Baroda, as per which they had been receiving salary in their accounts from U.P. Treasury @ Rs. 18,000/- per month. Petitioners have also annexed the orders, as per which specific work was allotted to them.

A supplementary affidavit has been filed, in which an order dated 15.11.2015 of the Regional Forest Officer, Mahof Forest Range, Pillibhit Forest Division, Pillibhit has been annexed, which shows that petitioner no. 1 is described as 'Equal Pay Worker' and has been assigned work in Tharu Hut number 1 and 2. Similar orders have been annexed to show that specific work has been allotted to other petitioners. The pay bills of certain persons from other divisions (who are not petitioners), who are claimed to be similarly placed, have been annexed, in which their gross pay is shown at Rs. 18,000/-. According to the petitioners, their claim for regularization is yet to be considered in terms of the directions issued in Putti Lal (supra), as also the Rules framed for regularization and that, protection of payment at minimum of pay scale admissible to a Class - IV employee is the only protection which has been extended over the years by the State. Their grievance is that even this bare protection has been withdrawn on an erroneous assumption.

Learned counsel for the petitioners submits that a letter appears to have been sent by the Principal Chief Conservator of Forest on 15.06.2017, which mentions about grant of minimum of pay scale to such persons in the past. The letter of 15.06.2017 has been relied upon in order to contend that respondents, themselves, have admitted that petitioners were being paid at minimum of pay scale, which was admissible to a Class - C or Class - D employee. The first paragraph of the letter of the Principal Chief Conservator of Forest dated 15.06.2017 reads as under:-

विभाग में कार्यरत समूह 'ग' के दैनिक वेतन भागी कार्मिकों की छठे वेतन आयोग की संस्तुतियो के सादृष्य न्यूनतम वेतन की स्वीकृति से सम्बन्धित शासनादेश 830/चौदह–3–10–300(12)/09 दिनांक 25–05–2010 एवं समूह ''घ'' के दैनिक वेतन भोगी कार्मिकों को छठे वेतन आयोग की संस्तुतियों के सादृष्य न्यूनतम वेतन की स्वीकृति से सम्बन्धित शासनादेश संख्या 830(1)/चौदह–3–10–300 (12)/09, दिनांक 25–05–2010 के द्वारा मा0 सर्वोच्च न्यायालय में दायर वाद सिविल अपील संख्या 3634 पुत्ती लाल बनाम उ0प्र0 सरकार एवं अन्य में पारित निर्णय दिनांक 21–02–2002 तथा शासनादेश संख्या रिट –361/चौदह–3–499(823) /96 , दिनांक 03–05–2002 के अनुपालन में समूह 'ग' का न्यूनतम वेतनमान रू0' 7730/– तथा समूह 'घ' का न्यूनतम वेतनमान रू0– 7000/– भुगतान किया जा रहा है।

It appears that the Principal Chief Conservator of Forest sought a clarification from the State Government as to whether the benefit of minimum of pay scale, which now stands enhanced in view of 7th Pay Commission report, is to be extended to these persons or not?

Learned counsel for the petitioners states that the letter of 15.06.2017 incorrectly describes the status of the petitioners as daily wagers; in as much as, the petitioners, admittedly, were being paid @ of minimum of pay scale, and

were being described as 'Equal Pay Worker' in all communications and therefore, use of expression for them as 'daily wager' was with an ulterior intent. This letter of the Principal Chief Conservator of Forest, which was followed with subsequent letters, has been replied by the Government on 08.03.2018, stating that benefit of Government Order dated 22.12.2016, whereby, 7th Pay Commission report has been enforced, would be applicable only for regular employees and not upon daily wagers. This Government Order is, therefore, challenged in this petition.

Learned counsel for the petitioners refers to the order of the Hon'ble Supreme Court in Putti Lal (supra) as well as the subsequent order of the Apex Court in Deputy Director, Social Forestry Division and Another Vs. Lakshmi Chandra, passed in Civil Appeal Nos. 879-883 of 2016, decided on 02.02.2016, which arose out of the contempt proceedings drawn pursuant to the orders passed in Putti Lal (supra). Paragraph nos. 5 to 8 of the aforesaid judgment, read as under:-

"5. It is seen from the records of the contempt petition that the Principal Chief Conservator of Forests of the State had filed an affidavit before the High Court to the effect that necessary instructions had been issued to all the officers concerned to implement the directions referred to above with regard to payment of minimum of the payscale to the daily wagers.

6. We direct the Principal Secretary to the Department of Forests, U.P. and the Principal Chief Conservator of Forests, U.P. to file separate affidavits before the High Court on the implementation of the orders referred to above. In case, the workmen have not been paid the amounts as per the orders, they shall see that wages are paid in terms of the orders within a period of one month from today and the affidavit in that regard shall be filed before the High Court within two weeks thereafter.

7. In case, the orders are not implemented, the Principal Secretary to the Department of Forests and the Principal Chief Conservator of Forests shall not be eligible to draw their salaries from the month of April, 2016, without permission from the High Court.

8. Subject to the above directions, these civil appeals are disposed of with no orders as to costs. Pending interlocutory applications, if any, are disposed of." Petitioners, then, contend that the Apex Court, in a recent judgment in State of Punjab Vs. Jagjit Singh and Others reported in AIR 2016 SC 5176, has been pleased to reiterate the principles, which are in consonance with the directions issued in Putti Lal (supra). Submission is that once the petitioners were being paid salary @ of minimum of pay scale for years together, as per the pay scale fixed from time to time by the State Government, which included payment at minimum of pay scale as per 7th Pay Commission report, it would be wholly arbitrary and unjust for the respondents to withdraw such benefit from the petitioners pursuant to the impugned Government Orders; in as much as, it would clearly be an act in teeth of the orders of the Hon'ble Supreme Court and would be contemptuous in nature.

Shri Abhishek Srivastava, learned Additional Chief Standing Counsel for the State - respondents, has vehemently urged

that the action of the State under challenge is strictly in accordance with law and has cited a large number of judgments, including the Division Bench judgment of this Court in Special Appeal No. 1530 of 2007 (State of U.P. and Others Vs. Chhiddi and Another) decided on 24.09.2015. Reliance is also placed upon the judgment of the Hon'ble Supreme Court in Government of West Bengal Vs. Tarun K. Roy and Others, passed in Appeal (Civil) 3527 of 1998 decided on 18.11.2003, to contend that unless a person is regularly appointed to a post, he would not be entitled to minimum of pay scale. Reliance is also placed upon a judgment of the Apex Court in State of Punjab Vs. Surjit Singh and Others reported in 2009 (9) SCC 514. Learned counsel submits that benefit of minimum of pay scale, if was being extended to the petitioners, the same was under threat of contempt and was not warranted in view of the law laid down by the Apex Court, as has been referred to in the aforesaid judgments.

From what has been contended before this Court, on the basis of material placed on record, this Court, prima facie, finds the following facts to exist on records:-

(i) petitioners were engaged from 1990-91 onwards and this engagement, with few break, has been continued for different periods. However, their uninterrupted continuous working for the last more than 10 years is virtually unquestioned;

(ii) specific orders have been passed sanctioning minimum of pay scale to the petitioners. To substantiate such plea, petitioners have annexed an order dated 19.10.2013 passed in favour of the petitioner no. 1, as per which he has been placed in minimum of pay scale @ Rs. 7,000/- per month from the month of October, 2013. This order reads as under:-

''इस वन प्रभाग की बराही रेंज में कार्यरत दैनिक श्रमिक श्री मोहन स्वरूप पुत्र श्री रूपलाल निवासी ग्राम भिलैय्या गांवखेड़ा जिला पीलीभीत जोकि वर्ष 1991 से दैनिक वेतन पर कार्यरत रहे, को आज दिनांक 15.10.2013 को आयोजित चयन समिति की सुस्तुति के आधार पर न्यूनतम वेतन रू0 7000/– प्रतिमाह कार्य पर उपस्थित होने के दिनांक से स्वीकृत किया जाता है कि इनकी तैनाती इस वन प्रभाग की बराही रेंज में जनहित में की जाती है। इस तैनाती हेतु इन्हें कोई यात्रा भत्ता देय नहीं होगा।''

(iii) records further reveal that petitioners have been assigned specific work pursuant to the specific orders passed by the competent authority from time to time;

(iv) minutes of meeting dated 15.10.2013 have also been brought on record by the respondents, which acknowledge that the petitioners are working since long, but it is not possible to regularize their services as of now. However, recommendation has been made to grant them minimum of pay scale in light of orders passed in different courts proceedings, and also by the concerned authorities of the Forest Department. The working of petitioners since long as well as payment of minimum of pay scale to them is, therefore, not in issue; and

(v) records also reveal that after 7th Pay Commission report was introduced, the minimum of pay scale was released to the petitioners and such benefit was granted to the petitioners from the month of March, 2017 onwards and got discontinued in March, 2018. According to the respondents, this benefit has been withdrawn because there was no approval of the State.

From the facts, noticed above, this Court finds that petitioners are continuing for the last several years/decades and the respondents, themselves, have granted benefit of payment to them at minimum of pay scale, although without any allowances. This arrangement, apparently, was followed by the respondents in view of the specific directions issued by the Hon'ble Supreme Court in Putti Lal (supra) and has been reiterated under the orders of the Hon'ble Supreme Court dated 02.02.2016 in Deputy Director, Social Forestry Division and Another Vs. Lakshmi Chandra (passed in Civil Appeal Nos. 879-883 of 2016, decided on 02.02.2016).

Once the entitlement of the petitioners, to be paid minimum of pay scale admissible to a Class - IV employee, has been acknowledged by the respondents, it would be difficult to accept the contention of the respondents that minimum of pay scale, which is applicable now, would not be extended to them (the petitioners). What is relevant is the minimum of pay scale and not the Pay Commission reports; in as much as, Pay Commission reports are enforced for different periods depending upon the price index, etc. It is not in dispute that 7th Pay Commission report has been enforced in the State. The minimum of pay scale, as on date, would be the minimum of pay scale which is admissible to other similarly placed employees of the State carving out distinction for persons who are receiving salary in the minimum of pay scale, so as to deny them minimum of pay scale admissible to a similarly placed Government servant as on date, only on the ground that they are treated as daily wager, would be wholly irrational and violate Article 14 of the Constitution of India, apart from being violative of the directions issued by the Apex Court.

Prima facie, the State would not be justified in denying minimum of pay scale to the petitioners at par with other similarly placed Government employee (except allowances, etc.) only because there is no specific order granting minimum of pay scale to the daily wagers. The denial of minimum of wages on the strength of Government Order dated 08.03.2018 is also found to be unsustainable in law. This interpretation, on part of the respondents, appears to be inconsistent with and in teeth of the directions issued by the Apex Court from time to time. Although learned Additional Chief Standing Counsel has referred to various orders passed by the Apex Court, but those judgments, apparently, will have no applicability in the facts of the present case; in as much as, a specific direction of the Hon'ble Supreme Court, with regard to employees of Forest Department (which has already been implemented by them), would continue to be applicable upon them, particularly, when the latest order of the Hon'ble Supreme Court, inter se, parties arising out of the same contempt proceedings, reiterates the direction issued by the Apex Court in Putti Lal (supra).

In view of the above, it would be appropriate to extend one more opportunity to the respondents to examine their stand and to call upon the Additional Chief Secretary, Forest Department of the State of U.P. to clarify as to how the benefit of minimum of pay

scale, which has been extended to these persons under the orders of the Apex Court, referred to above, could be withdrawn unilaterally by the State pursuant to the Government Orders impugned? The Officer shall also explain as to why the direction of Apex Court dated 02.02.2016 to deny salary to him and the Principal Chief Conservator of Forest be not enforced?

The Officer concerned, before filing his reply, is expected to be conscious of the fact that the direction issued by the Hon'ble Supreme Court is, otherwise, binding upon all the authorities by virtue of Article 141 of the Constitution of India.

Let the required affidavit be filed by 31st of August, 2018. Put up this case, in the additional cause list, on 31.08.2018. " (Emphasis supplied)

8. The matter was adjourned again on 31.8.2018 requiring the authorities to file their affidavit, after examining their own records in light of the previous observations made in the matter. The order dated 31.8.2018 reads as under:-

"Supplementary affidavit filed today is taken on record.

Pursuant to the order passed on 16.8.2018, matter is listed today. Learned Standing Counsel has made a request to defer the hearing as various materials are being collected in the process.

Supplementary affidavit has been filed on behalf of the petitioner stating that the Principal Chief Conservator of Forest is proceeding to harass and victimize all those who have complied with the orders of the Hon'ble Supreme Court.

Learned counsel for the petitioners submits that officers are in contempt and appropriate proceedings be drawn against them.

In view of the fact that the matter is being deferred on request of the learned Standing Counsel, this Court need not make any observations on the oral prayer of the petitioners, at this stage.

Let this matter be listed in the additional cause list on 13.9.2018 at 2.00 PM. Required affidavits shall be filed, in terms of the previous order, by the Additional Chief Secretary and the Principal Chief Conservator of Forest, by the next date fixed, failing which both the officers shall remain personally present before the Court alongwith records.

It shall be open for the learned Standing Counsel to obtain instructions with regard to averments made in the supplementary affidavit filed today."

9. The respondents in their counter affidavit primarily urged that petitioners have not worked continuously since 1991, as was alleged in the writ petition, and that there were breaks in their working from time to time. A plea was also taken that benefit of minimum of pay scale was allowed previously in the year 2013 in ignorance of correct facts about petitioners' continuous working since 1991.

10. The petitioners filed a rejoinder affidavit denying the allegations made in the counter affidavit and prayed for initiating perjury against the officials of the Forest Department. It was also contended that respondents have filed false affidavit about petitioners' working not being continuous since 1991 and that the stand of

respondents was contrary to their own record.

11. The above accusation of petitioners led to filing of a supplementary counter affidavit by Principal Secretary, Forest, State of U.P., on 12.9.2018, running into 88 pages. A supplementary counter affidavit was also filed by the Principal Chief Conservator of Forest on 10.9.2018, running into 113 pages. The Sub-Divisional Officer also filed a short counter affidavit on 11.9.2018. An application thereafter was filed by the Principal Chief Conservator of Forest on 25.9.2018 to withdraw his previous affidavit to which an objection was also filed by the petitioners. Third supplementary counter affidavit was thereafter filed by the Principal Chief Conservator of Forest on 29.9.2018, which was followed with yet another counter affidavit filed by Principal Chief Conservator of Forest on 3.10.2018. These affidavits formed part of the record of writ petition.

12. The matter remained pending and in between the roster changed. An order came to be passed by the Hon'ble Chief Justice on 1.10.2018 nominating this Court to hear the present petition alongwith connected matters. On 3.10.2018, the matter was heard again at length and following orders were passed:-

"1. This matter has been placed today pursuant to an order of nomination passed by Hon'ble The Chief Justice on 1st October, 2018.

2. A detailed order had been passed on 16.8.2018, requiring the respondents to file an affidavit in light of the observations made therein. Matter was thereafter adjourned on different occasions and following orders were passed on 25.9.2018:-

"This matter is listed today pursuant to an order passed on 20th of September, 2018.

An application has been filed for permitting the learned Standing Counsel to withdraw the supplementary counter affidavit filed by the respondents on 10th of September, 2018. This application is supported by the affidavit of Principal Chief Conservator of Forest, wherein it is stated that some of the paragraphs were not properly worded and for which the deponent tenders an unconditional apology.

Shri Pankaj Srivastava, learned counsel appearing for the petitioners strongly contests the application and contends that materials have been brought on record, which would constitute an act of ex-facie contempt, and therefore, the respondents ought not to be allowed to withdraw their affidavit.

Shri Abhishek Srivastava, learned Additional Chief Standing Counsel submits that an affidavit in reply to the writ petition and the observations made by this Court in the order dated 16.8.2018 would be served upon the petitioners by Monday i.e. 1st of October, 2018.

Application for withdrawal would be considered on the next date fixed in the matter i.e. 3rd of October, 2018. Petitioners would be at liberty to file a reply to the affidavits of respondents by then.

List this case in the additional cause list on 3rd of October, 2018.

The Principal Chief Conservator of Forest shall remain personally present before the Court along with the relevant records."

3. Pursuant to the aforesaid order, the Principal Chief Conservator of Forest is present before the Court. Sri Neeraj Tripathi, learned Additional Advocate General assisted by Sri Abhishek Srivastava appearing for the respondent State have been heard on an affidavit filed by the concerned respondent.

4. This Court on 16.8.2018 had recorded following prima facie findings:-

"(i) petitioners were engaged from 1990-91 onwards and this engagement, with few break, has been continued for different periods. However, their uninterrupted continuous working for the last more than 10 years is virtually unquestioned;

(ii) specific orders have been passed sanctioning minimum of pay scale to the petitioners. To substantiate such plea, petitioners have annexed an order dated 19.10.2013 passed in favour of the petitioner no. 1, as per which he has been placed in minimum of pay scale @ Rs. 7,000/- per month from the month of October, 2013. This order reads as under:-

''इस वन प्रभाग की बराही रेंज में कार्यरत दैनिक श्रमिक श्री मोहन स्वरूप पुत्र श्री रूपलाल निवासी ग्राम भिलैय्या गांवखेड़ा जिला पीलीभीत जोकि वर्ष 1991 से दैनिक वेतन पर कार्यरत रहे, को आज दिनांक 15.10.2013 को आयोजित चयन समिति की सुस्तुति के आधार पर न्यूनतम वेतन रू0 7000/– प्रतिमाह कार्य पर उपस्थित होने के दिनांक से स्वीकृत किया जाता है कि इनकी तैनाती इस वन प्रभाग की बराही रेंज में जनहित में की जाती है। इस तैनाती हेतु इन्हें कोई यात्रा भत्ता देय नहीं होगा।''

(iii) records further reveal that petitioners have been assigned specific work pursuant to the specific orders passed by the competent authority from time to time;

(iv) minutes of meeting dated 15.10.2013 have also been brought on record by the respondents, which acknowledge that the petitioners are working since long, but it is not possible to regularize their services as of now. However, recommendation has been made to grant them minimum of pay scale in light of orders passed in different courts proceedings, and also by the concerned authorities of the Forest Department. The working of petitioners since long as well as payment of minimum of pay scale to them is, therefore, not in issue; and

(v) records also reveal that after 7th Pay Commission report was introduced, the minimum of pay scale was released to the petitioners and such benefit was granted to the petitioners from the month of March, 2017 onwards and got discontinued in March, 2018. According to the respondents, this benefit has been withdrawn because there was no approval of the State."

5. In the supplementary counter affidavit filed today by the Principal Chief Conservator of Forest, the prima facie findings contained in the order dated 16.8.2018 are sought to be challenged by contending that benefits were wrongly granted to the petitioners earlier, and that officers who had extended benefits to the petitioners are being proceeded with departmentally. Attention of the Court has been invited to para 18 of the supplementary counter affidavit, which reads as under:-

"18. That the Department had also proceeded to take action against the erring officials, who were instrumental in granting minimum pay to the petitioners in year 2013. It is worth mentioning that the petitioner no.1, who was working in another Forest Division of Pilibhit Forest area has been granted minimum pay by the other Division and not the Divisional Forest Officer under whom he has worked. Similarly it is also surprising that the document, which has been considered by Selection Committee at the time of granting minimum of the pay scale to petitioner nos.1 and 2 in the year 2013, the committee was not having the work details of the petitioner no.1 after 2010 and the petitioner no.2 after 2006 and on account of all these facts the Department has proceeded against the erring officials, who have improperly granted minimum pay to the petitioners without examining their record thoroughly and in teeth of rule-8 of the Regularization Rules, 2001."

6. In para 17, the officer admits that certain duties were allotted to petitioners and that orders might have been issued by the then Divisional Forest Officer, at local level. It is then stated that notwithstanding such records the nature of engagement of petitioners remain that of a daily wager. Para-17 of the supplementary counter affidavit is also reproduced hereinafter:-

"17. That the petitioners in their Supplementary Affidavit have only annexed two documents pertaining to them as all other documents have no relation with them. One such document is letter dated 15.11.2015 annexed as annexure no.1 to the second supplementary affidavit dated 21.5.2018. It is stated that regarding some duties allotted to the petitioners, the orders might have been issued by the then Divisional Forest Officer alongwith the orders for other regular employees by the then Divisional Forest Officer at local level. The duties of the petitioners were of the nature of daily wagers only but instead of maintaining their muster roll, vouchers have been prepared for their payment because of accounting procedure for payment of minimum pay. It is to be made clear that no order has been issued from the Headquarter level of the U.P. Forest Department regarding assigning any specific duty of responsibility to any daily wager getting minimum of the pay scale."

7. Oral submission is advanced on behalf of respondents contending that there were different divisions in Pilibhit where petitioners were engaged and while petitioners were working in one division, some of the privileges have been granted by officers of other divisions. This oral submission, however, is not supported by any specific pleading in the supplementary counter affidavit. **The respondents have also placed reliance upon a chart contained in Annexure-3 to the supplementary counter affidavit to suggest that petitioners were not working on a regular basis. This chart, however, contains a remark column as per which the basis of such contention is the certificate or cashbook item. The officer swearing the affidavit has not owned any responsibility with regard to working of the petitioners, with reference to the records available in the office concerned. The assertions, on facts, are based upon only two records. Facts ought not to be pleaded with reference to selective records, when the respondents are in possession of entire**

records with them. It is not in dispute that petitioner no.1 has been working since 1991. Similar is the situation regarding other petitioners. The selection committee has already granted benefit of minimum of pay scale to petitioner in the year 2013 and the dispute appears to have been raised only when minimum of pay scale as per the VIIth Pay Commission Report was withdrawn under the impugned orders. It is at this stage that respondents have virtually started questioning all previous decisions extending privileges to the petitioners on the basis of records available. Such orders have otherwise not been withdrawn in any proceedings known to law. Although the Principal Chief Conservator of Forest was directed to remain present with records to assist the Court, but upon being asked to produce relevant records relating to petitioner no.1, as a test case, no records are available or produced. The arguments advanced on behalf of respondents are otherwise not found to be supported by reliable material.

8. In the facts and circumstances, before proceeding further, it would be appropriate to grant one further indulgence to respondent no.2 to verify their own records and to file a specific affidavit on factual aspects, which are being sought to be raised now. The concerned respondent would have the entire records examined for the relevant period upto granting of minimum of pay scale to petitioner no.1. The records of Nawabganj Range, Bareilly would also be examined for the period 1995 to 1997. Such records relating to petitioner no.1 would also be produced before the Court on the next date. It would be open for the Principal Chief Conservator of Forest to take assistance of the concerned Divisional Forest Officer for the purpose. The respondents shall also disclose as to under which provision of law prior approval is required to be obtained by the Divisional Forest Officer before granting any benefit to persons such as petitioners, particularly when the Divisional Forest Officer is the appointing authority for them. The records maintained in the office of Principal Secretary, Forest, and the Principal Chief Conservator of Forest relating to grant and withdrawal of minimum pay scale to petitioners would also be produced. The required affidavit shall be filed by the Principal Chief Conservator of Forest, by the next date fixed.

9. Put up this case on 12th October, 2018.

10. Personal appearance of the Principal Chief Conservator of Forest is dispensed with, unless directed otherwise by the Court. The Divisional Forest Officer, Pilibhit and Bareilly, however, shall remain personally present before the Court, on the next date fixed, alongwith records to assist the Court."

(Emphasis supplied by me)

13. The Principal Chief Conservator of Forest filed yet another supplementary counter affidavit on 11.10.2018, running into 210 pages. The Divisional Forest Officer, Pilibhit also filed an affidavit on 11.11.2018. It was in this backdrop that matter was fixed for hearing before the Court on 17.11.2018. It would also be relevant to note that much of the resistance to petitioners' claim was put forth by the respondents on the ground that previous orders of the Supreme Court were not final, and that the Apex Court was seized of the issue relating to entitlement of a daily wage

employee to receive minimum of pay scale. The previous judgment of the Supreme Court in the case of Putti Lal (supra) was questioned in light of certain later judgments of this Court and of the Supreme Court of India. When the matter was taken up on 17.11.2018 the Court was apprised that the Supreme Court in the case of Sabha Shanker Dube Vs. Divisional Forest Officer and others), Civil Appeal No.10956 of 2018, decided on 14.11.2018, has examined the entitlement of daily wagers working for decades to receive minimum of pay scale admissible to a Class-IV employee and delivered a detailed judgment recognizing right of persons such as petitioners, who were continuing on temporary basis for decades to receive minimum of pay scale. Previous judgments of the Supreme Court on the basis of which minimum of pay scale was sanctioned to the two petitioners was reiterated. Since the issue stood settled by the judgment of Supreme Court in the case of Sabha Shanker Dube (supra) no further arguments on the issue were advanced and this Court consequently proceeded to follow the judgment of Supreme Court in the case Sabha Shanker Dube (supra), as also the principles laid down by the Apex Court in the case of State of U.P. & Others Vs. Putti Lal, reported in 2002 (2) UPBLEC 1595 & 2006 (9) SCC 337, and State of Punjab and Others Vs. Jagjit Singh and Others, reported in 2017 (1) SCC 148. The Government Order dated 8th March, 2018 which was relied upon by the Principal Chief Conservator of Forest to withdraw minimum of pay scale as per the VIIth pay commission report was quashed and the respondents were commanded to restore minimum of pay scale to the petitioners. In connected petitions also the Government Order dated 8th March, 2018 as also the consequential directions were challenged and therefore, connected petitions are also disposed off on same terms.

14. The facts of the case had clearly been noticed in the order of the Court dated 16.8.2018, as per which petitioners were initially allowed minimum of pay scale as per the Vth pay commission report from 2002 to 2009; VIth pay commission report from 11th March, 2010 to December, 2016, and after VIIth pay commission report was enforced in the State vide Government Order dated 22.12.2016 the petitioners were paid minimum of pay scale admissible to a Group "D' employee from the month of March, 2017 onwards. They were also allotted specific work by different authorities. The payment of minimum of pay scale since 2002 onwards has been found to be in conformity with the directions issued by the Supreme Court on 21.2.2002 in State of U.P. and others Vs. Putti Lal (supra). Para 5 of the judgment in Putti Lal (supra) is reproduced hereinafter:-

"5. In several cases, this Court, applying the principle of equal pay for equal work has held that a daily-wager, if he is discharging the similar duties as those in the regular employment of the Government, should at least be entitled to receive the minimum of the pay-scale though he might not be entitled to any increment or any other allowance that is permissible to his counterpart in the Government. In our opinion, that would be the correct position and we, therefore, direct that these daily-wagers would be entitled to draw at the minimum of the pay-scale being received by their counter-part in the Government and would not be entitled to any other allowances or

increment so long as they continue as daily-wager. The question of their regular absorption will obviously be dealt with in accordance with the statutory rule already referred to." (Emphasis supplied)

This direction has been reiterated in Civil Appeal No.879-883 of 2016, arising out of contempt proceedings.

15. At this stage, it would be worth noticing that factual issues that were raised by the authorities before the Court were confined to the aspect of continuous working of the writ petitioners since 1991 on the ground that there were breaks in their working from time to time. **The respondents, at no stage, had set up a plea of petitioners' appointment having been made on the basis of forged and fabricated documents. Attention of the Court, at no stage, was invited to any fraudulent document having led to petitioners' initial engagement in the forest department as Class-IV employees on daily wage basis in 1991.**

(emphasis supplied)

16. As a matter of fact the Additional Chief Secretary of the State filed a supplementary counter affidavit before this Court on 12.9.2018 in response to the order passed by this Court on 16.8.2018, in which the Additional Chief Secretary annexed the report of Selection Committee constituted by the Forest Department for regularizing services of daily wage employees. This report is signed by five responsible officers of the Forest Department, consisting of Regional Forest Officers and Divisional Forest Officer(s), in which petitioner nos.1 and 2 both were found entitled to regularization on the basis of their past working since 1991. Petitioners' working from 1991 was duly certified and the only objection taken was that during the last about 28 years petitioners have not worked for eight odd years, and that petitioners had also not worked continuously and their working contained breaks. The further stand of the State was that benefit of minimum of pay scale was not extended to petitioners on account of directions issued by the Supreme Court in Putti Lal (supra), and that such benefit was accorded to petitioners only on 19.10.2013. Para 4 of the supplementary counter affidavit of the Additional Chief Secretary is reproduced hereinafter:-

"4. That so far as direction of this Hon'ble Court regarding clarifying as to how the benefit of minimum of pay scale, which has been extended to these persons under the orders of the Apex Court in Putti Lal's case could be withdrawn unilaterally by the State pursuant to the Government Orders impugned is concerned, it is worth mentioning that the petitioners were never extended the benefit of minimum of the pay scale in pursuance of the judgment and order dated 21.02.2002 (Annexure no.2 to the writ petition). The facts related with providing minimum of the pay scale to the petitioners are as under:

The petitioner no.1 was accorded the benefit of minimum of the pay scale vide order dated 19.10.2013 (Annexure No.1 to the writ petition) on the basis of the recommendations of a Selection Committee constituted by the then Divisional Forest Officer, Pilibhit in its meeting held on 15-10-2013. This benefit was given to the petitioner no.1 and other 26 workers without any rationale. The Selection Committee had held that the workers whose cases were considered, had not been found eligible for regularization/minimum

of pay scale for want of continuity in their work in previous years. The Selection Committee held that the regularization of the 27 workers including petitioner no.1 who were under consideration was not possible but recommended sanctioning of minimum of pay scale to them on self-determined basis of their long experience. The work details of the petitioner no.1 as contained in the list annexed with minutes of meeting dated 15-10-2013 exhibit that he had worked just for two months in Nawabganj Range, Bareilly from 1995 to 1997 (on the basis of certificate) but the information given by Divisional Forest Officer, Bareilly Forest Division, Bareilly vide his office letter no. C-13/2-1 dated 13.07.2018 speaks that he had not worked at all in Nawabganj Range of Bareilly Forest Division, Bareilly from 1995 to 1997. In other subsequent years till the year 2009, the work of petitioner no.1 ranges from 03 months to 10 months. Hence, it is clear that in view of the eligibility criteria laid down in Regularization Rules, 2001, the petitioner no.1 was not eligible for regularization and consequently not for sanctioning minimum of the pay scale in light of the judgment and order dated 21-02-2002 passed by Hon'ble Supreme Court in Putti Lal's case.

Copies of the aforesaid minutes of meeting of the Selection Committee dated 15.10.2013 and letter dated 13.07.2018 of the office of Divisional Forest Officer, Bareilly Forest Division, Bareilly are annexed herewith as Annexure No.SCA-1 and SCA-2 respectively.

Similarly, petitioner no.2 was unwarrantedly provided with the minimum of the pay scale by the then Divisional Forest Officer, Pilibhit Forest Division, Pilibhit. He was sanctioned minimum of the pay scale vide F.O. No.30/16F-1 dated 01.10.2013 by the then Divisional Forest Officer, Pilibhit Forest Division, Pilibhit on the basis of recommendation of the Selection Committee in its meeting dated 23.09.2013. In the seniority list attached with minutes of meeting of the Selection Committee dated 23.09.2013, the name of the petitioner finds place at serial no.4. In column no.2 of this list, interim order of this Hon'ble Court dated 23.03.2010 in Writ Petition No.15299/10 is mentioned and the operative part of the interim order is reproduced in column no.8 of the list which reads as under:

"In view of the facts and circumstances of the present writ petition as the petitioner's representation is still pending before respondent no.2, in such circumstances, respondent no.2 is directed to consider the representation of the petitioner for regularization in view of the regularization rules strictly in accordance with law by a speaking and reasoned order within a period of three months."

In column no.11 of the list, remarks are incorporated relating to the ineligibility of the petitioner no.2 for regularization in view of his breaks in service but even then providing minimum of pay scale (Rs. 6050/-) was recommended for him mentioning insignificant break therein. Hence, in case of the petitioner no.2 also, when he was not found eligible for regularization, recommending and providing/sanctioning him minimum of the pay scale without any rationale was unwarranted and a wrongful act on part of the authorities concerned. In this regard, the work details provided by the Divisional Forest Officer, Pilibhit Tiger Reserve,

Pilibhit exhibit that the petitioner no.2 has not worked at all in the two consecutive years of 1996 and 1997 and similar is the situation for the years 2000 to 2005. In other years from 1990 to 2006 the working period ranges from two (02) months to the maximum of nine (09) months.

Copies of the aforesaid order dated 01.10.2013, minutes of meeting of the Selection Committee dated 23.09.2013, and work details of petitioner no.2 are annexed herewith as Annexure No. SCA-3, SCA-4 and SCA-5 respectively.

On account of the unwarranted and unlawful recommendations made by the Selection Committee and the orders issued by the Appointing Authority based upon them, the action of the members of the Selection Committee and that of the Appointing Authority concerned amounts to serious misconduct on their part and the disciplinary proceedings for such misconduct are being instituted against them in accordance with the Rules as per the jurisdiction therefor.

As stated above, the orders for sanctioning of minimum pay scale to the petitioners are adverse in nature and it is well-settled principle of law that anything adverse cannot be perpetuated for eternity whenever detected. It is also worth considering that the petitioners, nowhere in the writ petition, have stated that they are/were eligible for regularization in accordance with the statutory rules. The respondents are constrained to issue orders for cancelling the orders regarding sanction of minimum of pay scale to the petitioners till the final outcome of the present writ petition as this Hon'ble Court is actively considering the issue involved in the writ petition."

17. On behalf of petitioners it was strongly urged that respondents have not produced complete records and have deliberately withheld the records relating to their engagement of certain periods, which was in different Depots of the Forest Department. Applications were made to direct the respondents to produce their original records. It was also urged on behalf of petitioners that respondents are attempting to question petitioners' non-working for certain periods only in order to justify their act of unilateral withdrawal of the benefit of minimum of pay scale previously sanctioned to petitioners in view of the directions issued by the Supreme Court in the case of Putti Lal (supra).

18. It was not necessary for this Court to examine the continuous length of petitioners' working as the State itself admitted in its counter affidavit that both the petitioners were working since 1991; and that they were already granted minimum of pay scale since 2013. Plea of break in service, from time to time was taken for the first time to deny minimum of pay scale and to justify the unilateral withdrawal of seventh pay commission report and restoring the petitioners to minimum of pay scale as per the sixth pay commission report, notwithstanding the fact that seventh pay commission report was already enforced. In the opinion of the Court occasional gaps in petitioners' working over the last 28 years was not material for withdrawing minimum of pay scale to the petitioners. This was so as the respondents had already admitted that during the last about 28 years the petitioners had worked for about 20 years and the dispute was only about 7-8 years. Moreover, their continuous working for the last more than 10 years was almost undisputed. Factual issues in this regard

may have had some relevance for the purposes of passing orders of regularization, but it would not be a relevant consideration for withdrawal of minimum of pay scale already granted for the last several years. It may also be noticed that the alleged absence of 7-8 years' working by the petitioners was seriously disputed by the petitioners and the possibility of breaks being artificial could not be ruled out. The basis of such objection was also the cash book and complete records had not been verified by the department. The report of five member committee certifying petitioner's entitlement to the minimum of pay scale was also not set aside. Factual issues not relevant for the purposes was attempted to be raised by the respondents but it required no further consideration in view of the admitted facts and the law settled by the Supreme Court in the case of Sabha Shanker Dube (supra).

19. The judgment of this Court dated 17.11.2018 was also challenged in special appeal on the limited ground that minimum of pay scale cannot be granted prior to 14.11.2018, in view of the orders of the Supreme Court in the case of Sabha Shanker Dube (supra). This issue was dealt with by the Division Bench while disposing of Special Appeal Defective No.231 of 2019, vide order dated 14.3.2019, which is reproduced hereinafter:-

"Heard Sri Anand Kumar Ray, learned counsel for the appellants and Sri Pankaj Srivastava, learned counsel for the respondents on the delay condonation application and the merits of the appeal.

The delay of 75 days in filing the appeal is condoned for the reasons stated in the delay condonation application supported by affidavit.

Delay Condonation Application No.1 of 2019 is allowed.

The appeal has been preferred against the judgement and order dated 17.11.2018 of the learned Single Judge whereby the writ petition as filed by the respondents has been allowed quashing the government order dated 08.03.2018 and directing the appellants to pay the minimum pay-scale as per the 7th Pay Commission Report as well as the arrears within three months.

The respondents were temporary Class-IV employees working in the Forest Department of the State of U.P. for several years. In an earlier round of litigation they were directed to be paid the minimum of the pay-scale admissible to the Class-IV employees whether working on temporary basis, casual basis or daily-wage basis. In pursuance thereof the respondents were getting the minimum of the pay-scales initially as per the 5th Pay Commission, then as per the 6th Pay Commission and finally as per the 7th Pay Commission w.e.f. the year 2017.

However, the minimum of pay-scale as per the 7th Pay Commission was stopped to them on account of the government order dated 08.03.2018 which provided that the benefit of the minimum of pay-scale as per 7th Pay Commission Report would be made available to only to those who are the regular employees and not to those who have been engaged on temporary basis/casual/daily-wage basis.

The submission of Sri Ray, learned counsel for the petitioner-appellants is that even though the respondents may be entitle to the minimum of pay-scales as per the 7th Pay Commission but they are not entitle to arrears according to the same beyond the period 1st December, 2018 in view of the decision of the Apex Court in Sabha Shanker Dube Vs. Divisional Forest Officer and others decided on 14.11.2018.

The Supreme Court in the aforesaid decision while allowing the appeal and setting aside the judgement and orders of the High Court held the employees to be entitled to be paid minimum pay-scales applicable to the regular employees working on the same post and for payment of the same pay-scale w.e.f. 1st December, 2018.

The principle that was laid down was that the temporary employees are also entitled to the minimum pay-scales applicable to the regular employees. The date from which it was directed to be paid was under the facts and circumstances of the said case.

In the present case the respondents were already getting the minimum of the pay-scales applicable to regular employees as per the 7th Pay Commission from the year 2017 and therefore, they would be entitled to continue receive the same, notwithstanding the government order dated 08.03.2018 which has been quashed.

The said government order could not have made any distinction between the employees in matter of payment of wages on the basis of any particular date. Thus, we do not find any error or illegality on part of the writ court in quashing the aforesaid order.

Once the said government order is quashed the respondents are to be restored back in the same position as existed prior to the said government order in the matter of payment of salary. Since they were receiving minimum of the pay-scales as per the 7th Pay Commission from the year 2017 they would continue to receive the same even today.

The direction to make the payment to the respondents of the minimum of the pay-scale as per the 7th Pay Commission Report would not mean that the respondents would be entitled to any arrears for the period prior to 2017 and the said direction is confined only for the period 08.03.2018 onwards.

No other point has been raised and argued before us.

All applications moved by either of parties stand disposed of.

Accordingly, the appeal is disposed of."

20. It is in the above background that the merits of the review application is required to be determined by this Court.

21. The review application contains seventeen grounds but none of them even remotely suggest that the petitioners had secured engagement in the Forest Department on the strength of fabricated documents, as was alleged on behalf of the State before the Supreme Court of India. Ground no.8 to 17 questions the right of a daily wager to be paid minimum of pay scale in light of various judgments of the Supreme Court. As per the applicant State the Supreme Court judgment in the case of Putti Lal (supra) does not lay down correct law. Ground no.13 to 15 in the review application is reproduced hereinafter:-

"13. Because the Hon'ble Apex Court at the time of passing of the judgment and order dated 21.02.2002 in the case of State of U.P. and others vs. Putti Lal (Civil Appeal No.3631 of 1998) has not considered the law laid down by the Apex Court in the case of Harbans Lal vs. State of Himachal Pradesh reported as 1989 (4) SCC 459, Ghaziabad Development Authority Vs. Vikram Chaudhary reported as 1995 (5) SCC 210 and State of Haryana and others Vs. Jasmer Singh and others reported as 1996 (11) SCC 77 that the daily rated workmen could not claim the minimum of the regular pay of the regularly employed therefore, the judgment and order dated 21.02.2002 would be treated as per the curium ignoring the earlier laws laid down by the Apex Court itself.

14. Because Apex Court in the case of State of Orissa vs. Balaram Sahu reported as 2003 (1) SCC 250 and also in the case of State of Haryana and another vs. Lakhraj and others reported as 2003 (6) SCC 123 after discussing and following the decision of Jasmer Singh case has held Equal Pay for Equal Work is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming identical pay scales and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated into a mathematical formula.

Therefore, the Apex Court observed that the State has to ensure that minimum wages are prescribed for such workers and the same is paid to them.

15. Because, subsequent to the judgment of State of U.P. vs. Putti [2003 (6) SCC 337], Hon'ble Apex Court (three-Judge bench) in the case of State of Haryana vs. Charanjit Singh [2006 Vol. 9 SCC], disposed of large number of civil appeals collectively by a common order. The salient facts of this case were- ....."

(Emphasis supplied)

22. In view of the authoritative pronouncement of law by the Supreme Court in the case of Sabha Shanker Dube (supra) above contentions cannot be entertained by this Court. This Court is not required to answer the respondents' plea, in a review petition, that the judgment of Supreme Court in Putti Lal (supra) does not lay down correct law. The wisdom of State in taking such plea, before this Court, in review, is best left unanswered.

23. Ground no.7 of the review application is also reproduced hereinafter:-

"7. Because the Hon'ble Court failed to consider that there was a total break of 8 years, 10 months in regard petitioner No.2."

The above plea also cannot be a ground for review in light of the observations made in the previous part of this judgment.

24. Ground no.4 of the review application states that petitioner no.1 is claiming regularization and minimum pay scale on the basis of forged and fabricated document and has not come with clean hands. This ground also does not allege any plea of fraud about initial engagement of petitioners. During the course of argument the counsels appearing for the State were asked to show as to which of the document relied upon by the petitioners for seeking employment /regularization /minimum of

pay scale is forged and fabricated but the learned counsels could show no material in support of such factual plea. The plea of fraud set up by the State for seeking review of the judgment dated 17.11.2018, therefore, remains unsubstantiated.

25. The grounds of review broadly are that (i) some of the documents furnished by the petitioners to certify their working during the period of their alleged absence, during the pendency of writ petition, are not reliable as they contain partial verification only; (ii) the second ground urged is that the document furnished by petitioners now about their working for the year 1991, 2001, 2002, 2003, 2004, 2005, 2006 and 2007 do not contain signature of any authority on the first page and that while first page is written in blue ink, the signature of the signing authority is in black and the handwriting varies. It is also asserted that petitioner no.1 has not worked prior to 1998 and his working in social forestry division is not certified. These arguments are wholly fallacious as the report of petitioners' working for about 20 years are clearly certified by a team of senior officials upon verification of their own records and no reasons are disclosed to doubt such official records and the affidavit of the Principal Secretary of the Forest Department itself. The documents which are now being doubted at the stage of review are the documents produced by the petitioners themselves during the pendency of the writ petition to substantiate their uninterrupted continuance. Even if these documents are ignored yet the admitted record and affidavit of the Principal Secretary leaves no room of doubt about petitioners' working of about twenty years since 1991. The last 10 years working remains uninterrupted. The fact that petitioners were allowed minimum of pay scale in 2013 is also admitted and there is no reason to doubt it. Similarly, questioning of petitioners' continuance during 1995-1997 at Bareilly on account of difference in the parentage of petitioner no.1 also cannot be a ground to review the judgment.

26. The records further show that even after withdrawal of S.L.P. on 08.01.2020 the respondents did not care to file any review. An application was filed by the writ petitioners in June, 2020 stating that the respondents have unleashed a series of arbitrary actions against thousands of daily wagers engaged by the Forest Department taking advantage of the orders passed by the Supreme Court on 8.1.2020. It is after nearly 06 months of filing of such application that State has filed review petition in only 03 cases including the present matter.

27. The plea of petitioners that S.L.P. has been withdrawn by the State on the strength of false accusations with an intent to derive unfair advantage and thereby playing fraud upon the Court would clearly be going beyond the contours of the proceedings of review application, and therefore, need not be adjudicated in this proceedings.

28. Law with regard to scope of a review petition has been examined by the Supreme Court in a series of judgments. It cannot be an appeal in disguise. It has to be confined to errors apparent on the face of the record. In Kamlesh Verma Vs. Mayawati and others, (2013) 8 SCC 320, the Supreme Court has observed as under in para 17 to 20, which are reproduced:-

"17. In a review petition, it is not open to the Court to reappreciate the

evidence and reach a different conclusion, even if that is possible. Conclusion arrived at on appreciation of evidence cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. This Court in Kerala SEB v. Hitech Electrothermics & Hydropower Ltd. [(2005) 6 SCC 651] held as under: (SCC p. 656, para 10)

"10. ... In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible. The learned counsel for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended before us that there is any error apparent on the face of the record. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."

18. Review is not rehearing of an original matter. The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. A repetition of old and overruled argument is not enough to reopen concluded adjudications. This Court in Jain Studios Ltd. v. Shin Satellite Public Co. Ltd. [(2006) 5 SCC 501] , held as under: (SCC pp. 504-505, paras 11-12)

"11. So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negatived. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.

12. When a prayer to appoint an arbitrator by the applicant herein had been made at the time when the arbitration petition was heard and was rejected, the same relief cannot be sought by an indirect method by filing a review petition. Such petition, in my opinion, is in the nature of "second innings' which is impermissible and unwarranted and cannot be granted."

19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties

are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in Chhajju Ram v. Neki [(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius [AIR 1954 SC 526 : (1955) 1 SCR 520] to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. [(2013) 8 SCC 337 : JT (2013) 8 SC 275]

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.."

29. Analyzing the facts of the present case in light of the settled scope of review proceedings and for the detailed discussions held above, it is apparent that the respondents/applicants have not been able to show any error apparent on face of the record which may require this Court to review its judgment dated 17.11.2018.

Review petition lacks merit and is dismissed.

(2021)05ILR A177
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.05.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE CHANDRA DHARI SINGH, J.
THE HON'BLE MANISH MATHUR, J.

Service Single No. 14930 of 2017

Km. Kalyani Mehrotra ....Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Vijay Kumar Srivastava, Upendra Nath Mishra

Counsel for the Respondents:
C.S.C, Sultan Akhtar

A. Civil Law - U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules (1974) – Rule 5 - Compassionate appointment - Applicability of Rules to employee of District Rural Development Agency (DRDA) - *Held* - In view of the provisions of G.O. dated 17.03.1994, particularly clause 2(9), the provisions of Dying in Harness Rules, 1974 would be applicable upon employees of the DRDA – law laid in 'State of U.P. vs. Ajeet Kumar Shahi, Special Appeal No.714 of 2015' overruled (Para 63)

No Service Regulations notified for employees of DRDA - State Government, issued G.O. Dt 17.03.1994 in which guidelines for conditions of service of DRDA employees were laid down - but para 2 (9) of Government Order indicates that other matters which are not covered specifically with G.O. would be regulated by such rules, regulations and orders which generally apply to Government servants serving with regard to affairs of the State - Held - Though no specific service condition has been indicated in the said G.O. pertaining to compassionate appointment but at the same time there is no specific exclusion of compassionate appointment being granted to employees of the DRDA in terms of the 1974 Rules - no legal bar that beneficial conditions of service pertaining to Government employees made under Article 309 cannot be extended to a registered society such as DRDA, which is "State' under Article 12 **-** provisions of the 1974 Rules would be applicable upon employees of the DRDA (41,42, 52, 63)

B. District Rural Development Agency (DRDA) - Employee status - employees of DRDA do not hold any civil post either under the State or Central Government - they do not, come within purview of the definition "government employees' - however extending the benefit of compassionate appointment under the 1974 Rules upon the employees of the DRDA would only have the effect of providing the said beneficial benefit and not granting them the status of Government servants (Para 54)

C. Interpretation - Doctrine of "occupied field' - Held - field pertaining to conditions of service of employees of the DRDA being unoccupied, the said void was filled by issuance of Government Order dated 17.03.1994 (Para 39, 40)

D. Phrase - "approbate and reprobate' - it is used to express common law principles of election that no party can accept and reject the same instrument - A person cannot say at one time that a transaction is valid and thereby obtain some advantage, and then turn round and say it is void for the purpose of securing some other advantage - *Held* - opposite parties cannot be permitted to repudiate the conditions of service which are beneficial to the employees of the DRDA while

applying other similar such service conditions. (Para 48, 50)

Reference Answered. (E-4)

List of Cases cited:

1. St. of U.P. & ors. Vs Pitamber [S.A.(D) No.687 of 2010] dt 19.08.2010

2. St. of U.P. Vs Ajeet Kumar Shahi, Special Appeal No.714 of 2015

3. Anoop Rai Jain & ors. Vs St. of U.P. & ors. [Writ Petition No.458 (S/B) of 2000

4. Smt. Reeta Mishra Vs St. of U.P. [Writ Petition No.2205(S/S) of 2006]

5. Surya Bhan Singh Vs St. of U.P. [Writ Petition No.6411(S/S) of 2005] dt 08.12.2006

6. State of Assam Vs Kanank Chandra Dutta reported in AIR 1967 SC 884

7. Kalika Prasad Vs St. of U.P. & ors. [Writ Petition No.45(S/S) of 2005

8. A.B. Krishna Vs St. of Kar (1998) 3 SCC 495

9. St. M.P. & ors. Vs Shardul Singh reported in 1970 (1) SCC 108

10. Vimal Kanwar & ors. Vs Kishore Dan & Ors (2013) 7 SCC 476

11. Karam Kapahi & ors. Vs Lal Chand Public Charitable Trust & anr. (2010) 4 SCC 753

12. M/s New Bihar Biri Leaves Co. & ors. Vs St. of Bihar & ors. (1981) 1 SCC 537

(Delivered by Hon'ble Ramesh Sinha, J,
Hon'ble Chandra Dhari Singh, J.
& Hon'ble Manish Mathur, J.)

1. This Full Bench has been constituted upon orders of Hon'ble the Chief Justice pursuant to order dated 28.08.2017 passed by learned Single Judge in Writ Petition No.14930(S/S) of 2017 whereby the following two questions have been referred to this Bench:-

(i) Whether in view of the provisions of Government Order dated 17.3.1994, particularly clause 9 thereof, the provisions of the Rules of 1974 would be application upon the employees of DRDA?

(ii) Whether the judgment of Division Bench in State of U.P. vs. Ajeet Kumar Shahi, Special Appeal No.714 of 2015, requires reconsideration in light of the Government Orders dated 17.3.1994 and 18.7.2016?

2. The writ petitioner had challenged an order dated 22.05.2017 whereby claim for grant of compassionate appointment under the U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 (hereinafter referred to as '1974 Rules') was rejected on the ground that the same are inapplicable in the case of employees, such as mother of the writ petitioner, who was employed in the District Rural Development Agency (hereinafter referred to as DRDA) since the same is a Society registered under the Societies Registration Act, 1860.

3. The learned Single Judge has noticed that a Division Bench of this Court in **State of U.P. & others v. Pitamber** [Special Appeal (Defective) No.687 of 2010] had by its judgment and order dated 19.8.2010 held the DRDA to be 'State' within meaning of Article 12 of the Constitution of India but at the same time has also held that the employees of DRDA do not hold any civil post either under the State or the Central Government and do not, therefore, come within purview of the definition "government employees'.

4. In the referral order, it has also been noticed that another Division Bench of this Court in **State of U.P. & others v. Ajeet Kumar Shahi** [Special Appeal No.714 of 2015] while following the judgment in **Pitamber** (supra), rejected the claim for compassionate appointment on the ground that the 1974 Rules are inapplicable upon employees of DRDA since they do not come within definition of "government employees'.

5. However, learned Single Judge thereafter referred the matter to a larger Bench while posing the question whether the judgment rendered in **Ajeet Kumar Shahi** (Supra) required reconsideration.

6. The reference was made upon consideration by the learned Single Judge that the Division Bench in the case of **Ajeet Kumar Shahi** (Supra) was apparently not made aware with regard to Government Order dated 17.3.1994, which provided that in respect of matters of employment of DRDA employees, for which there is no specific provision in the said Government Order, such employees would ordinarily be governed by provisions as are applicable upon employees of the State Government. The relevant portion of the order dated 28.08.2017 by learned Single Judge is as follows:-

"7. The reason assigned to hold that Rules of 1974 would not apply upon employees of DRDA is that employee of DRDA are not the Government Servant. However, while holding the provision of 1974 Rules to be inapplicable upon the employees of DRDA, attention of the Division Bench apparently was not invited to the Government Order dated 17.3.1994, which clearly records that in respect of matters of employment of DRDA employees, which are not covered by the Government Order dated 17.3.1994, the persons employed in DRDA would ordinarily be governed by such provisions, as are applicable upon the employees of the State Government. The provisions contained in para 6 to 13 of the Government Order dated 17.3.1994 clearly contemplates that in the matter of such employees, relevant provisions relating to determination of seniority, application of reservation rules, transfer etc. would all be applicable as are applicable upon the employees of the State Government. Once such is the position, the Rules of 1974, which are applicable upon the employees of the State Government, would also be applicable upon the employees of DRDA. Moreover, by a subsequent Government Order dated 18.7.2016 employees of DRDA have now been absorbed in the department of Rural Development of the State."

"8. For the aforesaid reasons, I am of the opinion that the question as to whether provision of 1974 Rules would apply upon an employee of DRDA needs to be considered by a Larger Bench."

7 . We have heard Mr. Upendra Nath Mishra, Senior Advocate assisted by Mr. Neel Kamal Mishra, learned counsel for writ petitioner and Mr. Kuldeep Pati Tripathi learned Additional Advocate General assisted by Mr. Vivek Kumar Shukla learned Standing Counsel for the State of U.P. and learned counsel for DRDA who has adopted submissions of learned State Counsel.

8. Learned counsel appearing on behalf of petitioner has submitted that the DRDA was created by various office

memorandums of Government of India and consequent Government Orders by the State Government. The DRDA is fully funded by the Central and State Governments and has already been held to be an instrumentality of State under Article 12 of the Constitution of India. As such, power of the Central and State Governments to issue directions and policy guidelines to the DRDA including service conditions of the employees has been recognised and accepted not only by the opposite parties but by judgments of this Court as well. It is submitted that upon creation of DRDA, draft service rules were made but were never notified. Due to the said fact, although the DRDAs were set up for different Districts and were separately registered as Societies under the Societies Registration Act, 1860 but all the conditions of service of employees of DRDA are governed by various Government Orders issued by the Government and departmental orders issued by the Commissioner, Rural Development for maintaining uniformity in DRDA set up. It is submitted that the State Government has the power to issue Government Orders with regard to policy guidelines to the DRDAs as provided in the bye-laws.

9. Learned counsel for petitioner has submitted that in view of the fact that no Service Regulations were notified for employees of DRDA, the State Government, exercising its powers of superintendence, issued the Government Order dated 17.03.1994 in which guidelines for conditions of service of the employees were laid down. It is submitted that paragraph 9 of the said Government Order clearly provided that the service conditions which are not specifically provided for in the Government Order would be made applicable upon employees of the DRDA as they are ordinarily applicable upon State Government employees. Attention has been drawn to the fact that subsequently, the employees of the DRDA have been absorbed in the department of Rural Development of the State Government vide Government Order dated 18.07.2016 thereby recognising the fact that not only was the DRDA established as a permanent department but that the employees thereof were also functioning on behalf of the State Government.

10. Learned counsel for petitioner has also submitted that the condition indicated in paragraph 9 of Government Order dated 17.03.1994 thereafter stood ratified in view of the fact that the same was adopted by the DRDA , Raebareli vide Resolution dated 02.06.1994. In view of aforesaid, learned counsel appearing for the petitioner has submitted that the said Government Order dated 17.03.1994 and the resolution dated 02.06.1994 were very relevant for the purposes of determination of applicability of the 1974 Rules upon employees of the DRDA but the same were not brought to the attention of the Division Bench in **Ajeet Kumar Shahi** (Supra), which therefore requires to be reconsidered. Learned counsel has further submitted that the Government Order dated 17.03.1994 and the resolution dated 02.06.1994 are clearly in the nature of legislation by reference. He has further submitted that except for the provisions of compassionate appointment, rest of the service conditions indicated in the Government Order dated 17.03.1994 have been implemented in the DRDAs throughout the State irrespective of the fact whether the same was adopted or not. As such, it is submitted that the State Government cannot approbate and reprobate at the same time. Learned

counsel has relied upon various judgments in order to buttress his submissions, which shall be considered subsequently.

11 . Learned counsel appearing on behalf of the State has refuted the submissions of learned counsel for petitioner on the ground that the petitioner has misconstrued the Government Order dated 17.03.1994 which clearly provides that it would be inapplicable in case of Rules pertaining to Government Servants made and notified under Article 309 of the Constitution of India and since the 1974 Rules have been made under Article 309 of the Constitution of India, the same are exempt from applicability upon employees of DRDAs by virtue of Government Order dated 17.03.1994 itself. It has been further submitted that a reading of the 1974 Rules clearly indicates that it is applicable only upon Government servants and since it has already been held and is undisputed that the employees of the DRDAs employed prior to issuance of Government Order dated 18.07.2016 would not come within the purview of Government servants, therefore, there is no question of the 1974 Rules being applicable upon them.

12. Learned counsel appearing on behalf of the State has further submitted that paragraph 9 of the Government order dated 17.03.1994 is only an enabling provision and would be applicable only once it is adopted by each and every DRDA in all the Districts. That having not been done, the same would not automatically apply throughout the State of U.P. It has been further submitted that **Ajeet Kumar Shahi** (Supra) indicates the correct position of law while following the Division Bench judgment in the case of **Pitamber** (supra). It is submitted that the position has thereafter been made clear by the Government Order dated 10.06.2013 in which also it has been stated that the 1974 Rules are inapplicable upon employees of DRDAs.

13. We have considered the submissions advanced by learned counsel for the parties and perused the record as well as written arguments submitted by learned counsel on behalf of petitioner as well as the State.

Creation and background of DRDA

14. For the purpose of answering the reference, it would be worthwhile to examine the creation, establishment and nature of DRDA.

15. DRDAs have been created in each district of the State under the directions of the Government of India for ensuring effective and speedy implementation of all the Central and State Government programmes pertaining to rural development. Before the establishment of DRDA in its present form in 1980, the Government of India issued instructions in the year 1971 for creation of Small Farmers Development Agency (SFDA) in each district, which was registered as a Society for implementation of the Central Government programmes like IRDP etc.

16. Later on, when the IRDP was extended to all the districts of the State throughout the Country, the Government of India vide notification dated 4.10.80, decided to set up a single execution agency at the district level for ensuring effective implementation of Rural Development Programmes. Formal creation of the DRDA

was contemplated under the office memorandum of the Government of India dated 24.10.80, which provided that DRDA will be created as a Society in each district. It was further provided that the DRDA shall be controlled and governed by the State Government and it will be headed by the Collector/Deputy Commissioner in each district. Apart from that, DRDAs were to have full time Executive Officer preferably a senior scale IAS officer. In the State of U.P., Chief Development Officer is currently the Executive Director of DRDA.

17. The State Government vide government order dated 24.11.80 created DRDAs in each district. In order to maintain uniformity in the constitution of all the DRDAs existing in various districts, the Central Government issued an O.M. dated 10.3.81, whereby guidelines were issued regarding uniform structure of DRDA. Consequently, the State Government issued the Government order dated 10.7.81, whereby a uniform structure of the Governing Body of the DRDA was provided. Thus, each DRDA is headed by the District Magistrate, who is the Chairman of the DRDA. The Deputy Development Commissioner is to be the Vice Chairman of the DRDA and thereafter eight members were provided, which include Deputy Registrar, Cooperative Societies, Deputy Director Agriculture, Deputy Director Animal Husbandary, ADM/DDO, Assistant Registrar, Cooperative Societies, District Agriculture Officer, District Animal Husbandry Officer and Assistant Engineer, Minor Irrigation. Since the earlier District Officers did not have the provisions for a Governing Body, hence directions were issued by the State Government to all the DRDAs to incorporate the aforesaid uniform Governing Body in their Articles of Association. In this regard, the Office Memorandum dated 10.3.81 of the Government of India and the Government order dated 10.7.81 are relevant.

18. In compliance of the aforesaid instructions of the Government of India dated 10.3.81 as well as the directions issued by the State Government vide Government order dated 10.7.81, all the DRDAs prepared almost identical bye-laws. One of such bye-laws which has been placed before us relating to DRDA, Auraiya, in Rule 5 prescribe establishment and appointment etc., wherein sub-rule (2) of Rule 5 provides that subject to the approval or under the directions of the Government of India or State Government from time to time, the Agency will create new post. Sub-rule (4) of Rule 5 further says that the directions of the Government orders providing for duties, responsibilities and powers etc. will be final and if required will have an overriding effect on the old and existing rule.

19. Rule 14 of the bye-laws provide that every employee of Agency, whether directly recruited or on deputation from department of State Government or local body shall be governed by Service Conduct Rules of the State Government. Rule 15 further clarifies that service conditions and service rules not covered under Rules 4 to 13 shall be the same as those applicable on State Government employees.

20. From the aforesaid directions issued by the Government of India and the State Government and the object for which the DRDAs have been established in each district with present structure, it is clear that the State Government has all pervasive control over the administration of the DRDA and all the DRDAs existing in

various districts of the State have a uniform administrative set up, created by the State Government under the directions of Central Government.

21. The status of DRDAs was considered by a Division Bench of this Court in the case of **Anoop Rai Jain and others v. State of U.P. and others** [Writ Petition No.458 (S/B) of 2000 and other connected matters]. The same formed the basis of another Division Bench judgment in **Pitamber** (supra) whereunder it was held that the DRDA is 'State' within meaning of Article 12 of the Constitution of India. The said fact is undisputed between the parties and has been followed in various subsequent judgments of this Court as well. However, the said judgment also held that the employees of DRDA do not hold any civil post under the Government and consequently are not Government employees.

22. It is on this latter reasoning that the Division Bench in **Ajeet Kumar Shahi** (Supra) rejected the claim for compassionate appointment to dependent of an employee of DRDA holding that the 1974 Rules are applicable only upon Government employees.

23. Since the status of DRDA as 'State' under Article 12 of the Constitution of India is neither being disputed by the parties nor is a subject matter of reference, as such, it is not being deliberated upon by this bench.

Litigational background regarding DRDA employees.

24. Prior to the judgment of Division Bench in Pitamber (supra), a learned Single Judge in the case of **Smt. Reeta Mishra v. State of U.P.** [Writ Petition No.2205(S/S) of 2006] had directed the DRDA to consider appointment of the writ petitioner therein on compassionate basis in terms of the 1974 Rules in view of the fact that in an earlier judgment rendered in Writ Petition No.2280 (S/S) of 2006, the DRDAs had been declared an instrumentality of State. The learned Single Judge vide order dated 26.07.2006 quashed the Government Order dated 22.04.2004 whereunder the benefit of the 1974 Rules to the employees of DRDA had been denied.

25. Subsequently, another case of **Surya Bhan Singh v. State of U.P**. [Writ Petition No.6411(S/S) of 2005] was decided vide order dated 08.12.2006 in terms of the judgment rendered in **Reeta Mishra** (supra). After Surya Bhan Singh was granted appointment under the 1974 Rules, he was terminated from service, which was challenged in Writ Petition No.5332 (S/S) of 2007 and was allowed vide judgment and order dated 27.09.2013. Special Appeal No.33 of 2014 (D) filed by the State of U.P. against the said order was dismissed vide judgment and order dated 21.07.2014 on the ground that once the petitioner therein had been appointed on compassionate basis, it was not open for the authority to terminate his services after a lapse of six months. Apparently, neither the Government Order dated 17.03.1994 nor the judgment of Division Bench in **Pitamber** (supra) was considered in the matter pertaining to Surya Bhan Singh since in the meantime judgment in the case of **Pitamber** (supra) came to be rendered vide judgment and order dated 19.08.2010. However, consequent upon judgment rendered in the case of **Reeta Mishra** (supra), the cases of dependents of

employees of DRDA continued to be entertained since the Government Order dated 22.04.2004 had been set aside and the judgment in **Reeta Mishra** (supra) had become final as no appeal had been preferred by either party.

26. The situation underwent a change in 2010 with the advent of Division Bench judgment in the case of Pitamber (supra).

Consideration of the case of Pitamber (supra)

27. In the aforesaid case, Special Appeal had been filed by the State of U.P. against the judgment and order dated 23.03.2010 passed by a learned Single Judge in Writ Petition No.10464 of 2009. The issue in the said case was regarding applicability of Fundamental Rule 56 of the Financial Handbook pertaining to Government servants with regard to age of superannuation of employees of DRDA. The learned Single Judge in his judgment had quashed the notice dated 29.12.2008 holding that the writ petitioner therein would be entitled to continue up to the age of 60 years as in the case of Government Servants since the Fundamental Rules would be applicable upon the employees of DRDA in pursuance of paragraph 9 of the Government Order dated 17.03.1994.

28. While noticing the background of DRDA regarding its creation, status and the deep and pervasive control of the State Government, the Division Bench reached a conclusion that the DRDA would be 'State' within the meaning of Article 12 of the Constitution of India despite being a Society registered under the Societies Registration Act, 1860. However, the Division Bench relying upon the Supreme Court Judgment in **State of Assam v. Kanank Chandra Dutta** reported in AIR 1967 SC 884 held that the employees of DRDA do not answer the tests for coming within the purview of a Government servant since they do not hold any civil post either under the Central Government or the State Government. It was held that merely because an Association falls under the expression "instrumentality of State' within the meaning of Article 12 of the Constitution, it would not make its employees come within the definition of government employees. It was held that the employees of DRDA are for all practical purposes employees of the Society who are not holding any civil post in the services of the State and therefore Rule 56 of the Fundamental Rules would be inapplicable in their case. The Single Judge judgment in the case of **Kalika Prasad v. State of U.P. & others** [Writ Petition No.45(S/S) of 2005] holding Rule 56 of the Fundamental Rules to be applicable upon DRDA employees, was overruled.

29. The Division Bench held that if the Government Order dated 17.03.1994 was applicable upon the employees of DRDA being within competence of the State Government to issue the same, it was also within competence of the State Government to issue the Government Order dated 09.03.2004 restricting the age of superannuation. The relevant portion of the judgment is as follows:-

"The learned Judge in Kalika Prasad (supra), has not discussed the reason as to why F.R. 56 is applicable. If F.R. 56 was applicable because of Guideline No. 2 (10) of Government Notification dated 17th March, 1994, then it was within the competence of the State Government to also have issued the Government Order dated 09.03.2004. In

these circumstances, considering the Government Notification dated 09.03.2004, the age of superannuation of employees of DRDA would be 58 years from that date. Question (1) is answered in the affirmative."

Consideration of the case of Ajeet Kumar Shahi (Supra)

30. The said Special Appeal in the case of **Ajeet Kumar Shahi** (Supra) arose from judgment and order of a learned Single Judge dated 24.04.2015 and was particularly with regard to claim for compassionate appointment under the 1974 Rules. The claim for compassionate appointment of the writ petitioner therein was rejected by authorities on the basis of Government Order dated 22.04.2004 whereunder it was provided that the DRDA being a society registered under the Societies Registration Act, 1860, its employees would not come within the purview of the 1974 Rules. Writ Petition against rejection order was allowed. The Division Bench noticed the judgment rendered in the case of **Reeta Mishra** (supra) and the fact that the said Government Order dated 22.04.2004 had been quashed, which was thereafter followed in other cases as well. It also noticed the judgment rendered by another Division Bench in the case of Pitamber (supra) and the fact that the employees of the DRDA did not hold any civil post in the services of State and continued to be employees of DRDA which was a society. In such circumstances, it was held that provisions of Rule 2(a) of the 1974 Rules would not be attracted in the case of employees of DRDA. The relevant portion of the judgment is as follows:-

"In view of the law which has been laid down by the Division Bench in its judgment dated 19 August 2010 in Pitamber (supra), it is now a settled principle of law that the employees of DRDA are not holding civil posts in the services of the State. They continue to be the employees of DRDA which is a society registered under the Societies Registration Act, 1860. That being the position, the provisions of Rule 2 (a) of the Rules of 1974 would not be attracted."

31. The case of **Reeta Mishra** (supra) was distinguished on the ground that it was rendered prior to judgment in **Pitamber** (supra) and therefore cannot be considered as laying down any principle of law as such. The judgment of Division Bench in Surya **Bhan Singh** (supra) was also distinguished on the ground that the issue of applicability of the 1974 Rules was not being considered by the Division Bench, which was considering only the fact that once the writ petitioner therein had been appointed on compassionate basis then whether his services could be terminated after a lapse of six months, without complying with the principles of natural justice. However, a reading of the judgment indicates that neither the Government Order dated 17.03.1994 nor the resolution dated 02.06.1994 was placed before the Division Bench and as such do not find any mention therein.

Consideration of Question No.1 :- (i) Whether in view of the provisions of Government Order dated 17.3.1994, particularly clause 9 thereof, the provisions of the Rules of 1974 would be application upon the employees of DRDA?

32. It is undisputed that : -

(a) the DRDA is a Society registered under the Societies Registration Act, 1860 but has nonetheless been held to be 'State' under Article 12 of the Constitution of India, which is an accepted position.

(b) there are no service regulations in any of the DRDAs pertaining to its employees throughout the State of U.P.

(c) in the absence of service rules, the State Government had issued notification dated 17.03.1994 indicating the conditions of service which were to be applicable upon all the employees of DRDA in uniformity throughout the State of U.P.

(d) consequent upon their establishment, almost identical bye-laws were framed by the DRDA in all the Districts in which the State Government has been empowered to issue policy directions and guidelines for the proper functioning of DRDA throughout the Sate of U.P. including conditions of service of its employees.

(e) employees of the DRDA throughout the State of U.P. has been absorbed in the department of Rural Development of the State Government vide Government Order dated 18.07.2016.

33. Considering the aforesaid factors, the reference has to be answered regarding applicability of the 1974 Rules upon employees of DRDA appointed or working prior to issuance of Government Order dated 18.07.2016 since the said employees after absorption already have the status of State Government employee upon whom the 1974 Rules are automatically applicable now.

34. It is an accepted fact that subsequent to creation and establishment of DRDA, all the DRDAs prepared almost identical bye-laws pursuant to instructions of the Government of India dated 10.03.1981 and of the State Government dated 10.07.1981. An exemplar bye-law relating to DRDA, Auraiyya has been placed before us in which Rule 14 of the bye-laws provides that every employee of DRDA whether directly recruited or on deputation from a department of State Government or a local body would be governed by the service conduct rules of the State Government. Rule 15 further clarifies that service conditions and service rules not covered under Rules 4 to 13 of the bye-laws would be the same as those applicable upon the State Government employees. The bye-laws of DRDA have already been considered in Pitamber (supra) in the following manner :-

"11. There is no dispute that the DRDAs are registered as Societies under the Societies Registration Act. DRDAs are registered for each District. The Bye-laws provide for a Governing Body. The powers of the Governing Body has been set out under Bye-law 19 of the Bye-laws. Bye-law 20 provides for other powers conferred on the Governing Body. Bye-law 35 provides the manner in which the Society can sue or be sued. The Memorandum of Association of DRDA provides for Working Committee of the Governing Body, which consists of officers, who hold office in the Working Committee, by virtue of their posts in Government service. The members of the Society hold the post of Chairman or Members or the Executive Director by

virtue of the posts they hold in Government service. By virtue of these Bye-laws, the Governing Body can appoint staff subject to the directions issued by the Central Government/State Government. The State Government issued Notification dated 17th March, 1994 which provided for the conditions of service of the employees in respect of employees of DRDA. Once the State Government has issued directions in exercise of its power, the Governing Body is bound by the said directions in the matter of appointment of staff. The power to appoint also includes the power to terminate and/or superannuate."

35. Similarly bye-law 20 of the bye-laws provides as follows:-

"20. In particular and without prejudice to the generality of the foregoing provisions, the Governing Body may :

(a) ....

(b) ....

....

(h) Subject to the direction, if any, of the Government of India/State Government appoint such staff as may from time to time be necessary for carrying out day to day affairs of the Society."

36. From a perusal of the bye-laws, it is apparent that although the governing body of the DRDA is the appointing authority of its employees but the same would be subject to the directions issued by the Central or the State Government. It is pursuant to the said power of the State Government, which is undisputed, that the notification dated 17.03.1994 was issued particularly to fill in the void created due to the fact that no service rules were notified with regard to employees of the DRDA.

37. The opening paragraphs of Government Order dated 17.03.1994 states that with regard to employees of DRDA, no service rules have been notified and the DRDA being a registered society, rules framed for Government employees under Article 309 of the Constitution of India would be inapplicable. It is further stated that in view of the said lacuna, directions are being issued by the State Government for regulating and bringing about uniformity of service conditions of the DRDA employees since all the DRDAs are registered separately as a Society in every District. The relevant paragraphs of the Government Order dated 17.03.1994 are as follows:-

"उपर्युक्त विषय पर मुझे यह कहने का निर्देश हुआ है कि उत्तर प्रदेश के समस्त जनपदों में जिला ग्राम्य विकास अभिकरण रजिस्ट्रेशन आफ सोसाइटीज एक्ट की धारा 18 के अधीन पंजीकृत सोसाइटी के रूप में स्थापित है जिसके अध्यक्ष सम्बन्धित जनपद के जिला मजिस्ट्रेट होते है। प्रत्येक अभिकरण सोसाइटीज रजिस्ट्रेशन एक्ट के अधीन रजिस्टर्ड सोसाइटीज है और उसमें स्वीकृत स्टाफ भारत के संविधान के तहत अनुच्छेद 309 में बनने वाली सेवा नियमावलियों से आच्छादित नहीं होते है। ऐसी स्थिति में जिला ग्राम्य विकास अभिकरणों में विभिन्न पदों पर कार्मिकों की भर्ती किये जाने हेतु स्टेट लेवेल, तथा डिस्ट्रिक्ट लेवेल कैडर्स बनाये जाने और उनमें नियुक्त व्यक्तियों की सेवा शर्तो को विनियमित करने तथा अन्य शर्तो को जारी करने के सम्बन्ध में सामान्य सेवा नियमावली बनाये जाने का प्रस्ताव वर्ष 1989 से शासन के विचाराधीन था और इसके लिए कतिपय अन्य प्रदेशों में विघमान व्यवस्था का भी अध्ययन किया गया।

2. चूँकि जिला ग्राम्य विकास अभिकरण में कार्यरत एवं भविष्य मे नियुक्त होने वाले कार्मिकों के वेतनादि पर होने वाला सम्पूर्ण व्यय भारत सरकार तथा राज्य सरकार द्वारा वहन किया जाता है और चूँकि इनके बारे में कोई सेवा नियमावली गठन किया जाना सम्भव नहीं हो सका है अतः प्रदेश के समस्त जिला ग्राम्य विकास अभिकरणों में एकयपता बनाये रखने के उद्देश्य से यह निर्णय लिया गया है कि प्रश्नगत अभिकरणों में कार्मिकों की नियुक्ति की प्रकिया श्रोत

शैक्षिक योग्यता आदि के निर्धारण तथा सेवा शर्तो को लागू किये जाने के बारे में एक सामानय दिशा निर्देश शासन सतर से समस्त अभिकरणों के लिए जारी कर दिये जाये ताकि सम्बन्धित अभिकरण अपनी अपनी अधिकारित में तद्नुसार नियम अथवा उपनियम बनाकर उसे अंगीकृत कर सके।.....…"

38. In terms of bye-laws of the DRDA as noticed herein above and the pronouncement regarding the authority of State Government to issue such directions as already noticed in the case of **Pitamber** (supra), it is evident that Government Order dated 17.03.1994 would be binding upon all the DRDAs in the State particularly since the field pertaining to service conditions of the employees of the DRDA was unoccupied.

39. It is well settled that the doctrine of "occupied field' would be applicable in case of subordinate legislation and issuance of administrative instructions where no rules have been made in terms of Article 309 of the Constitution of India pertaining to service conditions. Hon'ble the Supreme Court in **A.B. Krishna v. State of Karnataka**, reported in (1998) 3 SCC 495 has held as follows:-

"8. The Fire Services under the State Government were created and established under the Fire Force Act, 1964 made by the State Legislature. It was in exercise of the power conferred under Section 39 of the Act that the State Government made Service Rules regulating the conditions of the Fire Services. Since the Fire Services had been specially established under an Act of the legislature and the Government, in pursuance of the power conferred upon it under that Act, has already made Service Rules, any amendment in the Karnataka Civil Services (General Recruitment) Rules, 1977 would not affect the special provisions Validly made for the Fire Services. As a matter of fact, under the scheme of Article 309 of the Constitution, once a legislature intervenes to enact a law regulating the conditions of service, the power of the Executive, including the President or the Governor, as the case may be, is totally displaced on the principle of "doctrine of occupied field". If, however, any matter is not touched by that enactment, it will be competent for the Executive to either issue executive instructions or to make a rule under Article 309 in respect of that matter."

"9. It is no doubt true that the rule-making authority under Article 309 of the Constitution and Section 39 of the Act is the same, namely, the Government (to be precise, the Governor, under Article 309 and the Government under Section 39), but the two jurisdictions are different. As has been seen above, power under Article 309 cannot be exercised by the Governor, if the legislature has already made a law and the field is occupied. In that situation, rules can be made under the law so made by the legislature and not under Article 309. It has also to be noticed that rules made in exercise of the rule-making power given under an Act constitute delegated or subordinate legislation, but the rules under Article 309 cannot be treated to fall in that category and, therefore, on the principle of "occupied field", the rules under Article 309 cannot supersede the rules made by the legislature."

40. In terms of aforesaid, it is clear that the field pertaining to conditions of service of employees of the DRDA being unoccupied, the said void was filled by issuance of Government Order dated 17.03.1994. The provisions pertaining to applicability of service rules of Government employees upon the

employees of the DRDA have been indicated in sub-paragraphs (6) to (13) of paragraph 2 of the Government Order, which are as follows : -

"2. (6). सीधी भर्ती द्वारा नियुक्त कर्मचारियों की ज्येष्ठता का निर्धारण समय समय पर यथा संशोधित उ0प्र0 सरकारी सेवक ज्येष्ठता नियमावली, 1991 के अनुसार किया जायेगा।

2. (7). विभिन्न श्रेणी के पदों पर सीधी भर्ती द्वारा नियुक्त व्यक्तियों के अनुमन्य वेतनमान ऐसा होगा जैसा सरकार द्वारा समय समय पर अवधारित किया जाये। इस मार्ग निर्देश के प्रारम्भ होने के समय के वेतनमान परिशिष्ट क में दिये गये है।

2. (8). दशतारोक पार करने की अनुमति तब तक नही दी जायेगी, तब तक कि उसका कार्य और आरचण संतोषजनक न पाया जाये और उसकी सत्यनिष्ठा प्रमाणित न कर दी जाये।

2. (9). अन्य विषयों का विनियमन–उन विषयों के सम्बन्ध में, जो विनिर्दिष्ट रूप से इस मार्ग निर्देश या विशेष आदेशों के अन्तर्गत न आते हो, जिला ग्राम्य विकास अभिकरणों में नियुक्त व्यक्ति ऐसे नियमों, विनियमों और आदेशों द्वारा नियंत्रित होगे जो राज्य के कार्यकलाप के सम्बन्ध में सेवारात सरकारी सेवकों पर सामान्यतयाः लागू होते है।

2. (10). अनुसूचित जाति, अनुसूचित जनजाति, पिछड़े वर्ग तथा अन्य श्रेणी के व्यक्तियों के लिए सेवा में आरक्षण से सम्बन्धित भर्ती के समय प्रवृत्त सरकार के आदेशों के अनुसार आरक्ष्झण किया जायेगा।

2. (11). जहॉ राज्य सरकार का यह समाधान हो जाये कि सीधी भर्ती द्वारा नियुक्ति व्यक्तियों की सेवा की शर्तो को विनियमित करने वाले किसी नियम के प्रवर्तन से किसी विशिष्ट मामले में अनुचित कठिनाई होती है, यहॉ यह उस मामले में लागू होने वाले नियमों/उपनियमों में किसी बात के होते हुए भी, आदेश द्वारा उस नियम की अपेक्षाओं का उस सीमा तक और ऐसी शर्तो के अधीन रहते हुए जिन्हें यह मामले में न्यायसंगत और साम्यपूर्ण रीति से कार्यवाही करने के लिए आवश्यक समझे, अभिमुक्ति या शिथिल कर सकती है।

2. (12). उत्तराचंल के सभी 08 जिला ग्राम्य विकास अभिकरणों में सीधी भर्ती के समस्त पदों को उत्तरांचल क्षेत्र के अभ्यर्थियों में से उपयुक्त अभ्युर्थियों द्वारा ही भरा जायेगा और इस प्रयोजन हेतु उन पदों के पदधारको का अपने अपने सम्वर्ग में पृथक उपसम्वर्ग होगा, परन्तु इसका प्रभाव अनुसूचित जातियों, अनुसूचित जनजातियों और व्यक्तियों की अन्य विशेष श्रेणियों के अभ्युर्थियों के लिए प्राविधानित आरक्षण पर नही पड़ेगा।

2. (13). जिन पदों के सम्बन्ध में नियुक्ति का प्राधिकार श्री राज्यपाल या आयुक्त, ग्राम्य विकास विभाग में निहित है, उन पदों के पदधारकों को उत्तर प्रदेश के किसी भी जिला ग्राम्य विकास अभिकरण में स्थानान्तरित किया जा सकेगा।"

41. From the aforesaid provisions, it is apparent that no specific service condition has been indicated pertaining to compassionate appointment but a reading of paragraph 2 (9) of the Government Order indicates that other matters which are not covered specifically with the Government Order or any other special order pertaining to employees of the DRDA would be regulated by such rules, regulations and orders which generally apply to Government servants serving with regard to affairs of the State.

42. A reading of the aforesaid paragraph 2(9) of the Government Order makes it evident that there is no specific exclusion of compassionate appointment being granted to employees of the DRDA in terms of the 1974 Rules. On the contrary, the said provision clearly indicates that matters which are not specifically covered in the Government Order would be regulated and applicable as per the rules, regulations and orders generally applicable upon Government servants serving with regard to State affairs. As such, it is clear that compassionate appointment under the 1974 Rules would be covered under the said paragraph 2(9) of the Government Order.

43. There is no dispute between the parties that compassionate appointment under the 1974 Rules constitutes a condition of service. The expression "conditions of service' means all those conditions which regulate the holding of a post by a person right from the time of his

appointment till his superannuation and even beyond it particularly with regard to matters like post-retiral benefits etc. Hon'ble the Supreme Court in **State of Madhya Pradesh and others v. Shardul Singh** reported in 1970 (1) SCC 108 has defined the said expression in the following terms:-

"9. The expression "conditions of service" means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension, etc."

44. Similarly, in **Vimal Kanwar and others v. Kishore Dan and others** reported in (2013) 7 SCC 476, Hon'ble the Supreme Court has held as follows:-

"21. "Compassionate appointment" can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case, the employee dies in harness i.e. while in service leaving behind the dependants, one of the dependants may request for compassionate appointment to maintain the family of the deceased employee who dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one's death and have no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependants may be entitled for compassionate appointment but that cannot be termed as "pecuniary advantage" that comes under the periphery of the Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act."

45. From the aforesaid, it is clear that matters pertaining to compassionate appointment of employees of the DRDA would constitute a condition of service as envisaged under Government Order dated 17.03.1994.

46. Learned counsel for petitioner has drawn attention to the Government Order with the submission that the same provides applicability of various rules of service applicable upon Government servants to be applicable upon employees of the DRDA. Such rules pertained to appointment, promotion, seniority, reservation etc. It has been submitted that once the said rules have been made applicable upon employees of the DRDA pursuant to the Government Order, then applicability of the 1974 Rules cannot be denied since the State cannot approbate and reprobate at the same time.

47. A perusal of the Government Order does make it evident that the service rules applicable upon Government servants with regard to appointment, seniority, promotion, reservation etc. have been made applicable upon employees of the DRDA. Although, the said rules are specifically mentioned in the Government Order while omitting any such specific mention with regard to the 1974 Rules but in view of paragraph 2(9), denial of applicability of the 1974 Rules would come within the purview of the said doctrine. Once the opposite parties have provided certain benefits to employees of the DRDA in

terms of the Government Order then it would be impermissible to permit them to deny the benefits of other service conditions covered under paragraph 2(9).

48. The phrase "approbate and reprobate' is borrowed from the Scottish law where it is used to express common law principles of election that no party can accept and reject the same instrument. Hon'ble the Supreme Court in **Karam Kapahi and others v. Lal Chand Public Charitable Trust and another**, reported in (2010) 4 SCC 753 has held as follows:-

"53. In the old equity case of Streatfield v. Streatfield [Wh & TLC, 9th Edn., Vol. I, 1928] this principle has been discussed in words which are so apt and elegant that I better quote them:

"Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both [Story, 3rd Edn., p. 452; Dillon v. Parker, (1818) 1 Swans 359 : 36 ER 422; Thellusson v. Woodford, (1806) 13 Ves 209 : 33 ER 273.] . The principle is stated thus in Jarman on Wills [6th Edn., p. 532; and Farwell on Powers, 3rd Edn., p. 429.] :"That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it' [See Walpole v. Conway (Lord), 1740 Barn C 153 : 27 ER 593; Kirkham v. Smith, (1749) 1 Ves Sen 258 : 27 ER 1018; Macnamara v. Jones, 1 Bro CC 481 : 28 ER 1251; Blake v. Bunbury, (1792) 4 Bro CC 21 : 29 ER 758; Wintour v. Clifton, 8 De GM & G 641 : 44 ER 537;Codrington v.Codrington, (1876) LR 7 HL 854 at p. 861; Pitman v. Crum Ewing, 1911 AC 217 at pp. 228, 233 (HL); Brown v. Gregson, 1920 AC 860 at p. 868 : 1920 All ER Rep 730 (HL).] . The principle of the doctrine of election is now well settled."

"54. This principle has also been explained by this Court in Nagubai Ammal v. B. Shama Rao [AIR 1956 SC 593] . Speaking for a three-Judge Bench of this Court, Venkatarama Ayyar, J. stated in the Report : (AIR p. 602, para 23) "23. ... The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

It is clear from the above observations that the maxim that a person cannot "approbate and reprobate' is only one application of the doctrine of election...."

49. *Similarly, in* **M/s New Bihar Biri Leaves Co. and others v. State of Bihar and others,** reported in (1981) 1 SCC 537, the principle has been explained as follows:-

"48. It is a fundamental principle of general application that if a person of his

own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobat (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. [(1921) 2 KB 608] ; see Douglas Menzies v. Umphelby [1908 AC 224, 232] ; see also stroud's judicial dictionary, Vol. I, p. 169, 3rd Edn.)."

50. In view of the discussions made herein above, it is clear that the principle of approbate and reprobate would be applicable in the present circumstance and the opposite parties cannot be permitted to repudiate the conditions of service which are beneficial to the employees of the DRDA while applying other similar such service conditions.

51. Learned Additional Advocate General appearing on behalf of the State has submitted that the Government Order dated 17.03.1994 has been misconstrued by the petitioner since it states that service rules made under Article 309 of the Constitution of India would not be applicable upon employees of the DRDA and since the 1974 Rules have been made under Article 309 of the Constitution of India, the same thus cannot be made applicable upon employees of the DRDA.

52. With regard to aforesaid submission, the opening paragraphs of Government Order dated 17.03.1994 would be referable in which the purpose of issuance of Government Order has been indicated. The Government Order clearly states that directions are being issued to regulate and bring about uniformity in service conditions of the employees of the DRDA because no service conditions for such employees have been notified as yet and since the DRDA is a registered Society, the rules made under Article 309 of the Constitution of India would be inapplicable. It is evident that the inapplicability of Rules made under Article 309 of the Constitution of India upon the employees of the DRDA clearly means that Rules made under Article 309 of the Constitution of India would not automatically be applicable upon the employees of the DRDA since it is a registered society. However, there is no legal bar in either Article 309 of the Constitution of India or under the said Government Order that beneficial conditions of service pertaining to Government employees made under Article 309 of the Constitution of India cannot be extended to a registered society such as DRDA, which is "State' under Article 12 of the Constitution of India. As such, the submission of learned counsel for the State is clearly misconceived.

53. The second submission of the learned State counsel is that the employees of the DRDA have already been held not to be government servants since they are not holding any civil posts under either the Central or the State Governments and, therefore, providing benefit of the 1974 Rules to employees of the DRDA would amount to giving them the status of Government servants.

54. The said submission of the learned State Counsel at the very outset is

clearly misconceived. By extending the benefit of 1974 Rules upon employees of the DRDA, it cannot be said by any stretch of imagination that it would confer the status of Government employees upon them. Incorporation of the said Rules by reference merely amounts to providing the benefit of a beneficial legislation. As such, extending the benefit of compassionate appointment under the 1974 Rules upon the employees of the DRDA would only have the effect of providing the said beneficial benefit and not granting them the status of Government servants.

55. It has been further submitted by the learned State Counsel that paragraph 2(9) of the Government Order is merely an enabling provision and would be inapplicable unless it is adopted in all the DRDAs of the State, which has not been done. With regard to aforesaid submission, it is seen from the record that the present matter pertains to District Raebareli where the DRDA vide resolution dated 02.06.1994 has already adopted the Government Order dated 17.03.1994 in its entirety.

56. Apart from the aforesaid factor, it is also to be noticed that paragraph 2 of the Government Order clearly indicates that the State Government has taken a decision to issue guidelines with regard to service conditions of the employees of the DRDA in order to regulate and bring about uniformity for the employees in various DRDAs of the State. It has also been stated that the order is being issued so that the various DRDAs are able to make rules pertaining to the same in terms of the directions that are being issued.

57. The aforesaid statement in the Government Order clearly specifies that the directions issued vide the Government Order would be applicable across all the DRDAs without exception and would not be dependent upon its adoption by individual DRDAs. The provision enabling the various DRDAs to make rules or sub-rules in terms of the directions is merely consequential and the directions issued by the Government Order are not at all dependent upon the DRDAs adopting the same or making rules in terms thereof. As such, the submission of learned State Counsel that the provisions of the Government Order are only enabling does not appear to be a correct position, particularly when it is undisputed that other service rules regarding Government employees are already being enforced upon the employees of the DRDAs throughout the State without any specific adoption or Rule having been made thereunder.

58. The last submission of learned State Counsel pertains to the fact that the DRDA was set up as a temporary organisation as indicated in Government Order dated 17.03.1994 itself and the staff also being temporary in nature. Regarding the aforesaid provision, it is also to be noticed that subsequently, vide Government Order dated 18.07.2016, the employees of the DRDA throughout the State of U.P. have been absorbed in the Department of Rural Development of the State Government. Even prior to such absorption, the department is existing for more than 35 years with its staff having been employed since then. Such a long period of not only the organisation but its employees as well cannot be said to be temporary in nature, which is a fact recognised by the State Government itself by issuance of the Government Order dated 18.07.2016. As such, the said submission lacks merit.

59. Another submission of learned State Counsel although not having been taken in the counter affidavit filed in the writ petition is being considered since the same has been raised in the written submissions and is that the State Government subsequently has issued a Government Order dated 10.06.2013 denying the applicability of the 1974 Rules upon the employees of the DRDA and the same has not been challenged.

60. A perusal of the order dated 10.06.2013 filed along with the written submissions clearly indicates that it is not in the nature of a Government Order and has merely rejected the representation of one Smt. Meera Awasthi, wife of late Vijay Kant Awasthi for compassionate appointment under the 1974 Rules. The rejection of her claim is merely on the ground that the 1974 Rules are inapplicable upon the employees of the DRDA. The same cannot be termed to be a Government Order and is merely in the nature of decision upon a representation pertaining to one Smt. Meera Awasthi and was, therefore, not required to be challenged by the present petitioner. Even otherwise, the ground of rejection indicated in the order dated 10.06.2013 has already been considered herein above.

61. In view of the aforesaid facts that undisputedly, the State Government has the power to issue orders such as the Government Order dated 17.03.1994 in order to fill in the void pertaining to service conditions of employees of Government Order and also in view of paragraph 2(9) of the Government Order, it is clear that the Rules of 1974 would be applicable upon the employees of the DRDA.

Consideration of Question No.2 :- (ii) Whether the judgment of Division Bench in State of U.P. vs. Ajeet Kumar Shahi, Special Appeal No.714 of 2015, requires reconsideration in light of the Government Orders dated 17.3.1994 and 18.7.2016?

62. In view of the discussions made herein above, particularly with regard to the importance and applicability of Government Orders dated 17.03.1994 and 18.07.2016, and the same having escaped attention of the Division Bench in the case of Ajeet Kumar Shahi (Supra), it is clear that the aforesaid case required reconsideration.

63. Consequently, the questions referred to this Bench are answered as follows:-

Question No.1 : In view of the provisions of Government Order dated 17.03.1994, particularly clause 2(9), the provisions of the U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 would be applicable upon employees of the District Rural Development Agency:

Question No.2 : The judgment of Division Bench in **Ajeet Kumar Shahi** (Supra) having been passed in ignorance of Government Order dated 17.03.1994 is held not to be a good law and is, therefore, overruled.

64. The reference is answered accordingly.

65. Registry is directed to place the matter before the appropriate court dealing with the matter.

(2021)05ILR A195
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.03.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 16561 of 2020

Brijesh Kumar ....Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Jai Narayan Pandey, Aprajita Tiwari, Mayur Shukla

Counsel for the Respondents:
C.S.C, Arun Deshwal

Constitution of India - Art. 14, Art. 21 - Suspension - keeping an employee under suspension for substantially long period i.e. for more than 14 months without providing charge-sheet & without conducting departmental inquiry is harassment - Non-making of subsistence allowance during period of suspension is absolutely illegal & is violation of Article 14 and 21 (Para 9)

Allowed. (E-4)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Jai Narayan Pandey, learned counsel for the petitioner.

2. List revised. None appears for the opposite parties, nor any request for adjournment has been made.

3. On 08.03.2021 this Court directed learned counsel for the petitioner to intimate the learned counsel for the opposite parties about the date fixed, as the date was fixed for 10.03.2021.

4. Sri Pandey has shown a letter whereby he has intimated about the date fixed through e-mail.

5. By means of this writ petition, the petitioner has assailed the suspension order 04.01.2020 passed by the Managing Director, U.P. Cooperative Federation Limited, Lucknow. The reason/ground of suspension is that the petitioner was transferred to District Office, Mau on 21.11.2019, but he has not submitted his joining at the transferred place. Therefore, pending departmental inquiry, he was placed under suspension. Learned counsel for the petitioner has drawn attention of this Court towards Annexure-3, which is an order dated 09.01.2020 passed by the District Manager, P.C.F., Jhansi, relieving the petitioner from Jhansi.

6. Learned counsel for the petitioner has submitted that when the petitioner was relieved from Jhansi on 09.01.2020, how could he submit his joining at Mau, pursuant to the transfer order dated 21.11.2019. Therefore, the reason so indicated in the suspension order is mis-concieved and the Managing Director has passed the suspension order without verifying the fact from Jhansi, as to whether the petitioner has been relieved from Jhansi or not.

7. Learned counsel for the petitioner has submitted that after the suspension order dated 04.01.2020 being passed, the petitioner preferred representations to the Managing Director, which have been enclosed with the writ petition, apprising

that he has not committed any misconduct. As non-submitting his joining at transferred place was not a deliberate and intentional conduct of the petitioner, but the competent authority at Jhansi has not relieved the petitioner till 09.01.2020 and before his relieving from Jhansi, the suspension order dated 04.01.2020 has been passed, therefore, he has requested that suspension order may be withdrawn.

8. Learned counsel for the petitioner has submitted that more than 14 months period have passed since order of suspension dated 04.01.2020, but neither the charge-sheet has been served upon the petitioner nor any inquiry has been conducted. He has further submitted that after the suspension of the petitioner, he has not been paid subsistence allowance till date. He has lastly submitted that he is ready to submit his joining at the transferred place and the opposite parties may be directed to accept the joining of the petitioner at transferred place at District Office, P.C.F., Mau.

9. Be that as it may, since the counsel for the opposite party Nos. 2, 3 and 4 is not present to dispute the contention of the petitioner and despite the list having been revised, no request for adjournment has been made, therefore, the contention and submission of the learned counsel for the petitioner are treated to be correct. Besides, the records of the writ petition are also supporting the contention of the petitioner, inasmuch as the suspension order has been passed on 04.01.2020 prior to the relieving order dated 09.01.2020, whereby the petitioner has been relieved from Jhansi. Therefore, it appears that the suspension order has been passed without verifying the fact and reason for not submitting the joining at transferred place by the petitioner. Not only the above, when the petitioner has preferred his representation dated 22.01.2020 (Annexure 4 to the writ petition) to the General Manager and representation dated 05.02.2020 (Annexure 5 to the writ petition) preferred to the Managing Director, the competent authority must have verified the very fact as to whether the petitioner has committed any misconduct or not, inasmuch as not submitting joining at the transferred place for the reason that he was not relieved from Jhansi on or before passing of the suspension order, may not be treated as misconduct. Further, keeping an employee under suspension for substantially long period i.e. for more than 14 months in the present case without providing charge-sheet and without conducting departmental inquiry is a harassment. Non-making of subsistence allowance during period of suspension is absolutely illegal and unwarranted action/inaction of the concerning opposite party, as non-payment of subsistence allowance during period of suspension is violation of Article 14 and 21 of the Constitution of India.

10. Therefore, in view of the above, the impugned order dated 4.01.2020 passed by the Managing Director, U.P. Cooperative Federation Limited, Lucknow, which is contained as Annexure-1 to the writ petition is hereby quashed. The competent authority is directed to accept the joining of the petitioner at Mau pursuant to his transfer order dated 21.11.2019. He shall be paid his regular salary as and when the same falls due. The opposite parties are also directed to make payment of entire salary for the suspension period of the petitioner expeditiously, preferably within a period of one month.

11. In view of the aforesaid terms, the writ petition is **allowed**. No order as to costs.

(2021)05ILR A197
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.05.2021

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Service Single No. 30492 of 2017

Anuragh Singh & Ors. ....Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioners:
Yadukul Shiromani Srivast

Counsel for the Respondent:
C.S.C.

Constitution of India - Art. 14 & 16 - Promotion & financial benefits- Training Officer in Judicial Training and Research Institute (JTRI) - 'Ex-Cadre' posts - No rules regarding promotion of Training Officer - Training Officer denied benefit of ACP on the ground that they hold Ex-Cadre posts - *Held* - employees cannot be made to suffer in the absence of rules regarding promotion - promotions are granted to a higher post to avoid stagnation - work of Training Officer is perennial, regular and permanent - said post was not created for any specific person or particular period and not going to be abolished after their retirement - they continued in service without any break from the respective dates of their appointment, therefore, they are members of the service in a substantive capacity - No justification for recovery of excess payment made to the petitioners which was given to them after considering their continuous long length of service (Para 34, 36)

Allowed.(E-4)

List of Cases cited:-

1. Rudra Kumar Sain & ors. Vs U.O.I.& ors. - (2000) 8 SCC 25

2. D.R. Nim, IPS Vs U.O.I. - AIR 1967 SC 1301

3. G.K. Dudani & ors. Vs S.D. Sharma & ors. - 1986 (supp) SCC 239

4. State of Tripura & ors. Vs K.K. Roy - (2004) 9 SCC 65

5. A. Satyanarayana & ors. v. S. Purushotham & ors. - (2008) 5 SCC 416

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. The petition has been filed with the following prayers:-

"(a) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 25.09.2017 served on 27.9.2017 as contained in Annexure Nos. 1, 2 & 3 to this writ petition.

(b) Issue a writ order or direction in the nature of mandamus commanding the opposite parties by directing them not to give effect to the impugned orders dated 25.9.2017 as contained in Annexure Nos. 1, 2 & 3 which has been issued in circumvention of the GOs dated 22.5.1990 & 16.11.1998 as contained in Annexure Nos. 9 & 15 respectively.

(c) Issue a writ order or direction in the nature of mandamus commanding the opposite parties by directing them to consider the petitioners for upgradation/ modification of their pay scale at least above those incumbents who were appointed in Office Staff i.e. ministerial

cadre i.e. Group 'C' as since their initial appointments the petitioners are the gazetted officers.

(d) Issue a writ order or direction in the nature of mandamus commanding the opposite parties by directing them to create a structure of cadre by providing avenue of promotions from the post of Training Officers.

(e) Issue a writ order or direction in the nature of mandamus commanding the opposite parties by directing them not to make any recovery from the salary and the emoluments already paid to the petitioners as all of them deserve to be treated as appointed in the cadre since date of their initial appointment.

(f) Any other suitable direction or order may also be issued in favour of the petitioners, which this Hon'ble Court may deem fit and proper in the circumstances of the case."

2. Brief facts of the case are as follows:-

(i) The Judicial Training and Research Institute (JTRI) was established at Lucknow after Governor's approval in furtherance of National Joint Conference of Chief Ministers, Chief Justices & Law Ministers presided by Prime Minister with object for training & research of Judicial Officers, Law Officers, Government Advocates, and Public Prosecutors. The decision was followed by Law Commission's 14th & 17th Report.

(ii) The Governor of U.P. accorded the approval for establishing JTRI at Lucknow under the administrative control of Law Department, Government of U.P. Two 'Ex-Cadre' posts of Training Officer in JTRI were created with other gazetted posts by G.O. No.अधि0 2034/सात-उ०न्या०/1986-55/86 dated 06.08.1986. Vide G.O. No.959/ सात-उ०न्या०/1986-55/86 dated 31.08.1987, two more Ex-Cadre posts of Training Officer were created. Thus, total number of Ex-Cadre posts of Training Officer at JTRI reached at 04 (Four).

(iii) Vide office order dated 16.08.1989, petitioner no.1 was appointed on the vacant post of Research Officer. Subsequently, vide office order dated 22.06.1990, he was promoted/appointed on the post of Training Officer. Petitioner No.1 was confirmed on the post of Training Officer vide order dated 28.10.1998.

(iv) Petitioner No.1 was not being allowed the next benefit arising out of IIIrd ACP and Petitioner Nos.2 and 3 of IInd ACP on the ground that since they are holding Ex-Cadre posts, they are not entitled for Time Scale/ACP.

(v) Vide Letter/G.O. No.सा०-976/सात - न्याय - 1-15-07(प्र)/14 dated 06.08.2015, it was communicated/directed by the Government that either under the earlier arrangement of Time Bound Promotional Pay Scheme (for short 'Time Scale Scheme') or under the present scheme of Financial Upgradation (for short 'ACP'), there is no provision of grant of Financial Upgradation to the incumbents of Ex-Cadre posts.

(vi) Vide G.O. No.63/2016/सा०-1539/सात - न्याय - 1 - 16 - 7 (प्र)/2014 dated 08.12.2016, three out of four Ex-Cadre Posts of Training Officer in JTRI have been made Cadre posts w.e.f. 15.06.2003 and the

persons working against those three posts of Training Officer have been absorbed against cadre posts.

(vii) Vide Office Order No.जेo टीo आरoआईo/अधिo-397/324 dated 23.02.2017 issued by JTRI in due compliance of the aforesaid Government Order dated 08.12.2016, order has been passed to absorb three incumbents/Training Officers against the three posts of Training Officers made a Cadre Post w.e.f. 15.06.2003. Further, vide Letter No.जेo टीo आरoआईo/अधिo-397/325 dated 23.02.2017, appropriate direction was sought from the Government in respect to the date of admissibility and grant of Time Scales/ACPs to the petitioners.

(viii) In the meantime, a test checking of the pay fixation of the officers/employees working in JTRI was conducted by the team of Auditors of the Establishment Revision Bureau, Department of Finance, U.P. Civil Secretariat, Lucknow (for short 'ERB') from 01.05.2017 to 05.05.2017 in which discrepancies were found in pay fixation of total 8 officers/employees working in JTRI, including the petitioners herein. Subsequently, vide Letter No.ब्यूरो-638/दस-2017-6 (ऑडिट)/2017 dated 25.08.2017 issued by Director, Establishment Revision Bureau, Department of Finance, Lucknow, U.P., it was directed that the fixation of pay etc., of the aforementioned 8 officers/employees found erroneous in the aforesaid test/checking audit, be corrected and the amount paid in excess to their entitlement be adjusted from their salary etc., after inviting their objections in that regard.

(ix) In furtherance of the aforesaid letter dated 25.08.2017 (supra), the pay scale(s) of the aforesaid officers/employees have been re-fixed after inviting their objections. In the case of Training Officers, their pay scales and admissible time scales/financial upgradations have been re-fixed and appropriate order(s) dated 25.09.2017 have been issued, which are impugned herein, treating their services on the cadre post of Training Officer w.e.f. 15.06.2003 in terms of aforesaid Government Order dated 08.12.2016.

3. Learned counsel for the petitioners has submitted that the impugned order has been issued in a camouflage of pay fixation as per G.O. dated 08.12.2016, G.O. dated 22.12.2016 and letter dated 25.08.2017 without serving the same to the petitioners. It is submitted that after representation of the petitioner dated 17.03.2014 to the Principal Secretary (Judicial) & LR, Government of U.P. for upgradation of the post/pay scale on 30.10.2014, the State Government directed Director, JTRI to submit fresh proposal of upgradation of post/pay scale considering the qualification, work & responsibility of the posts of Training Officers.

4. Learned counsel for the petitioners has submitted that the impugned orders culminating into reduction of the pay of the petitioners without there being any fault on their part are violative of principles of natural justice as the reduction of pay if ordered against any proved misconduct, is included amongst the penalties in U.P. Government Servant (Discipline and Appeal) Rules, 1999.

5. Learned counsel has relied upon a judgment rendered by Hon'ble Supreme Court in the case of ***Rudra Kumar Sain & Ors. v. Union of India & ors. - (2000) 8 SCC 25*** in which it has been held that the longevity of service is a material factor as after rendering the services for about a decade, it may not be termed as adhoc, stop gap or fortuitous.

6. It is submitted that a person who possess the requisite qualification for being appointed on a particular post and if he is appointed on the said post after approval and consultation with the appropriate authority and continue on the said post for fairly long period, then such an appointment cannot be held stop gap or fortuitous or purely adhoc.

7. Learned counsel for the petitioners has submitted that the petitioners deserve to be considered for upgradation/modification of their pay scales at least above those incumbents who were appointed in the Office Staff i.e. Ministerial Cadre, which is Group 'C' post, as since their initial appointments, the petitioners are the Gazetted Officers.

8. Learned counsel for the petitioners has submitted that the impugned orders have been passed in arbitrary manner and without considering the entirety of the matter and without application of mind. The same deserve to be quashed.

9. *Per Contra*, learned counsel for the State has vehemently opposed the submissions made by learned counsel for the petitioners and submitted that Government Orders dated 06.08.1986 and 31.08.1987 have been issued on the basis of Project Report and those orders have accordingly been made effective. It is further submitted that vide Government Order dated 06.08.1986, two Ex-Cadre posts of Training Officer were created on temporary basis and further vide Government Order dated 31.08.1987, two more ex-cadre posts were created on temporary basis. Thus, the total number of ex-cadre posts reached at four.

10. It is submitted that the posts of Clerical/Ministerial Cadre, Accounts Cadre and Stenographers Cadre in JTRI have been restructured by the Government of U.P. in the line of other departments of the State Government. It is submitted that vide Government Order dated 06.08.2015 (supra), it was communicated/directed by the Government that either under the earlier arrangement of Time Scale Scheme or under the present scheme of ACP, there is no provision of grant of financial upgradation to the incumbents of ex-cadre posts. It is further submitted that vide Government Order dated 08.12.2016 (supra), three out of four posts of Training Officer in the JTRI have been made a cadre post only w.e.f. 15.06.2003, prior to which it was an ex-cadre post.

11. It is further submitted by the State that vide letter dated 23.02.2017, appropriate direction was sought from the Government in respect of the date of admissibility of the Time Scale/ACPs to the petitioners and the said matter is still pending consideration before the Government of U.P.

12. Learned counsel for the State has invited attention of the Court towards Para - 11 of Counter Affidavit dated 20.07.2018 and submitted that a test checking of pay fixation of officers/employees working in JTRI was conducted by the team of Auditors of ERB from 01.05.2017 to

05.05.2017 in which discrepancies were found in fixation of total 08 officers/employees working in JTRI, including the petitioners. Therefore, vide order dated 25.08.2017 (supra) issued by Director, ERB, it was directed that the discrepancies found in the pay fixation of aforesaid 08 officers/employees be corrected and amount paid in excess to their entitlement be adjusted from their salary etc., after inviting their objections.

13. It is submitted that in pursuance of order dated 25.08.2017 (supra), pay scale(s) of the aforesaid officers/employees have been refixed. It is further submitted that in the case of Training Officers (petitioners herein), their pay scale(s) and admissible Time Scale/financial upgradation have been refixed and appropriate order(s) dated 25.09.2017 have been issued treating their services on the cadre post of Training Officer w.e.f. 15.06.2003 in terms of Government Order dated 08.12.2016, which is absolutely just and proper and in accordance with the relevant Rules, Government Orders and law.

14. Learned counsel has submitted that the officers and employees of JTRI are governed by Rules and Government Orders promulgated by the Government from time to time and the incumbents of the post of Training Officers have been granted service benefits absolutely in accordance with relevant government orders.

15. It is submitted that as a policy decision taken by the Government, the post of Office Superintendent has been merged with the post of Administrative Officer and in resolution to the issue of pay disparity among the various posts of the cadre as raised by U.P. State Employees' Association, the Clerical/Ministerial Cadre of the Government Departments has been restructured and Grade Pay of Rs.4600 has been made admissible to the post of Administrative Officer. It is submitted that under the aforesaid restructuring of Clerical/Ministerial Cadre, it has been provided for promotions to the post of Senior Administrative Officer from the post of Administrative Officer and further promotion from the post of Senior Administrative Officer to the post of Chief Administrative Officer. It is submitted that the aforesaid three posts of Administrative Officer, Senior Administrative Officer and Chief Administrative Officer are Gazetted Posts.

16. In reply of counter affidavit dated 20.07.2018, the petitioners have filed rejoinder affidavit dated 30.08.2018 wherein it has been pleaded that there was no direction to create Training Officer post as Ex-Cadre in the Government Order dated 06.08.1986 and Government Order dated 31.08.1987. A proposal dated 24.02.2016 & 25.02.2016 was made by the Principal Secretary, Judicial & L.R. for restructuring of Training Officers and promotional avenues for upgrading/promotion to Assistant Director, Deputy Director and Joint Director. It is also pleaded that despite the order of this Hon'ble Court dated 27.03.2018 by which two months time was given to the State Government for restructuring, nothing has been done till now

17. It is also brought attention of the Court by the petitioners that in Government Order dated 06.08.1986 (supra), even the post of Assistant Director (Management) was shown as Ex-Cadre but the same has

not been treated as Ex-Cadre Post in the minutes of meeting held on 31.08.1998 & 03.09.1998 presided by Secretary Personnel regarding review of Ex-Cadre Post in different departments, however, the post of Training Officer was ignored while making restructuring of ministerial cadre in the line of other departments.

18. Learned counsel for the State has invited attention of the Court towards Para - 11 of the Counter Affidavit dated 09.11.2020 and submitted that in pursuance of direction dated 27.03.2018 (supra) passed by the Court, a meeting was conducted on 11.10.2018 under the Chairmanship of Principal Secretary, Law in which it was decided that apart from the service rules of Training Officer of JTRI, the service rules of all the cadre of JTRI shall be prepared. It is further pleaded in the counter affidavit that pursuant to decision of the meeting dated 11.10.2018, the Director, JTRI sent the proposal for promulgation of service rules of all cadres of JTRI. The said proposal was forwarded to Finance and Personnel Department in which certain objections were raised. The Finance and Personnel Department on 22.07.2020 remitted the proposal back to JTRI for correction of the proposal and amended draft which is still awaited.

19. Learned counsel for the petitioners in rejoinder affidavit dated 18.11.2020 denied all the averments made in the aforesaid counter affidavit and submitted that the counter affidavit does not disclose as to why while making restructuring of the ministerial cadre in the line of other departments, post of Training Officer was left despite the decision of the Hon'ble Chief Minister keeping in view the recommendation of meeting held on 31.08.1998 & 03.09.1998 presided by Secretary Personnel regarding review of Ex-Cadre Post in different departments.

20. Learned counsel for the petitioners has submitted that on 01.03.2014, Class III non-gazetted post of Office Superintendent - Grade II pay scale [Rs.570-1100] revised in Pay Scale Rs.9300-34800, Grade Pay Rs.4200/- was brought in Rs.15,600-39,100 Grade Pay Rs.5400/- as per 6th Pay Commission redesignating as Senior Administrative Officer further redesignated as Chief Administrative Officer which resulted in further hike of the Pay Scale as per 7th Pay Commission. However, Training Officers, a Gazetted post [Rs.770 1600] was revised merely as Rs.9300-34800 Grade Pay Rs.4600/-. Thus, due to non-structuring, three Training Officers of JTRI i.e. the petitioners, which was created as Gazetted Officer in pay scale Rs.770-1600 are merely at Rs.9300-34800 Grade Pay Rs.4600/- as per 6th Pay Commission i.e. much less than such incumbent who was in ministerial staff whereas the petitioners were appointed as Gazetted Officer on the posts of Training Officer. Therefore, the petitioners deserve to be given service benefits at least from the date the incumbent below in rank to them were so given.

21. It is submitted that petitioner no.2 is due to retire on 31.07.2021, petitioner no.3 on 31.05.2022 and petitioner no.1 on 30.09.2023 but inclination appears to keep them still stagnated after more than 30 years of service. Therefore, the petitioners are entitled to all the reliefs prayed for treating them as notionally promoted since the initial proposal made by the administrative department i.e. the Department of Law and Justice for restructuring of Training Officers.

22. I have heard learned counsel for the parties and perused the record.

23. Vide G.O. order dated 22.05.1990 (supra), the ex-cadre posts were made permanent, which reads as under:-

संख्या 1467/सात–उ0न्या0 – 87/86

प्रेषक,

श्री के0 एल0 शर्मा,

न्याय सचिव,

उत्तर प्रदेश शासन।

सेवा में,

निदेशक,

न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान,

उ0 प्र0, लखनऊ।

न्याय {उच्च न्यायालय} अनुभाग लखनऊः दिनांक 22 मई, 1990

विषय– न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान, लखनऊ के अन्तर्गत सृजित अस्थायी पदों का स्थायीकरण।

महोदय,

उपर्युक्त विषय पर आपके पत्र संख्या–जे0टी0आर0आई0/974 दिनांक 19 अप्रैल 1990 के संदर्भ में मुझे यह कहने का निदेश हुआ है कि राज्यपाल महोदय, न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान, लखनऊ के अन्तर्गत कार्यालय ज्ञाप संख्या अधि0 2034/सात–उ0न्या0–1986–55/86, दिनांक 6 अगस्त, 1986 के अनुलग्नक–1 में उल्लिखित अस्थायी पदों में से सहायक निदेशक– (प्रबन्ध) के अस्थायी पद जो शासनादेश संख्या 2986/सात–उ0न्या0–68/86, दिनांक 23 नवम्बर, 1989 द्वारा समाप्त कर दिया गया है को छोड़ते हुए संलग्नक में उल्लिखित अस्थायी पदों को दिनांक 1 मार्च, 1990 से स्थायी पदों में परिवर्तित किये जाने की स्वीकृति प्रदान करते है।

2– इन पदों के पद धारको को शासन द्वारा समय≤ पर जारी किये गये आदेशों के अनुसार मंहगाई भत्ता एवं अन्य भत्ते जो उन्हें अनुमन्य हो भी देय होंगे।

3– मुझे यह भी कहने का निदेश हुआ है कि संलग्नक के कालम–6 में उल्लिखित शासनादेश संख्या 53/सात–उ0न्या0–87/86, दिनांक 9 मार्च, 1989 के अनुसार इन अस्थायी पदों की निरन्तरता अंतिम बार वर्ष 1989–90 में दिनांक 28 फरवरी, 1990 तक जारी की गई थी।

4– इन पदों पर होने वाला व्यय आय–व्यय के अनुदान संख्या–42 के अन्तर्गत लेखा शीर्षक 2014 न्याय प्रशासन आयोजनेत्तर 800 अन्य तथा 01– न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान के अधीन सुसंगत प्राथमिक इकाइयों के नाम डाला जायेगा।

5– प्रमाणित किया जाता है कि इन पदों का स्थायीकरण कार्यालय ज्ञाप संख्या–ए–2–797–दस–87–24{12}–86, दिनांक 25 मई, 1987 में निहित सभी शर्तों की पूर्ति के बाद किया जा रहा है।

संलग्नक– यथोक्त।
भवदीय
ह0 अपठनीय
के0 एल0 शर्मा
न्याय सचिव

24. Vide G.O. dated 08.12.2016, three out of four posts of Ex-Cadre Training Officer post was made cadre post, which reads as under:-

संख्याः 63/2016/01539/सात-न्याय-1 10:/(ए)/2014

प्रेषक,

रंगनाथ पाण्डेय
प्रमुख सचिव,
उ०प्र० शासन।

सेवा में,

निदेशक,
न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान,
उ०प्र० लखनऊ।

न्याय अनुभाग-1 (उच्च न्यायालय)
लखनऊः दिनांक 08 दिसम्बर, 2016

विषयः न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान, उ०प्र० लखनऊ के निःसंवर्गीय प्रशिक्षण अधिकारियों के पदों को संवर्गीय पद घोषित किये जाने एवं उक्त पद पर वर्तमान में कार्यरत 03 प्रशिक्षण अधिकारियों को संवर्गीय पद पर संविलीन किये जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक आपके पत्र संख्या जे०टी०आर०आई०/अधि0-397/14-1322, दिनांक 9-7-14 के संदर्भ में मुझे यह कहने का निर्देश हुआ है कि शासनादेश संख्याः अधि0-2034/सात-उ0न्या0/1986-55-86, दिनांक 6-8-1986 द्वारा वेतनमान रू0 770-1600 (पुनरीक्षित वेतन बैण्ड-2 वेतन रू0 9300-34800 व ग्रेड वेतन रू0 4600/-) में सृजित प्रशिक्षण अधिकारी के 02 निःसवर्गीय पद तथा शासनादेश संख्याः अधि0-959/सात-30न्या0/1986-55/86, दिनांक 31-8-1987 द्वारा वेतनमान रू0 770-1600 (पुनरीक्षित वेतन बैण्ड-2 वेतन रू० 9300-34800 व ग्रेड वेतन रू0 4600/-) में सृजित प्रशिक्षण अधिकारी के 02. निःसंवर्गीय पदों के सापेक्ष 01 निःसंवर्गीय पद कुल 03 निःसंवर्गीय पदों को दिनांक 15-6-2003 से संवर्गीय बनाये जाने एवं उक्त पद पर वर्तमान में कार्यरत 03 प्रशिक्षण अधिकारियों को संविलीन किये जाने की श्री राज्यपाल महोदय सहर्ष स्वीकृति प्रदान करते हैं।

2. उक्त का समादेश न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान, उ०प्र० लखनऊ की प्रख्यापित की जाने वाली सेवा नियमावली में कर लिया जायेगा।

3. उक्त पदो में से 02 पदों को स्थायी किया गया है तथा 02 पदों की निरन्तरता अन्तिम बार दिनांक 28-02-2017 तक बढ़ायी गयी है।

4. यह आदेश वित्त विभाग के अशासकीय संख्या 1392/ई-12/दस/2016, दिनांक 05 दिसम्बर, 2016में प्राप्त उनकी सहमति से जारी किये जा रहे है।

भवदीय,
(रंगनाथ पाण्डेय)
प्रमुख सचिव

25. Letter dated 23.02.2017 is also reproduced hereinbelow for ready reference:-

संख्या :
जे0टी0आर0आई0/अधि0 - 397/325

प्रेषक,

श्री राम मनोहर नारायण मिश्र,
अपर निदेशक,
न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान, उ0प्र0
विनीत खण्ड, गोमती नगर
लखनऊ।

सेवा में,
विशेष सचिव

न्याय अनुभाग- 1 (उच्च न्यायालय),

उत्तर प्रदेश शासन,
लखनऊ।
दिनांक: 23 फरवरी, 2017

विषयः न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान, उ0प्र0, लखनऊ के निःसंवर्गीय प्रशिक्षण अधिकारियों के संवर्गीय पद घोषित किये जाने एवं उक्त पद पर वर्तमान में कार्यरत 03 प्रशिक्षण अधिकारियों को संवर्गीय पद पर संविलीन किये जाने के संबंध में।

महोदय,

कृपया उपर्युक्त विषयक शासनादेश संख्या 63/2016 / सा0-1539/सात-न्याय-1-16-7(2)/2014, दिनांकित 08 दिसम्बर, 2016 का संदर्भ लेने का कष्ट करें, जिसके द्वारा शासनादेश संख्या अधि0-2034 / सात-उ0न्या0 / 1986-55-85, दिनांक 06-8-1986 द्वारा वेतनमान रू0 770-1600 वेतन बैण्ड-2 वेतन रू0 9300-34800 ग्रेड वेतन रू0 4600) में सृजित प्रशिक्षण अधिकारी के 02 पद तथा शासनादेश संख्या अधि0-959 / सात-उ०च्या0 / 1986-55-86, दिनांक 31.08 1987 द्वारा वेतनमान रू0 770-1600 (पुनरीक्षित वेतन बैण्ड-2 वेतन रू0 9300-34800 व ग्रेड वेतन रू0 4600) में अधिकारी के 02 निःसंवर्गीय पदों के सापेक्ष 01 निःसंवर्गीय पद अर्थात कुल 03 निःसवर्गीय पदों को दिनांक 15.06.2003 से संवर्गीय बनाये जाने एवं उक्त पद पर वर्तमान में कार्यरत 03 प्रशिक्षण अधिकारियों को संविलीन किये जाने की स्वीकृति प्रदान की गयी है।

उक्त के सम्बन्ध में अवगत कराना है कि उक्त शासनादेश दिनांक 06.08.1986 एवं 31.08.1987 सृजित प्रशिक्षण अधिकारी के निःसंवर्गीय पदों पर श्री अनुराग सिंह दिनांक 22.06.1990 के अपरान्ह से, श्रीमती अर्चना शर्मा दिनांक 03.12.1993 से तथा सुश्री सबीहा अख्तर दिनांक 20.03.1996 के अपरान्ह से कार्यरत है। पूर्व में उन्हें कार्यभार ग्रहण करने की तिथि से सेवा के आधार पर समयमान वेतनमान / ए०सी०पी० का लाभ अनुमन्य कराया गया था।

उक्त के क्रम में शासनादेश संख्याः सा0-976/ सात-न्याय-1-15-07 (प्र) / 14, दिनांक 06 अगस्त, 2015 द्वारा शासन से प्राप्त निर्देश- "समयमान वेतनमान की पूर्व व्यवस्था तथा वित्तीय स्तरोन्नयन की वर्तमान व्यवस्था में निःसंवर्गीय पदों पर पदधारकों को वैयक्तिक वेतनमान अथवा वित्तीय स्तरोन्नयन अनुमन्य किये जाने की कोई व्यवस्था नहीं है। समयमान वेतनमान की पूर्व व्यवस्था में भी संवर्गीय पदों पर निरन्तर नियमित सन्तोषजनक सेवा के आधार पर तथा वर्तमान वित्तीय स्तरोन्नयन की व्यवस्था के अन्तर्गत संवर्गीय पदों पर नियमित निरन्तर सन्तोषजनक सेवा के आधार पर शासनादेशों में दी गयी शर्तों एवं प्रतिबन्यों को पूर्ण करने वैयक्तिक रूप से समयमान वेतनमान तथा वित्तीय स्तरोन्नयन अनुमन्य किये जाने की व्यवस्था की गयी है। निःसंवगीय पदों पर समयमान वेतनमान सुनिश्चित वित्तीय स्तरोन्नयन की अनुमन्यता नहीं है।" के कम में नोटिस दी गयी थी कि उन्हें पूर्व में प्रदत्य सेलेक्शन ग्रेड एवं ए०सी०पी० के लाभ को संशोधित कर वेतन निर्धारण सही किया जाना होगा और सही वेतन के निर्धारण के आधार पर हुए अधिक भुगतान का देय वेतन आदि से समायोजन किया जाना होगा।

उक्त के क्रम में शासनादेश संख्या: 63/ 2016 / सा0-1539 / सात-न्याय-1-16-7

(प्र)/2014, दिनांकित 08 दिसम्बर, 2016 द्वारा प्रशिक्षण अधिकारी के कुल (02 स्थायी व 01 अस्थायी) 03 निःसंवर्गीय पदों को दिनांक 15.06.2003 से संवर्गीय बनाये जाने एवं उक्त पद पर वर्तमान में कार्यरत 03 प्रशिक्षण अधिकारियों को संविलीन किये जाने की स्वीकृति प्रदान की गयी है, किन्तु पदधारकों को उनकी प्रशिक्षण अधिकारी के पद पर नियुक्ति/कार्यभार ग्रहण करने की तिथि से सेवा के आधार पर समयमान वेतनमान / ए०सी०पी० का लाभ देय होगा अथवा संवर्गीय किये जाने की तिथि 15.06.2003 से सेवा के आधार पर ए०सी०पी० का लाभ देय होगा, स्थिति स्पष्ट नहीं है। अतः शासन से अनुरोध है कि प्रशिक्षण अधिकारी के पदों को संवर्गीय किये जाने की तिथि 15.06.2003 के पूर्व से कार्यरत श्री अनुराग सिंह, श्रीमती अर्चना शर्मा एवं सुश्री सबीहा अख्तर को उनके वर्तमान पद पर कार्यभार करने की तिथि से सेवा के आधार पर समयमान वेतनमान / ए०सी०पी० का लाभ देय होगा अथवा प्रशिक्षण अधिकारी के पदों को संवर्गीय किये जाने की तिथि 15.06.2003 से सेवा के आधार पर ए०सी०पी० का लाभ देय होगा, के सम्बन्ध में कृपया मार्ग-दर्शन / आदेश प्रदान करने का कष्ट करें।

भवदीय,
(राम मनोहर नारायण मिश्र)
अपर निदेशक

26. The following orders were passed by this Hon'ble Court on 19.01.2018 and 27.03.2018:

Dt: 19.01.20218

"Learned counsel for the petitioners states that though promotion of the petitioners is under consideration since 2014, but the opposite parties have not promoted the petitioners on the ground that restructuring of the post is being considered at the Government level and after consideration, necessary exercise would be undertaken.

Learned counsel for the petitioners has also drawn the attention of the Court towards the Government Order dated 22nd May, 1990 wherein ex-cadre post where the petitioners were appointed has been made permanent post. Once the post has been made permanent, the consequences will follow automatically.

Learned Addl. Chief Standing Counsel prays for and is granted ten days' time to file counter affidavit.

List thereafter.

Interim order, if any, shall continue till the next date of listing."

XXX XXX XXX

Dt: 27.03.2018

"Learned standing counsel has submitted that he may be granted more time to file counter affidavit but the fact remains that the post has been made permanent in 1990 and restructuring exercise is pending at the government level since 2014. The restructuring exercise has not been finalised. It is submitted that the sub-ordinate staff of the petitioners are getting more salary than the petitioners on account of the fact that the claim of the petitioners has not been finalised as contemplated under law treating the post to be permanent. Since restructuring exercise is pending at government level on account of which the entire J.T.R.I. administration is suffering, therefore, in these circumstances, we direct the State

Government to undertake the restructuring exercise within a period of two months.

List thereafter.

Interim order to continue till the next date of listing."

27. Perusal of Annexure - 10 i.e. Government Order dated 22.05.1990 makes it clear that Ex-Cadre post of Training Officer was made permanent. Undoubtedly, promotion of the petitioners is under consideration since 2014 but the opposite parties have not taken any decision to promote the petitioners only on the ground that restructuring of the post is being considered at the Government level. Inspite of the aforesaid two directions of this Court, nothing has been done by the competent authority for restructuring the cadres yet.

28. Perusal of the orders dated 19.01.2018 and 27.03.2018 (supra) passed by a coordinate Bench of this Court reveals that the post of Training Officers i.e. the petitioners, were made permanent in 1990 and restructuring exercise is pending at the government level since 2014. The restructuring exercise has not been finalised yet and the sub-ordinate staff of the petitioners are getting more salary than the petitioners on account of the fact that the claim of the petitioners has not been finalised. Even after continuous service of more than 25 years, the petitioners are still struggling for their promotion and financial benefits.

29. The Hon'ble Supreme Court in the case of D***.R. Nim, IPS v. Union of India - AIR 1967 SC 1301*** has observed that when an officer has worked for a long period in a post and had never been reverted, it cannot be held that the officer's continuous officiation was a mere temporary or local or stop-gap arrangement even though the order of appointment may state so. In such circumstances, the entire period of officiation has to be counted for seniority. Any other view would be arbitrary and violative of Articles 14 and 16(1) of the Constitution because the temporary service in the post in question is not for a short period intended to meet some emergent or unforseen circumstances.

30. In the case ***of G.K. Dudani & Ors. v. S.D. Sharma & Ors. - 1986 (supp) SCC 239,*** the Hon'ble Supreme Court has held that promotees appointed to temporary additional posts which were initially created for a specific period but still continuing, as also those initially appointed to cadre posts but later deputed to hold ex-cadre posts, also fall within the category of regularly appointed. Therefore, rule of continuous length of service would apply to them also with effect from the date of their such appointments.

31. The Hon'ble Supreme Court in the case of ***State of Tripura and Ors. v. K.K. Roy - (2004) 9 SCC 65*** has held in Paras - 4, 5 & 6 as under:-

"4. Indisputably, the post of Law Officer-cum-Draftsman is a single-cadre post. It is also undisputed that there does not exist any promotional avenue therefor. The respondent is holder of a Master's degree as also a degree in Law. He was appointed in the year 1982. If the contention of the appellant is to be accepted, the respondent would be left without being promoted throughout his career. In almost an identical situation, a

Bench of this Court in Council of Scientific and Industrial Research v. K.G.S. Bhatt [(1989) 4 SCC 635 : 1990 SCC (L&S) 45 : (1989) 11 ATC 880] held: (SCC pp. 638-39, para 9)

"It is often said and indeed, adroitly, an organisation public or private does not "hire a hand' but engages or employs a whole man. The person is recruited by an organisation not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a requirement for progress of any organisation. It is an incentive for personnel development as well. (See Principles of Personnel Management, Flipo, Edwin B., 4th Edn., p. 246.) Every management must provide realistic opportunities for promising employees to move upward. "The organisation that fails to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale, and ineffectual performance, among both non-managerial employees and their supervisors.' (See Personnel Management, Dr Udai Pareek, p. 277.) There cannot be any modern management much less any career planning, manpower development, management development etc. which is not related to a system of promotions."

5. The matter came up for consideration again in O.Z. Hussain (Dr) v. Union of India [1990 Supp SCC 688 : 1991 SCC (L&S) 649 : (1991) 16 ATC 521] wherein this Court in no uncertain terms laid down the law stating: (SCC pp. 691-92, para 7)

"Promotion is thus a normal incidence of service. There too is no justification why while similarly placed officers in other ministries would have the benefit of promotion, the non-medical "A' Group scientists in the establishment of Director General of Health Services would be deprived of such advantage. In a welfare State, it is necessary that there should be an efficient public service and, therefore, it should have been the obligation of the Ministry of Health to attend to the representations of the Council and its members and provide promotional avenue for this category of officers."

6. It is not a case where there existed an avenue for promotion. It is also not a case where the State intended to make amendments in the promotional policy. The appellant being a State within the meaning of Article 12 of the Constitution should have created promotional avenues for the respondent having regard to its constitutional obligations adumbrated in Articles 14 and 16 of the Constitution of India. Despite its constitutional obligations, the State cannot take a stand that as the respondent herein accepted the terms and conditions of the offer of appointment knowing fully well that there was no avenue for promotion, he cannot resile therefrom. It is not a case where the principles of estoppel or waiver should be applied having regard to the constitutional functions of the State. It is not disputed that the other States in India/Union of India having regard to the recommendations made in this behalf by the Pay Commission introduced the Scheme of Assured Career Promotion in terms whereof the incumbent of a post if not promoted within a period of 12 years is granted one higher scale of pay and another upon completion of 24 years if in the meanwhile he had not been promoted despite existence of promotional avenues. When questioned, the learned counsel

appearing on behalf of the appellant, even could not point out that the State of Tripura has introduced such a scheme. We wonder as to why such a scheme was not introduced by the appellant like the other States in India, and what impeded it from doing so. Promotion being a condition of service and having regard to the requirements thereof as has been pointed out by this Court in the decisions referred to hereinbefore, it was expected that the appellant should have followed the said principle."

32. The following has been held in Paras - 28 & 30 by Hon'ble Supreme Court in the case of ***A. Satyanarayana and Ors. v. S. Purushotham and Ors. - (2008) 5 SCC 416***:

"28. The superior courts, while exercising their power of judicial review, must determine the issue having regard to the effect of the subordinate legislation in question. There must exist a rational nexus between the impugned legislation and the object of promotion. Promotions are granted to a higher post to avoid stagnation as also frustration amongst the employees. This Court, in a large number of decisions, has emphasised the necessity of providing for promotional avenues. (See Food Corporation of India v. Parashotam Das Bansal [(2008) 5 SCC 100] .) The State, keeping in view that object, having found itself unable to provide such promotional avenue, provided for the scheme of accelerated career progress (ACP). The validity and effect of the impugned legislation must be judged keeping in view the object and purport thereof. This Court would apply such principle of interpretation of statute which would enable it to subserve the object in place of subverting the same.

30. Although mere chance of promotion is not a fundamental right, but right to be considered therefor is. In that view of the matter, any policy whereby all promotional avenues to be promoted in respect of a category of employees for all times to come cannot be nullified and the same would be hit by Article 16 of the Constitution of India."

33. It is also admitted fact that in the minutes of meeting held on 31.08.1998 and 03.09.1998 (Annexure - 15) it was resolved to regularise all ex-cadre posts in all the departments of Government of U.P. The posts of Training Officers (petitioners) of JTRI also fall within the ambit of the aforesaid resolution. Vide letter bearing No.अ0शा0प0सं0-13/7/98-का-1-1998 उत्तर प्रदेश शासन कार्मिक अनुभाग-1, लखनऊः dated 16.11.1998, all Principal Secretary/Secretary of Government of U.P. were informed about the aforesaid resolution. According to the aforesaid resolution, the post of Training Officers in JTRI were to be brought amongst the cadre post in the year 1998. In such circumstances, issuance of Government Order dated 08.12.1996 (supra) treating all ex-cadre posts as cadre post only w.e.f. 15.06.2003 is not consonance with the resolution passed in the meeting held on 31.08.1998 and 03.09.1998. Therefore, I am convinced with the arguments and contentions of the petitioners that fixing of an arbitrary date for treating their services as cadre post w.e.f. 15.06.2003 is wrong and without any basis. Government Order dated 08.12.2016 is, therefore, nothing but has been passed for annulling the monetary

benefits and promotional avenues of the petitioners according to their long length of service since they have been appointed on 22.06.1990, 07.12.1993 & 20.03.1996 respectively.

34. It is an admitted fact that rules regarding promotioal avenues of Training Officer of JTRI is not in existence yet. However, the employees cannot be made to suffer in the absence of such rules. The Hon'ble Supreme Court in a number of cases has clearly stated that promotions are granted to a higher post to avoid stagnation. The work of Training Officer is perennial, regular and permanent and without this post, existence of JTRI may not be imagined. It is the admitted fact that they continued in service without any break from the respective dates of their appointment, therefore, they are members of the service in a substantive capacity. The post of Training Officer was not created for any specific person or particular period and not going to be abolished after their retirement. The institution like JTRI is meant for programmes relating to training & research, holding & organizing conferences at State, National & International Level wherefore Training Officers perform pivotal role, therefore, even assuming such post as an ex-cadre post would defeat the very purpose of establishing the JTRI.

35. The petitioners have been given service benefits i.e. Time Scale and ACP etc. arising out of their continuous long length of service required for the same. In the counter affidavit dated 20.07.2018, the following has been contended in Para - 11:-

"11. That, in the meantime, a test checking of the pay fixation of the officers/employees working in the JTRI was conducted by the team of auditors of the Establishment Revision Bureau (अधिष्ठान पुनरीक्षण ब्यूरो), Department of Finance, U.P., Civil Secretariat, Lucknow, from 01.05.2017 to 05.05.2017 in which discrepancies were found in fixation of total 08 officers/ employees working in the JTRI, including the petitioners herein. Subsequently, vide Letter No. ब्यूरो -638/दस-2017 6 (ऑडिट)/2017, dated 25.08.2017, issued by the Director, Establishment Revision Bureau, Department of Finance, U.P., Lucknow, it was directed that the fixation of pay etc. of the aforementioned 08 officers/employees found erroneous in the aforesaid test checking/audit, be corrected and the amount paid in excess to their entitlement be adjusted from their salary etc after inviting their objections in that regard."

36. After perusing the aforesaid contentions made in the said counter affidavit, I do not find any logic or justification for passing an order for recovery or excess payment made to the petitioners which has been given to them after considering their continuous long length of service.

37. In view of the foregoing observations, the instant petition is ***allowed.***

38. Writ of Certiorari is issued quashing impugned order(s) dated 25.09.2017 (Annexures - 1, 2 & 3) passed by respondent no.2/Director, Judicial Training and Research Institute, Lucknow.

Writ of Mandamus is issued directing respondents to consider the petitioners for upgradation/modification of their pay scale as per minutes of meeting held on 31.08.1998 and 03.09.1998 and as per letter dated 16.11.1998.

Writ of Mandamus is issued directing respondents not to recover excess payment, if any, already paid to the petitioners.

Writ of Mandamus is also issued directing respondents to create a structure of cadre by providing avenue of promotions from the post of Training Officers, at the earliest.

(2021)05ILR A211
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2021

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ -A No. 43109 of 2015

Gulab Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.P. Sharma, Sri Ajay Kumar Srivastava, Sri Samir Sharma

Counsel for the Respondents:
C.S.C, Sri M.P. Rai, Sri Sudhir Dixit, Sri U.S. Singh Visen.

A. Civil Law - Uttar Pradesh State Road Transport Corporation Employees (Other Than Officers) Service Regulations, 1981 - Disciplinary proceedings - After Retirement - No provision under the Regulations to initiate or continue disciplinary proceedings against a retired employee of the Corporation - Post-retirement, the relationship of an employer and employee, or master and servant, ceases - That relationship is a sine qua non for the exercise of disciplinary jurisdiction by the employers (Para 12)

B. Principle of Natural Justice - Opportunity of hearing - adverse revision or diminution in emoluments - any order that visits a person with adverse civil consequences, ought to be preceded by opportunity - It is not the stigma of punishment, but the adversity of consequences to an individual, that attracts the obligation of a State or of its instrumentalities, to hear a person likely to be affected before decision (Para 13)

By impugned order petitioner's emoluments were revised downward, directing recovery of money paid in excess - *Held* - Petitioner not confronted with material on the basis of which he has been subjected to an adverse revision / diminution in his emoluments - To revise a Class III employee's emoluments downwards and prejudicial to him after retirement, on ground that at the time when he was awarded a selection grade, some minor punishment order/orders that disentitled him were not noticed, would be inequitable - further recovery ought not to be made because petitioner is a retired Class III/Group C employee (Para 13, 16)

Allowed. (E-4)

List of Cases cited :-

1. Rajendra Prasad Singh Vs St. of U.P. & ors. Writ - A No. - 7517 of 2016 Dt 29.02.2016

2. Dev Prakash Tiwari Vs U.P. Coop. Institutional Service Board, Lucknow & Ors (2014) 7 SCC 260

3. Banda District Coop. Bank Ltd. & ors. Vs St. of U.P. & ors. S.A.(D) No. 31 of 2016, dt 03.02.2016

4. St. of Pun & ors. Vs Rafiq Masih (White Washer) & ors. (2015) 4 SCC 334

5. S.N. Mukherjee Vs U.O.I. (1990) 4 SCC 594

(Delivered by Hon'ble J.J. Munir, J.)

1. The petitioner commenced his career's journey as a Conductor with the

Uttar Pradesh State Road Transport Corporation1. He was promoted to the post of a Booking Clerk. He had a smooth ride for the most part of his career until the fag end of it. The petitioner served the Corporation from 01.12.1981 to 31.08.2014. While in service, the petitioner was granted the first selection grade with effect from 01.12.1991, on completion of 10 years continuous satisfactory service. His pay-scale was revised accordingly. The petitioner was granted a second selection grade with effect from 01.12.2001, on completion of 20 years continuous satisfactory service, with a corresponding revision of his pay. Again on 19.02.2013, by means of an order of that date, the petitioner was granted benefit of the third Assured Career Progression2. He was granted grade-pay of Rs. 4200/- with effect from 01.12.2001. Upon grant of this ACP, the petitioner's emoluments were revised and he was also paid arrears.

2. Trouble for the petitioner began on 14.03.2014, when he was issued with a charge sheet. It appears that at the relevant time, the petitioner was deputed to do the work of Issue Clerk in the Checking Department at the Aligarh Establishment of the Corporation. It was his duty to deposit receipts of the Corporation in the Corporation Treasury on a single queue bus service received on a daily basis. The petitioner, however, was charged with depositing the receipts of the Corporation accumulated over a number of days, instead of doing it daily. This was prima facie found to be a violation of the rules of the Corporation, besides an act of negligence. The petitioner was charged, as already said, on 14.03.2014, with violation of Rule 61 and 62 of the Uttar Pradesh State Road Transport Corporation Employees (Other Than Officers) Service Regulations, 19813.

3. The petitioner submitted a reply to the charge sheet, denying all the charges against him. Pending disciplinary proceedings, the petitioner retired, on attaining the age of superannuation, on 31.08.2014. The departmental inquiry that had been initiated against the petitioner went ahead and an inquiry report was submitted on 13.11.2014, according to which, the petitioner was found negligent in the performance of his duties. It was one of the petitioner's defences that he did not make the delay in deposit of receipts, received bag-wise, of his own. It was done that way on account of directions in this regard, received from the then Assistant Regional Manager, on 31.12.2011 and 18.01.2012. The said Officer of the Corporation had instructed that when the load factor was low, bag-wise deposit be not made and the conductor concerned be required to speak to him. It was further directed that bag-wise deposit of receipts be made only in the event the load factor was 75%. It was explained that the delay in depositing the receipts was on account of these instructions and there was no culpability on the petitioner's part.

4. The Assistant Regional Manager, who held inquiry into the charges, submitted an inquiry report dated 13.11.2014, holding the charges proved, and the petitioner guilty of negligence in the performance of his duties. The Regional Manager of the Corporation at Aligarh, without issuing a show-cause notice, passed an order dated 29.11.2014, holding the petitioner guilty of negligence. He imposed a punishment of recovery of a sum of Rs. 8,000/- from the petitioner, with a warning for the future. This order is one of the orders under challenge, the challenge being introduced through amendment. By an order dated 22.12.2014, the petitioner's

gratuity was calculated by the Corporation, determining it at a total sum of Rs. 6,39,178/-; but the sum of Rs. 8000/- ordered to be recovered from the petitioner was deducted from his gratuity. The order dated 22.12.2014, calculating the petitioner's gratuity to the extent that it deducts a sum of Rs. 8000/- from the sum payable, is also under challenge.

5. Mr. Samir Sharma, learned Senior Advocate assisted by Mr. Ajay Kumar Srivastava, learned counsel for the petitioner, submits that the impugned orders dated 29.11.2014 and 22.12.2014 represent one part of the petitioner's grievance, that has two facets to it. The first of the two orders is an order awarding him punishment in departmental proceedings illegally, and the other order deducts the sum of Rs. 8000/- illegally from the petitioner's gratuity, which, according to Mr. Sharma, notwithstanding the validity of the order of punishment, could not be deducted from whatever money was payable in gratuity to the petitioner. As it appears, this was not the end of troubles for the petitioner. By means of an order dated 20.06.2015, without affording any opportunity of hearing to the petitioner, the first and the second selection grades and the third ACP benefits paid to the petitioner were modified, directing recovery of the excess payments made. By this order of 20th June, 2015 the first selection grade was awarded to the petitioner with effect from 01.12.1993, instead of 01.12.1991, and the second selection grade with effect from 01.12.2007, instead of 01.12.2001. All payments made in accordance with the earlier date of award of the two selection grades and the consequential third ACP were directed to be recovered, as already said. Thereafter, by an order dated 08.07.2015, close on heels of the order dated 20.06.2015, the petitioner's emoluments were revised and re-fixed, directing recovery of the sum of money paid in excess, going by the revised calculation with effect from 01.12.1993. The orders dated 20.06.2015 and 08.07.2015 are also under challenge in the present writ petition. This downward revision of emoluments for the petitioner also led to redetermination of gratuity payable to him. This was done by means of an order dated 10.07.2015. Instead of the gratuity originally determined and paid to the petitioner in the sum of Rs. 6,39,179/-, it was redetermined at a figure of Rs. 6,31,696/-. Thus, a sum of Rs. 7,482/- was found to be paid in excess to the petitioner, under the head of gratuity, in terms of his redetermined emoluments. This was worked out by the order dated 10.07.2015, passed again by the Assistant Regional Manager, directing recovery of a sum of Rs. 7,482/- from the petitioner, under the head of gratuity paid in excess.

6. It is the petitioner's case and apparently not in dispute that though the gratuity was determined prior to a redetermination of the petitioner's emoluments at a figure of Rs. 6,39,179/-, the entire amount was not paid to the petitioner. It appears that a sum of Rs. 2,92,505/- had been withheld by the respondents under the head of leave encashment. The petitioner approached this Court, by means of Writ - A No. 24726 of 2016, with a case that a sum of Rs. 2,92,565/- on account of gratuity had not been released. This Court, by an order dated 25.05.2016, summarily disposed of the petition, with a direction to the Regional Manager of the Corporation to examine the petitioner's claims, noticed in

this Court's order dated 25.05.2016, passed in Writ - A No. 24726 of 2016, and to decide the same by means of a reasoned and speaking order, within a period of three months from the date of presentation of a certified copy of that order. In compliance with the order dated 25.05.2016 passed in Writ - A No. 24726 of 2016, the Regional Manager, Corporation at Aligarh, considered the petitioner's representation dated 02.06.2016, where he did a cursory reappraisal of the order dated 20.06.2015, whereby the petitioner's emoluments were redetermined. He approved of that order. It appears also from the order dated 27.08.2016 that, what was withheld in the sum of Rs. 2,96,656/- was not on account of unpaid gratuity; it was due under the head of leave encashment. In order to set the record straight, it must be mentioned that the fact that a sum of Rs. 2,96,565/- was withheld by the respondents from the gratuity dues of the petitioner, appears to be an erroneous mention, because the matter was summarily disposed of on the basis of whatever the petitioner said; and, being all that was before the Court.

7. A reading of the order dated 27.08.2016, it must be remarked here, shows that dues of the petitioner that were withheld, was a sum of money greater than Rs. 2,96,565/-. This difference in the petitioner's entitlement had come about as a result of the direction to redetermine his emoluments made on the basis of orders dated 20.06.2015 and 08.07.2015, both passed by the Regional Manager of the Corporation at Aligarh. It transpires that the Regional Manager of the Corporation has proceeded to hold that Rs. 3,45,633/- is all that has been determined towards excess emoluments paid to the petitioner, on account of a premature grant of the first and the second selection grade as well as the third ACP. He has directed recovery of the sum of money of Rs. 3,45,633/- in the manner that it is to be set-off against the petitioner's entitlement to leave encashment in the sum of Rs. 2,92,565/-, and a sum of Rs. 11,568/- on account of arrears of the Dearness Allowance, leaving a residue of Rs. 41,500/-, which has to be recovered in accordance with law. Challenge to the order dated 27.08.2016 has also been brought in through amendment. Thus, there are six orders under challenge in the present writ petition, to wit : the orders dated 29.11.2014 and 22.12.2014, both passed by the Regional Manager and the Assistant Manager, Corporation at Aligarh, respectively, punishing the petitioner post retirement, in disciplinary proceedings; and orders dated 20.06.2015, 10.07.2015, 08.07.2015 and 27.08.2016, all in substance, revising downwards the petitioner's emoluments, already determined, and directing recovery.

8. The parties, having exchanged affidavits when this matter came up on 10.12.2020, it was admitted to hearing, and heard there and then. Judgment was reserved.

9. Heard Mr. Samir Sharma, learned Senior Advocate assisted by Mr. Ajay Kumar Srivastava, learned counsel for the petitioner, Mr. U.S. Singh Visen, learned counsel appearing on behalf of respondent nos. 2 and 3, and the learned Standing Counsel appearing on behalf of respondent no. 1.

10. Now, so far as the order dated 29.11.2014 passed by the Regional Manager of the Corporation at Aligarh, punishing the petitioner in disciplinary proceedings with the imposition of a penalty of Rs. 8,000/- recoverable from his

emoluments, along with a warning to be careful in future is concerned, Mr. Sharma submits that the said order is absolutely without jurisdiction. It is the learned Senior Counsel's contention that disciplinary proceedings in this case commenced on 14.03.2014, with the issue of a charge-sheet to the petitioner. The petitioner filed a reply to the charge-sheet, denying the charges. Pending disciplinary proceedings, he retired on 31.08.2014, upon attaining the age of superannuation. Notwithstanding the petitioner's retirement, the departmental inquiry was conducted and a report submitted, holding the petitioner guilty of negligence in the performance of his duties. It is pointed out that the Disciplinary Authority, the Regional Manager of the Corporation at Aligarh, without issuing a show-cause notice, proceeded to punish the petitioner, by means of the impugned order, in the manner hereinabove indicated. It is argued by Mr. Samir Sharma, learned Senior Advocate, that there is no provision under the Regulations of 1981 to initiate or continue disciplinary proceedings against a retired employee of the Corporation. He urges that the order of punishment dated 29.10.2014, and the consequential recovery, directed to be made from the petitioner's gratuity vide order dated 22.12.2014, are without jurisdiction and manifestly illegal. The stand of the Corporation vis-a-vis the impugned order dated 29.10.2014 is carried in their counter affidavit filed in opposition to the amended pleas. It is a counter affidavit filed by one R.S. Pandey, the Assistant Regional Manager, Uttar Pradesh State Road Transport Corporation, Leader Road, Allahabad. It is an affidavit dated 08.12.2020. The stand of the Corporation is most startling. Paragraph no. 5 of the counter affidavit under reference, in answer to the amended Paragraph no. 13 of the writ petition (described in the counter affidavit as Para 3 (13)) says that no departmental proceedings were ever initiated against the petitioner, or conducted. It is stated that the order dated 08.07.2015 was passed because the petitioner had been wrongfully placed in a higher pay scale. It does not mention at all anything about the order dated 29.10.2014, specifically. But, the stand of the Corporation is very clear that no departmental proceedings were ever initiated against the petitioner. Paragraph no. 5 of the counter affidavit under reference, filed on behalf of the Corporation, reads :

> 5. That the contents of paragraph no.3 (13) of the Affidavit filed in support of Amendment Application are false and appear to be misconceived hence denied. In reply thereto **it is submitted that no departmental enquiry was ever initiated or conducted against the petitioner and the order dated 08.07.2015 was passed because the higher pay** scale Rs. 1175-259-1625 was granted to the petitioner on 01.12.1991 instead of 1175-25-1625 hence the order dated 08.07.2015 was infact a correction order and not the punishment hence the amendments made in para 3(13) is meaningless and is not covered by the Ruling sited in the paragraph.
>
> (emphasis by Court)

11. Now, if that stand of the Corporation were to be believed, the petitioner never faced any disciplinary proceedings. This Court has described that stand of the Corporation as startling, because a perusal of the order dated 29.10.2014, passed by the Regional Manager of the Corporation at Aligarh

shows fair and square that it is an order of punishment passed in disciplinary proceedings against the petitioner. There could never be any doubt about the fact that it is so. The fact that a State Corporation like the U.P. State Road Transport Corporation should take a stand like the one in Para 5 of the counter affidavit filed in response to the amended pleas is, to say the least, most shocking. The said affidavit has been filed by an Officer of the rank of an Assistant Regional Manager. This Court cannot go by the Corporation's stand that they never passed the order of punishment dated 29.11.2014, or ever initiated disciplinary proceedings against the petitioner. This Court has no option but to ignore the Corporation's stand taken in counter affidavit filed in answer to the amended pleas, so far as the validity of the order dated 29.11.2014 is concerned. This virtually leaves the assertion of the petitioner about the impugned order dated 29.11.2014 being without jurisdiction and a nullity, as it was passed by the Corporation after the petitioner's retirement, unrebutted. This Court can safely take it to be unrebutted that disciplinary proceedings commenced against the petitioner on 14.03.2014, when the petitioner was still in service, but concluded on 29.11.2014, after he had retired from the Corporation's service on 31.08.2014, upon attaining the age of superannuation. However, the petitioner's stand in law cannot be accepted merely for the respondents failure to plead that upon the petitioner's retirement, the Corporation lost all jurisdiction to punish him. This Court has examined the Regulations which govern the petitioner's service conditions. There is nothing apparent or brought to the Court's notice, which may show that after retirement, the employers have a continuing disciplinary jurisdiction over their retired employee. For a legal proposition, retirement upon superannuation is one of the modes by which the relationship of an employer and employee comes to a terminus. Post-retirement, the relationship of an employer and employee, or master and servant, ceases. That relationship is a sine qua non for the exercise of disciplinary jurisdiction by the employers. However, where the tenure of an employee is governed by Statute or statutory service rules or regulations, provision may be made, extending the disciplinary jurisdiction of the employers beyond an employee's retirement, particularly so, where proceedings have commenced prior to retirement. But, in this case, nothing in the Regulations point to a power of that kind with the Corporation over their ex-employees, who have superannuated and retired from service. This question engaged the attention of a learned Single Judge of this Court in **Rajendra Prasad Singh v. State of U.P. and 4 Others4**. Incidentally, in **Rajendra Pratap Singh** *(supra)*, a decision towards which Mr. Sameer Sharma drew this Court's attention, it was held by this Court, in the context of the regulations, following a decision of the Supreme Court in **Dev Prakash Tiwari v. Uttar Pradesh Cooperative Institutional Service Board, Lucknow and others5** and the decision of a Division Bench of this Court in **Banda District Cooperative Bank Limited and 2 Others v. State of U.P. and 2 Others6,** thus :

On a pointed query of the Court, the learned counsel for the appellant candidly admitted that there was no provision under the U.P. Cooperative Service Regulation 1975, which may authorize continuance of the proceedings from the stage at which the defect has been noticed nor is there any provision in terms

of which the proceedings may be continued and taken to their logical conclusion even after the retirement of the petitioner. We may in this connection refer to the law as laid down by the Supreme Court in Bhagirathi Jena Vs. Board of Directors, O.S.F.C. & others4 as reiterated by the Supreme Court in Deo Prakash Tewari Vs. U.P. Cooperative Institutional Service Board which clearly hold that once an employee has retired from service, in the absence of any authority vesting in the employer the right to continue disciplinary proceedings thereafter, the enquiry proceedings would be deemed to have lapsed and the employee would be entitled to all retiral benefits. In light of the above law laid down by the Supreme Court, we are unable to accede to the submission of the learned counsel for the appellant for a remit of the proceedings.

For the aforesaid reasons, we find no ground warranting interference with the judgment of the learned Single Judge. The special appeal is consequently dismissed.

12. Now, the decision in **Rajendra Prasad Singh** was concerned with the respondent-Corporation and the Regulations on the same issue of law as the one that arises here. It was held on the terms of the Regulations, going by principles that had endorsement of authority, that in the absence of provisions in the service rules that enabled disciplinary proceedings to continue beyond superannuation, disciplinary proceedings would be without jurisdiction. In **Rajendra Prasad Singh**, the Corporation had conceded to the aforesaid position of law. Here, they have not at all pleaded to it. Rather, they have pleaded absurdly on facts to show that no order of punishment was ever passed against the petitioner, or disciplinary proceedings initiated against him. This Court has, for itself, as already stated, examined the Regulations, and is of opinion that there is no jurisdiction with the Corporation to proceed in disciplinary proceedings against an employee, who retires pending such proceedings, in the absence of provisions enabling them in this behalf. Those provisions are not there. As such, the order dated 29.11.2014 passed by the Regional Manager of the Corporation at Aligarh, directing recovery dated 22.12.2014, is absolutely without jurisdiction, and liable to be quashed. The question whether recovery can be made from the petitioners' gratuity need not be answered here, as the orders that gave rise to the issue have been found to be vitiated by this Court. This takes the Court to the validity of another group of orders, the net effect of which is to bring about a prejudicial or downward revision of petitioner's emoluments, by postponing grant for the first selection grade, the second selection grade, and the third ACP, as already indicated. The substantive order, by which the petitioner's emoluments were directed to be revised downwards, is the order dated 20.06.2015. This order was again passed by the Regional Manager of the Corporation at Aligarh. The other orders under challenge, that seek to effect recovery of emoluments paid in excess, that is to say, the orders dated 10.07.2015 and 08.07.2015, are all consequential orders. It is submitted by Mr. Sameer Sharma, learned Senior Counsel for the petitioner, that the order dated 20.06.2015 has been passed without opportunity of hearing to the petitioner, and behind his back. It is his case that the order aforesaid, being one adversely affecting the petitioner's rights, could not be made,

without affording him reasonable opportunity of showing cause. It is particularly submitted by Mr. Sharma that the petitioner, being a Class-III employee, who had been paid his emoluments as determined by the Corporation, in terms of pay fixation made in his favour from time to time, the principle laid down by the Supreme Court in **State of Punjab & Others v. Rafiq Masih (White Washer) and others7** would prevent the Corporation from recovering any emoluments paid in excess. So far as the question regarding the provision of opportunity is concerned, Mr. U.S. Singh Visen submits that the order dated 20.06.2015 only involved a correction to the mistaken pay fixation. It did not involve any punishment inflicted on the petitioner. As such, no opportunity of hearing was required. About the right of the employer to recover, which is subject to various exceptions carried in **Rafiq Masih** (*supra)*, Mr. Visen submits that the petitioner being paid in excess of his due emoluments, there is no equity in his favour that may entitle him to the benefit of the principles laid down in Rafiq Masih.

13. This Court has considered the rival submissions. So far as the question of opportunity of hearing is concerned, the principle that any order that visits a person with adverse civil consequences, ought to be preceded by opportunity, is established beyond cavil. It is not the stigma of punishment, but the adversity of consequences to an individual, that attracts the obligation of a State or of its instrumentalities, to hear a person likely to be affected before decision. This principle has particularly been laid down in the case of S**.N. Mukherjee v. Union of India8**. Thus, the submission advanced on behalf of the Corporation that the order dated 20.06.2016, being not one of punishment, but about the rectification of a mistake in the determination of the petitioner's emoluments, cannot be sustained. The aforesaid decision does have the serious civil consequences, adverse to the petitioner by reducing his emoluments. There is, however, one facet of the matter about this issue. The petitioner earlier came up before this Court through *Writ - A No. 24726 of 2016,* raising a grievance about the Corporation, unauthorisedly holding his gratuity in the sum of Rs. 2,96,565/-, for the petitioner thought that what was withheld was part of his gratuity; in fact, it was leave encashment dues, as already stated. This Court disposed of the writ petition, directing the Corporation to examine the petitioner's claim and decide the same by means of a reasoned and speaking order, within a specified period of time. The Regional Manager of the Corporation considered the petitioner's representation dated 02.06.2016, that was submitted to him, along with a copy of the order passed by this Court in Writ - A No. 24726 of 2016. While passing the order dated 27.08.2016, rejecting the petitioner's claim, the Regional Manager, in one sense, did hear the petitioner vis-à-vis the substantive order dated 20.06.2015, whereby his emoluments suffered a downward revision. A perusal of the said order shows that the petitioner was granted the first and the second selection grade and consequently, the third ACP, not because he had not put in a requisite number of years in service, but because he had to his credit, three orders dated 17.09.1986, 30.04.1996 and 24.11.1997, by which his annual increments for specified periods of time were stopped. These orders, which appear to be punishment orders, and regarding which there is no pleading before this Court, were not taken into account, when the first and the second selection

grade was granted to the petitioner. In the opinion of this Court, denial of opportunity would still be there, because the petitioner was not specifically confronted with the question that he had been granted the first and the second selection grade in error, ignoring the three increment stoppage order of limited duration passed against him. Till this adverse material was brought to the petitioner's notice, the order dated 27.08.2016 is a hollow reiteration of the order dated 15.06.2020, with no meaningful opportunity extended to the petitioner. The vice of denial of opportunity, therefore, continues to vitiate the order dated 27.08.2016, as much as it does the order dated 20.06.2015. Quite apart, this Court is of opinion that to revise a Class-III employee's emoluments downwards and prejudicial to him after retirement, on ground that at the time when he was awarded a particular selection grade, some minor punishment order/orders that disentitled him were not noticed, would be inequitable. It is here that the other limb of Mr. Sharma's submissions also becomes relevant, where it is urged that the employers in this case ought not to recover from the petitioner, a retired Class-III employee, on the principles laid down in **Rafiq Masih.**

14. In **Rafiq Masih,** the principles on which the right of the employer to recover depends, were laid down in the following words by their Lordships of the Supreme Court :

7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.

8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.

9. The doctrine of equality is a dynamic and evolving concept having

many dimensions. The embodiment of the doctrine of equality can be found in Articles 14 to 18 contained in Part III of the Constitution of India, dealing with "fundamental rights". These articles of the Constitution, besides assuring equality before the law and equal protection of the laws, also disallow discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracised section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39-A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "directive principles of State policy". These articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice--social, economic and political, by inter alia minimising monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.

15. After considering various decisions, where the right of the employer to recover had fallen for scrutiny, the following principles were laid down in **Rafiq Masih :**

18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

16. It would appear that recovery from the petitioner ought not to be made, because the petitioner's case falls under the first and the second classes of cases adumbrated in **Rafiq Masih**, where recovery of emoluments paid in excess, has not been favoured. The petitioner is a Class III/Group C employee, and at the same time, a retired employee of the Corporation.

17. The orders dated 20.06.2015 and 27.10.2016 passed by Regional Manager of Corporation at Aligarh, in the opinion of this

Court, have not been able to purge themselves of the vice of denial of opportunity. The orders aforesaid would clearly be bad, in the opinion of this Court, on this score. An answer to the question whether orders being found to be bad on ground of denial of opportunity, should respondents be given the logical right to hear the petitioner afresh, confronting him with material on the basis of which he has been subjected to an adverse revision or diminution in his emoluments, would ordinarily be in the employer's favour. But, here is a case where the petitioner is a retired Class-III employee, who is exposed to the peril or a sufferance of a diminution in his emoluments, because the employers have committed a mistake in reading his service records, while granting him the first and the second selection grades. In the opinion of this Court, it would be most inequitable and illogical, at this distance of time, to subject the petitioner to the otherwise logical consequence of a callous mistake made by the employers years ago, when the petitioner was in their employ. This opinion, this Court expresses, on the supposition that if heard, the petitioner would still be subject to a downward revision of his emoluments. It is not known whether it would truly be so. But in any view of the matter, the equities that arise on the principles settled in Rafiq Masih, the employers ought not to be permitted to recover from the petitioner.

18. In the result, this writ petition **succeeds** and is **allowed**. The orders dated 29.11.2014, 22.12.2014, 20.06.2015, 10.07.2015, 08.07.2015 and 27.08.2016, variously passed by the Regional Manger and the Assistant Regional Manager of the Corporation at Aligarh, are hereby quashed. The entire post-retiral benefits of the petitioner, without any diminution to his emoluments, shall be paid to him forthwith.

19. There shall, however, be no order as to costs.

(2021)05ILR A221
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2020

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Contempt Application (Civil) No. 2632 of 2020

Anand Dwivedi ...Petitioner
Versus
H.C. Awasthi, D.G.P. & Ors.. ...Opposite Parties

Counsel for the Petitioner:
Sri Saurabh Tripathi

Counsel for the Opposite Parties:

The Contempt of Courts Act, 1971-Section 10-Contempt petition being filed before Hon'ble High Court-for issuing contempt for wilful disobedience of order passed by the Hon'ble Supreme Court-not maintainable. (E-7)

List of Cases cited:-

1. Vitusah Oberoi & ors. Vs Court of Its Own Motion; (2017) 2 SCC 314

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard learned counsel for the applicant.

2. Present contempt application has been filed with following prayer:-

"It is therefore, Most respectfully prayed that this Hon'ble Court may

graciously be pleased to summon the Opposite Party No.1, 2 & 3 Sri H.C. Awasthi Director General of Police State of U.P. Lucknow, Sri Ankit Mittal Superintendent of Police, Chitrakoot, District Chitrakoot & Sri Ravi Prakash, Station House Officer, Police Station, Bargadh, District Chitrakoot willfully flouted/ disobeyed the order dated 12.11.2013 passed by the Hon'ble Supreme Court in Writ Petition (Criminal) No. 68 of 2008 (Lalita Kumari vs. State of U.P. and Others reported in (2014) 2 SCC) and committed the contempt of court."

3. For ready reference Section 10 of The Contempt of Courts Act, 1971 and Article 129 and Article 215 of the Constitution of India are quoted as under:-

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

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

"129. Supreme Court to be a court of record*.-The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.*

"215. High Courts to be courts of record*.-Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."*

4. Section 10 of The Contempt of Courts Act, 1971 clearly provides that every High Court shall have power and authority in respect of contempts of courts subordinate to it as it has and exercises in respect of contempts of itself.

5. A reference may be made to the judgment of the Hon'ble Apex Court in the case of ***Vitusah Oberoi and Others vs. Court of Its Own Motion; (2017) 2 SCC 314,*** wherein the Hon'ble Apex Court has held that there is nothing in the Contempt of Courts Act, 1971 or in Article 215 of the Constitution of India which can be said to empower the High Court to initiate proceedings either of suo-motu or otherwise for the contempt of a superior Court like the Supreme Court of India. Paragraphs 10 and 12 of the aforesaid judgment are quoted as under:-

"10. There is, from a plain reading of the above, nothing in the Contempt of Courts Act, 1971 or in Article 215 of the Constitution which can be said to empower the High Court to initiate proceedings suo-motu or otherwise for the contempt of a superior Court like the Supreme Court of India. As a matter of fact, the Supreme Court under Article 219 and High Court under Article 215 of the Constitution are both declared to be Courts of Record. One of the recognised attributes of a court of record is the power to punish for its contempt and the contempt of courts subordinate to it. That is precisely why Articles 129 and 215, while declaring the Supreme Court and the High Courts as Courts of Record, recognise the power vested in them to punish for their own

contempt. The use of the expression "including" in the said provisions is explanatory in character. It signifies that the Supreme Court and the High Courts shall, as Courts of Records, exercise all such powers as are otherwise available to them including the power to punish for their own contempt.

12. The power to punish for contempt vested in a Court of Record under Article 215 does not, however, extend to punishing for the contempt of a superior court. Such a power has never been recognised as an attribute of a court of record nor has the same been specifically conferred upon the High Courts under Article 215. A priori if the power to punish under Article 215 is limited to the contempt of the High Court or courts subordinate to the High Court as appears to us to be the position, there was no way the High Court could justify invoking that power to punish for the contempt of a superior court. That is particularly so when the superior court's power to punish for its contempt has been in no uncertain terms recognised by Article 129 of the Constitution. The availability of the power under Article 129 and its plenitude is yet another reason why Article 215 could never have been intended to empower the High Courts to punish for the contempt of the Supreme Court. The logic is simple. If Supreme Court does not, despite the availability of the power vested in it, invoke the same to punish for its contempt, there is no question of a Court subordinate to the Supreme Court doing so. Viewed from any angle, the order passed by the High Court appears to us to be without jurisdiction, hence, liable to be set aside."

6. This application filed under Section 10 and 12 of the Contempt of Courts Act, 1971 for willful disobedience of the judgment and/ or direction given by the Hon'ble Supreme Court is clearly not maintainable before this Court.

7. Accordingly, present contempt application stands rejected.

(2021)05ILR A223
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.05.2021

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 1800 of 2020

Mohammad Najmuddin (Minor)
...Revisionist
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Sadful Islam Jafri, Sri Mohammad Belal, Sri Nazrul Islam Jafri (Senior Adv.)

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

Juvenile Justice Act,2015 -Section 12-Bail application of juvenile rejected-on ground that he was just below 18 years -17 years, 11 months and 7 days-revision-section 12 makes bail mandatory-can be rejected only to serve best interest of the juvenile-if releasing on bail will have adverse effect-possibility of associated with known criminals or moral, physical or psychological danger to him-or his release would defeat ends of justice.

Criminal revision allowed.(E-7)

List of Cases cited:-

1. Dr. Subramaniam Swamy Vs Raju, 2014 (86) ACC 637

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

1. Heard Sri N.I. Jafri, learned Senior Advocate assisted by Sri Sadaful Islam Jafri, learned counsel for revisionist and learned AGA for the State virtually.

2. Notice has been served to the informant and despite services, none appeared on his behalf nor any counter affidavit has been filed.

3. This criminal revision has been preferred against the impugned judgment and order dated 21.09.2020, passed by Additional Special Judge (POCSO) Court No. 1, Allahabad, in Criminal Misc. Bail Application No. 1571 of 2020, arising out of Case Crime No. 1087 of 2019, under Sections 363, 366, 376D, 120B IPC and Section 5/6 POCSO Act, Police Station Soraon, District Prayagraj, whereby the bail application of the juvenile Mohammad Najmuddin has been rejected.

4. The submission of the learned Senior Counsel is that the revisionist is a juvenile as determined by the Juvenile Justice Board and his case has been referred for trial as an adult in the Children Court.

5. As per FIR version, the victim is aged about 13 years. On 8.12.2019, in the night, she was taken by her Mausi, Usha Devi with two persons. Subsequently, when she was recovered, she stated that she went with her Mausi, accompanied by her brother-in-law co-accused Santosh and the present revisionist, who took her to Bhiwani, where rape was committed on her by both revisionist and Santosh.

6. The appellant has challenged the impugned order submitting that he is juvenile. He is in juvenile home since 20.12.2019 and his age has been determined below 18 years by Juvenile Justice Board, Prayagraj, vide its order dated 26.06.2020. From perusal of the said order, it is clear that the Board while referring the case of the present revisionist to the Children Court has referred that on the date of incident, the age of the juvenile was determined to be 17 years, 11 months and 7 days. It has further been submitted that the revisionist has been falsely implicated in the present case. The age of the victim is about 20 years. When the revisionist has applied for bail before the Children Court, his bail application was rejected. Submission of the learned counsel is that the Children Court rejected the bail application illegally without taking into consideration Section 12 of the Juvenile Justice (Care and Protection of Children) Act and also the report of the Probationary Officer. The medical report of the victim does not suggest recent sexual intercourse with her nor any injury has been found on her private part. Further submission is that there is discrepancy in the statement of the victim given under Section 161 CrPC to the Investigating Officer and under Section 164 CrPC to the Magistrate. The ossification report of the victim shows that she was above 18 years in age. The bail application of the revisionist has been rejected only on the basis of the gravity of the offence without giving due consideration to the circumstances of the case and the age of the juvenile. Submission of the learned counsel is that the rejection of the bail application is illegal and the learned Court has not been able to exercise the jurisdiction vested in it.

The order suffers from jurisdictional error, material irregularity and illegality, and therefore, the impugned order is liable to be set aside and the revisionist is entitled to be released on bail.

7. Learned AGA has opposed and has submitted that at the time of incident as per educational record, the revisionist was just below 18 years in age. The Juvenile Justice Board found him to be of matured understanding, and therefore, his case was referred for trial as an adult before the Children Court. It has been also submitted that there is no illegality or material irregularity nor there is any jurisdictional error in the impugned order, and therefore, the revision is liable to be rejected.

8. It is pertinent to mention that provision has been made under Section 12 of the Juvenile Justice Act that when any juvenile who is accused of a bailable or a non-bailable offence, is arrested or detained or is brought before a board then irrespective of the accusation he shall be released on bail except when

1. there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminals or

2. that it will expose him to moral, physical or psychological danger, or

3. that his release would defeat the ends of justice.

9. It has been held by the Supreme court in **Dr. Subramaniam Swamy vs Raju, 2014 (86) ACC 637** that a juvenile has to be released on bail unless the court has a reasonable ground to believe that his release will bring him into association of some known criminal, or will expose him to moral, physical or psychological danger or his release would defeat the ends of justice.

10. Section 15 of the Amending Act only provides for transfer of a juvenile to the Children Court for trial as an adult. Where the child has attained the age of 16 years and has been alleged to have committed heinous offence, the JJ Board is required to conduct a preliminary inquiry with regard to his mental and physical capacity to commit offence, ability to understand the consequence of the offence and the circumstances in which the offence was committed considering his physical, psychological and mental status in commission of crime. Section 18(3) of the Act provides that after making the assessment under section 15, the JJ Board comes to a conclusion that there is a need for trial of the child as an adult, the Board may pass an order for the transfer of the trial of the case to the Children Court.

11. It is pertinent to mention here that Section 12 of the Juvenile Justice (Care and Protection of Children) Act has not been amended so far as the parameters and yardstick for granting bail to the juvenile is concerned. Therefore, while rejecting the bail application of such juvenile, it cannot be the criteria that the alleged offence is of serious and heinous nature. The order must show that the grant of bail to the juvenile-accused is against his interest as there is possibility of his being associated with known criminals, or there is some short of moral, physical or psychological danger to him or there is likelihood of end of justice being defeated. All these conditions have

been incorporated in law in order to ensure justice to the juvenile.

12. Thus it is clear that even though Juvenile Justice Act has been amended and the juvenile above 16 years in age, can be tried as an adult by the Children Court, there is no amendment in respect of considerations which is taken into account for the bail of juvenile. Section 12 of the Juvenile Justice Act makes the bail of the juvenile mandatory and the grounds on the basis of which his bail application can be rejected is also to serve the best interest of the juvenile himself. Therefore, the bail of juvenile can only be rejected if the court comes to a conclusion that the release on bail will adversely affect the interest of juvenile.

13. In this case, there appears to be nothing on record showing that there is moral, physical or psychological danger to the juvenile, if he is released, nor there was any possibility that he will come in the company of known criminal nor there is any reason to conclude that his release on bail will defeat the ends of justice.

14. From the perusal of the papers annexed and the facts of the case, it is clear that there is discrepancy in the statement of the victim as she stated that only revisionist committed rape on her in her statement under Section 161 CrPC and when she was examined under Section 164 CrPC by Magistrate, she stated that both revisionist and co-accused Santosh committed rape on her. It is noticeable that when the offence has been alleged to have been committed, the victim was in the company of her own Mausi and the other co-accused Santosh who is the brother-in-law of her Mausi. Thus, the victim went with her Mausi and the offence was committed when she was accompanied by her Mausi. So far as the age of the victim and the revisionist is concerned, there is not much difference in their age and the the medical report says that the victim was 18 to 20 years in age. There is nothing adverse in the report of the Probationary Officer nor there is any possibility that on being released the revisionist may join the company of known criminals. So far as the expression "ends of justice" occurring in Section 12 of the Juvenile Justice Act is concerned, the same has to be considered in relation to the justice to such juvenile. In view of object and purpose of the Juvenile Justice Act, the revisionist is in jail from the last about 17 months and this fact should also be considered while considering the bail application of such juvenile. Victim going with her own Mausi and other male relative and commission of the offence in their company and the age of juvenile and victim being comparable also dilutes the culpability.

15. Bail to the juvenile is mandatory and rejection of bail application should also be to serve the interest of juvenile to avoid physical or psychological danger to him, to ensure that he may not come in the close company of known criminal or to ensure that the ends of justice may not be defeated. Considerations such as gravity of offence and involved culpability and the rejection of bail by the courts below on that ground is highly inappropriate and the rejection order suffers from material irregularity and illegality. Therefore, the court is of the firm view that the court below has not exercised jurisdiction vested in it keeping in view the object of the Act. There is one more consideration necessitating this conclusion. At present, there is wide spread of

pendemic Covid-19 and it requires a liberal approach to be adopted while considering the bail plea of a juvenile.

16. In view of above, I find that the impugned orders are not sustainable and they are liable to be set aside.

17. The criminal revision is therefore allowed. The impugned orders rejecting the bail application are set aside.

18. The juvenile, namely **Mohammad Najmuddin (Minor)** be released on bail and he be given in the custody of the mother guardian namely Smt. Majda Begum on her filing a personal bond and two sureties of the like amount to the satisfaction of the court concerned with undertaking that the guardian mother Smt. Majda Begum shall keep the juvenile away from unsocial and criminal association and will look after his education and health, keeping his mental and social status. She will also give an undertaking that on being so released on bail, the juvenile will not however indulge in commission of any crime and she will ensure his presence during trial before the court whenever so required by court.

19. Office is directed to transmit the certified copy of this order to the court concerned for information and its necessary compliance. A computerized copy of the order may also be obtained and produced before the court concerned for compliance.

(2021)05ILR A227
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.05.2021

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 2051 of 2020

Jai Krishna (Minor) ...Revisionist
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Ms. Maimoona Fatima

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

Juvenile Justice Act,2015 -Section 12-Bail application of juvenile rejected-revision-revisionist declared juvenile -16 years 3 months and 2 days as per high school certificate-section 12 makes bail mandatory-can be rejected only to serve best interest of the juvenile-if releasing on bail will have adverse effect-possibility of associated with known criminals or moral, physical or psychological danger to him-or his release would defeat ends of justice.

Criminal revision allowed. (E-7)

List of Cases cited:

1. Dr. Subramaniam Swamy Vs Raju, 2014 (86) ACC 637

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

1. Ms. Maimoona Fatima, learned counsel for the revisionist and learned AGA are virtually connected.

2. The opposite party no.2 has been served with notice, but none has appeared on his behalf.

3. Heard.

4. This revision has been filed against the judgment and order dated 23.9.2020 passed by Additional District and Sessions Judge/ Special Judge, POCSO Act-3, Gorakhpur in Criminal Appeal No.58 of 2020, which was preferred against the order dated 26.8.2020 passed by the Juvenile Justice Board, Gorakhpur rejecting the bail application of the revisionist and the appeal filed against the same has been also dismissed by the Additional District and Sessions Judge by the impugned order.

5. The FIR was registered against the revisionist, Jai Kishan (Minor) and others in respect of incident dated 3.4.2020 for the offence under Sections 147, 323, 376, 452, 504, 506 IPC and 3/4 POCSO Act, Crime No. 94 of 2020, PS - Sahjanwa, District Gorakhpur with the allegation that on 3.4.2020 at about 01:00 AM in the midnight, the revisionist on the point of a knife committed rape on the victim, who was a minor and he was caught red handed by the family members at the time of occurrence. Police was informed. So many persons of the locality and the family members of the revisionist also reached there, committed maarpeet with the family members of the victim and threatened them with dire consequences.

6. The admitted fact is that the revisionist was declared juvenile by order dated 28.7.2020 and he was found to be aged about 16 years 3 months and 2 days as per his high school certificate. Bail application was given before the Juvenile Justice Board and the same was rejected vide impugned order against which an appeal was filed and the appeal was also rejected by the impugned order dated 23.9.2020.

7. Both the orders have been challenged in this revision on the basis that both the courts below passed the impugned orders against the law and facts on record and the impugned orders are perverse vitiated and contrary to law and fact, therefore, the impugned orders are not sustainable under law and are liable to be set aside and the revisionist is entitled to be released on bail.

8. Submission of the learned counsel for the revisionist is that the victim was examined under Section 164 CrPC by the Magistrate in which she denied the fact of rape and stated that a false FIR was registered because of old enmity by her family members. It has been also submitted that no knife was recovered which was alleged to have been used by the revisionist and by causing threat, he committed rape on the victim. It has been also submitted that the legal provision provided under Section 12 of the Juvenile Justice Act was not interpreted in the right prospective which requires justice to be done to the juvenile. It has also been submitted that there was nothing adverse against the juvenile in the report of the Probationary Officer and there was no legal ground to deny bail to the revisionist.

9. Learned AGA has opposed the bail application and has submitted that after investigation charge sheet has already been filed. It has been also submitted that both the courts below have rightly considered the bail application and come to the conclusion that the bail application has got no force and was liable to be rejected. There is no illegality nor there is any jurisdictional error in the impugned orders.

10. The noticeable fact in this case is that both revisionist and victim were of comparable age and there was not much difference in their age. Another aspect is

that no injury was found in the medical of the victim. It was also required to be considered that when the victim was examined under Section 164 CrPC, she denied the fact of rape by the revisionist. It appears that this fact was not given any weight by both the courts below, which is an apparent illegality in the impugned orders.

11. It is pertinent to mention that provision has been made under Section 12 of the Juvenile Justice Act that when any juvenile who is accused of a bailable or a non-bailable offence, is arrested or detained or is brought before a board then irrespective of the accusation he shall be released on bail except when

1. there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminals or

2. that it will expose him to moral, physical or psychological danger, or

3. that his release would defeat the ends of justice.

12. It has been held by the Supreme court in **Dr. Subramaniam Swamy vs Raju, 2014 (86) ACC 637** that a juvenile has to be released on bail unless the court has a reasonable ground to believe that his release will bring him into association of some known criminal, or will expose him to moral, physical or psychological danger or his release would defeat the ends of justice.

13. Section 15 of the Amending Act only provides for transfer of a juvenile to the Children Court for trial as an adult. Where the child has attained the age of 16 years and has been alleged to have committed heinous offence, the JJ Board is required to conduct a preliminary inquiry with regard to his mental and physical capacity to commit offence, ability to understand the consequence of the offence and the circumstances in which the offence was committed considering his physical, psychological and mental status in commission of crime. Section 18(3) of the Act provides that after making the assessment under section 15, the JJ Board comes to a conclusion that there is a need for trial of the child as an adult, the Board may pass an order for the transfer of the trial of the case to the Children Court.

14. It is pertinent to mention here that Section 12 of the Juvenile Justice (Care and Protection of Children) Act has not been amended so far as the parameters and yardstick for granting bail to the juvenile is concerned. Therefore, while rejecting the bail application of such juvenile, it cannot be the criteria that the alleged offence is of serious and heinous nature. The order must show that the grant of bail to the juvenile-accused is against his interest as there is possibility of his being associated with known criminals, or there is some short of moral, physical or psychological danger to him or there is likelihood of end of justice being defeated. All these conditions have been incorporated in law in order to ensure justice to the juvenile.

15. Thus it is clear that even though Juvenile Justice Act has been amended and the juvenile above 16 years in age, can be tried as an adult by the Children Court, there is no amendment in respect of considerations which is taken into account for the bail of juvenile. Section 12 of the

Juvenile Justice Act makes the bail of the juvenile mandatory and the grounds on the basis of which his bail application can be rejected is also to serve the best interest of the juvenile himself. Therefore, the bail of juvenile can only be rejected if the court comes to a conclusion that the release on bail will adversely affect the interest of juvenile.

16. In this case, there appears to be nothing on record showing that there is moral, physical or psychological danger to the juvenile, if he is released, nor there was any possibility that he will come in the company of known criminal nor there is any reason to conclude that his release on bail will defeat the ends of justice. In a case like this where the victim has herself denied the allegation of rape in her statement given to the magistrate under section 164 of the Criminal Procedure Code, the rejection of bail by the courts below is highly inappropriate and the rejection order suffers from material irregularity and illegality. Therefore, the court is of the firm view that both the courts below have not exercised their jurisdiction vested in them keeping in view the object of the Act. There is one more consideration necessitating this conclusion. At present, there is wide spread of pendemic Covid-19 and it requires a liberal approach to be adopted while considering the bail plea of a juvenile.

17. In view of above, I find that the impugned orders are not sustainable and they are liable to be set aside.

18. The criminal revision is therefore allowed. The impugned orders rejecting the bail application are set aside.

19. The juvenile, namely **Jai Kishan (Minor)** be released on bail and he be given in the custody of the mother guardian namely Smt. Yamuna Devi on her filing a personal bond and two sureties of the like amount to the satisfaction of the court concerned with undertaking that the guardian mother Smt. Yamuna Devi shall keep the juvenile away from unsocial and criminal association and will look after his education and health, keeping his mental and social status. She will also give an undertaking that on being so released on bail, the juvenile will not however indulge in commission of any crime and she will ensure his presence during trial before the court whenever so required by court.

20. Office is directed to transmit the certified copy of this order to the court concerned for information and its necessary compliance. A computerized copy of the order may also be obtained and produced before the court concerned for compliance. the court concerned for compliance.

(2021)05ILR A230
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.02.2021

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

Misc. Single No. 16086 of 2020
And
Misc. Single No. 18232 of 2020
And
Misc. Single No. 17570 of 2020
And
Misc. Single No. 3496 of 2021
And
Misc. Single No. 2662 of 2021

Haripal ....Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

O.P. Tiwari, Rajendra Singh, Sudhir Pandey

Counsel for the Respondents:
C.S.C.

National Food Security Act, 2013-section 12(2) (e); The Constitution of India, 1950-Article 14-Exlusive preference given to self help group -for grant of statutorily regulated licence -sidetracking the role of Gaon sabha violative of Article 14 beyond the scope of section 12 (2) (e) of the National Food Security Act, 2013. (E-7)

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

1. Let no one die of hunger is a fundamental duty postulated under Article 47 of the Constitution of India that must be read as a part of the right to life under Article 21 for it is the right to food without which the dignified existence of human beings is inconceivable. In other words, right to food is inherent in Article 21 of the Constitution of India obliging the State to ensure the execution of its duties in the true spirit of Article 47 read with Article 39-A of the Constitution of India. The discharge of this obligation fundamentally requires the government to have a Public Distribution System to reach out to the underprivileged citizens in order to satiate the basic ingredient of dignified life i.e. right to food. In the State of Uttar Pradesh, the targeted population for the supply of food grains under the Food Security Act, 2013 i.e. *Patra Grahasthi* and *Antyodaya Ann Yojna* is aimed at 15.21 crores out of which 14.69 crores are identified through bio-metric system according to the online report dated 11.2.2021 and this is what the statement on behalf of the State Government reads in para-6 of the counter affidavit filed in Writ Petition No. 16086 (MS) of 2021. For a population of this dimension residing in rural areas, the State Government is obliged to evolve a foolproof mechanism ensuring distribution of food grains as per the policy of the State trammeled in law.

2. Public Distribution System is incorporated under Entry-28 Schedule-XI of the Constitution of India, which by virtue of Article 243G, mandates as under:

*"**243G. Powers, authority and responsibilities of Panchayats**- Subject to the provisions of this Constitution the Legislature of a State may, by law, endow the Panchayats with such powers and authority and may be necessary to enable them to function as institutions of self government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to –*

(a) the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule"

3. In the pursuit of objects under Article 47 of the Constitution of India, the Essential Commodities Act, 1955 was enacted decades back but towards the fulfillment of Article 21 of the Constitution of India, the Food Security Act, 2013 was enacted by the Parliamant, whereunder, the targeted population as per the policy of the State is attentively focused for raising their

standards of livelihood to a dignified level. It is for the achievement of this object that Public Distribution System is significant and must work to the optimum good of people particularly for the targeted village population. In the first two writ petitions at hand, the Court is concerned with the distribution of food grains through Public Distribution System at the village level which involves creation of an incentive based '**agency**' by the government of which the financial liability payable to the dealers is met with out of the State largesse as a means of purported employment both in rural and urban areas. The targeted population in U.P. for this purpose in urban areas corresponds to 4.5 crores whereas in rural areas, it is figured at 15.51 crores.

4. In view of the 73rd Amendment in the Constitution of India, an amendment was also made in Section-15 of the Panchayat Raj Act, 1947 i.e. U.P. Act No. 9 of 1994 and thereby the functioning of Gram Panchayats was enlarged to the promotion of Public Distribution System for awareness and distribution of essential commodities inclusive of monitoring. Section 15 (xxix) of the U.P. Panchayat Raj Act, 1947 being relevant may be extracted below:

"15. Functions of Gram Panchayat*. - Subject to such conditions as may be specified by the State Government, from time to time, a Gram Panchayat shall perform the following functions, namely, -*

.....

(xxix) Public distribution system:

.

(a) Promotion of public awareness with regard to the distribution of essential commodities.

(b) Monitoring the public distribution system."

5. It is thus clear that the State Government has decentralised the function of awareness relating to distribution of essential commodities and monitoring of the Public Distribution System to the Panchayats in rural areas. In order to give an impetus to the Public Distribution System, the National Food Security Act, 2013 provides for reforms in 'Targeted Public Distribution System'. Section 12 of the Act reads as under:

"12. Reforms in Targeted Public Distribution System. - (1) The Central and State Governments shall endeavour to progressively undertake necessary reforms in the Targeted Public Distribution System in consonance with the role envisaged for them in this Act.

(2) The reforms shall, inter alia, include-

(a) doorstep delivery of foodgrains to the Targeted Public Distribution System outlets;

(b) application of information and communication technology tools including end-to-end computerisation in order to ensure transparent recording of transactions at all levels, and to prevent diversion;

(c) leveraging "aadhaar" for unique identification, with biometric information of entitled beneficiaries for proper targeting of benefits under this Act;

(d) full transparency of records;

(e) preference to public institutions or public bodies such as Panchayats, selfhelp groups, co-operatives, in licensing of fair price shops and management of fair price shops by women or their collectives;

(f) diversification of commodities distributed under the Public Distribution System over a period of time;

(g) support to local public distribution models and grains banks;

(h) introducing schemes, such as, cash transfer, food coupons, or other schemes, to the targeted beneficiaries in order to ensure their food grain entitlements specified in Chapter II, in such area and manner as may be prescribed by the Central Government."

6. The Act by virtue of Section 2(4) defines a fair price shop as under:

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

(1) .....

(2) .....

(3) .....

(4) "fair price shop" means a shop which has been licensed to distribute essential commodities by an order issued under section 3 of the Essential Commodities Act, 1955 (10 of 1955), to the ration card holders under the Targeted Public Distribution System."

7. In order to secure equitable distribution of food grains to the targeted population etc., the National Food Security Act, 2013, by virtue of Section 15, has constituted a district level redressal mechanism for distribution related grievances and at the State Level, a State Food Commission is provided for to carry out the functions as embodied under Section 16(6) of the Act. In the present case, however, the issues relate to the establishment of fair price shops through an open meeting of Gaon Sabhas, operation whereof is incentive based and payable directly in the bank account of the dealers subject to their satisfactory work on monthly basis and that is how it is termed as a means of employment by the State. It is looking to this dimension of fair price shop dealership that the Central Government as well as the State Government have both issued control orders from time to time whereunder the eligibility norms of persons and criteria for their selection as dealers were laid down with due regard to the implementation of reservation policy within the scope of law.

8. After the enforcement of Food Security Act, 2013, it is necessary to understand the laws having due regard to the object of 'Targeted Public Distribution System' and the purpose of equitable distribution of scheduled commodities through an accountable mechanism for which a fair selection of dealers in village areas, as per the eligibility criteria, is indispensable. The zone of eligibility for licensing as sanctified by law is traceable to Clause-9 of the Targeted Public Distribution System (Control) Order, 2015 issued by the Central Government and the same being relevant is reproduced as under:

***"9. Licensing and regulation of fair price shops**. - (1) The State Government shall issue an order under section 3 of the Act, but not inconsistent with this Order, for regulating the sale and distribution of the essential commodities.*

(2) The licences to the fair price shop owners shall be issued under the said order and the order issued by the State Government shall be notified and displayed on web portal.

(3) The designated authority appointed by the State Government shall issue the licences to the fair price shop owners.

(4) The State Government shall accord preference to public institutions or

public bodies such as panchayats, self help groups, cooperative societies in licensing of fair price shops and management of fair price shops by women or their collectives.

(5) The licences to the fair price shop owners shall be issued keeping in view the viability of the fair price shop.

(6) The State Government shall ensure that the number of ration card holders attached to a fair price shop are reasonable, the fair price shop is so located that the consumer or ration card holder does not have to face difficulty to reach the fair price shop and that proper coverage is ensured in hilly, desert, tribal and such other areas difficult to access.

(7) The State Government shall fix an amount as the fair price shop owner's margin, which shall be periodically reviewed for ensuring sustained viability of the fair price shop operations.

(8) The State Government shall put in place a mechanism to ensure the release of fair price shop owner's margin without any delay.

(9) The State Government shall allow sale of commodities other than the foodgrains distributed under the Targeted Public Distribution System at the fair price shop to improve the viability of the fair price shop operations."

9. The Targeted Public Distribution System (Control) Order, 2015 issued by the Central Government defines 'fair price shop owner' as under:

"2(j) 'fair price shop owner' *means a person and includes a cooperative society or a body corporate or a company of a State Government or a Gram Panchayat or any other body in whose name a shop has been licensed to distribute essential commodities under the Targeted Public Distribution System."*

10. A plain reading of the above provision clearly shows that the State Government obliged to issue an order for sale and distribution of essential commodities under Section-3 of the Essential Commodities Act is bound to act in consistence with the Control Order, 2015 issued by the Central Government. Interestingly, the Central Government has also provided for a preference to public institutions or public bodies such as Panchayats, Self help groups, Co-operative Societies in the matter of grant of licences. The law made by the Central Government also postulates for licencing of an equitable number of shops having regard to the number of ration card holders in a particular urban/village area. The margin of incentive admissible to the fair price shop dealers is also provided to be reviewed periodically. It is in furtherance of the above mandate that the State Government in suppression of earlier Control Orders chose to issue the U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016. Clause-7 of the Control Order, 2016 issued by the State Government being relevant is extracted below:

7- Appointment and regulation of fair price shops.-	With a view to affecting fair distribution of foodgrains and scheduled commodities the State Government shall issue directions under section-3 of the Act to such number of fair price shop in an

	area and in the manner as it deems fit.
(2)	(i)- A fair price shop shall be run through **such person and in such manner** as the Collector, subject to the directions of the State Government may decide. (ii)- **A person appointed to run a fair price** shop under sub clause (1) shall **act as the agent of the State Government**. (iii)- **A person appointed to run a fair price shop** under sub clause (1) **shall sign an agreement**, as directed by the State Government regarding running of the fair price shop. as per the draft appended to this order before the competent authority prior to the coming with effect of the said appointment.
(3)	The Food Commissioner shall ensure that the number of ration card holders attached to a fair price shop are reasonable, the fair price shop is so located that the consumer or ration card holder does not have to face difficulty to reach the fair price shop and that proper coverage is ensured in hilly, desert, tribal and such other areas difficult to access.
(4)	The State Government shall fix an amount as the fair price shop owner's margin, which shall be periodically reviewed for ensuring sustained viability of the fair price shop operations.
(5)	The Food Commissioner shall put in place a mechanism to ensure the release of fair price shop owner's margin without any delay.
(6)	The State Government shall allow sale of commodities other than the foodgrains and other scheduled commodities distributed under the Targeted Public Distribution System at the fair price shop to improve the viability of the fair price shop operations.

11. Reference may also be made to the definition clause-2 whereunder the 'agent', 'fair price shop' and 'fair price shop owner' are defined as under:

"**2- Definitions**- ln this Order, unless the context otherwise requires-,

(b) "**Agent**" means a person or a co-operative society or a corporation of the State Government authorized to run a Fair

Price Shop under the provision of this Order;

(n) "**Fair price shop**" means a shop set up as directed by the State Government under this order for distribution of foodgrains, sugar, kerosene oil etc. under various orders of Central and State Government."

(o) "**fair price shop owner**" means a person and includes a cooperative society authorized to run a fair price shop appointed under provisions of this order."

12. Having regard to definitions extracted above, it is quite clear that an individual, the co-operative societies or a corporation of the State are inclusive in the definition of **'agent'** but the definition of **'fair price owner'** as per the Control Order, 2015 issued by the Central Government is much wider. It is in the background of above mentioned provisions that the State Government by virtue of Section-3 of the Essential Commodities Act issued a further government order on **5.8.2019** whereunder the procedure for selection of persons in rural areas having regard to the policy of reservation was laid down. It is evident from the government order dated 5.8.2019 that reservation for various categories of persons was provided under Clause-I as under:

a. SC - 21%
b. ST - 02%
c. OBC - 27%
d. EWC - 10%

(not included in SC, ST, OBC as per G.O. No. 1/2019/4/1/2002/Ka-2/10TC-11dated 18.2.2019)

13. Clause-II of the government order dated 5.8.2019 provides for horizontal reservation for women (20%), Ex-Army Personnel (5%), Freedom Fighters (5%), Physically Handicapped (3%). Clause-III of the government order provides that every allotment of a fair price shop in the rural area shall be made on the basis of an open meeting of the Gaon Sabha and the resolution passed therein shall be forwarded by the Block Development Officer to the Sub-Divisional Magistrate within two weeks so that the same is presented to the tehsil level committee, headed by Sub Divisional Magistrate for appointment of fair price shop dealer.

14. The tehsil level committee as per the government order dated 5.8.2019 is under a bounden duty to take necessary decision as regards the approval of open meeting within 15 days from the date of receiving the resolution and within the same very period the Sub-Divisional Magistrate concerned is expected to issue an allotment order on the grant of approval by the Committee or return the resolution by recording reasons.

15. What is significant to note is that the process of selection is by an open meeting of the Gaon Sabha and rightly so when one may look at the scope of Entry-28 Schedule-XI in the context of Article 243-A of the Constitution of India read with Section 15(xxix) of the Panchayat Raj Act, 1947. It is also to be noted that the eligibility of a fair price shop dealer is dependent upon his being a resident of the same village and the process of selection is through an open meeting of the Gaon Sabha for which the resolution is passed by the registered voters of the same village by majority. This is the basic rule according to which the establishment of Public Distribution System to promote social justice in the rural areas is by law aimed

with due regard to the mandate of reservation policy. The zone of consideration for allotment of fair price shops, when looked at in the light of preferential clause embodied under Section 12(2)(e) enables the competent authority to give preference to the public institutions or public bodies when there is an impasse between a person and a public body /institution or two public bodies/institutions on account of the support of villagers being equal. The rule of preference applies when the basic criteria of selection brings the two prospective persons on equal footing in a level playing filed. Law does not conceive application of the rule of preference by eroding competition in a level playing field. It is for this reason that the law makers have wisely phrased the essential legislation i.e. Section 12(2)(e) of the Act, 2013.

16. A plain reading of the statute attaching preference to the public institutions or public bodies does not suggest that the local residents who for the purposes of grant of licenses fall in the zone of eligibility or consideration are sought to be ousted altogether. The rule of preference is supplementary to the essential rule under which every person including the public institutions or public bodies may compete for allotment of a fair price shop in an open meeting of the Gaon Sabha. The purpose is to design a result oriented delivery system.

17. The State Government in order to bring the U.P. Control Order, 2016 in line with the definition clause 2(j) of the Central Control Order, 2015 amended the definition of 'fair price shop owner' by Second Amendment Order, 2020, notified on 2.7.2020 as under:

"(O) "Fair Price Shop Owner" means a person and includes a co-operative society and self-help group authorized to run a fair price shop appointed under provisions of this order."

18. This amendment however left the definition of 'agent' extracted above as unaltered. The definition introduced stands somewhat at variance as compared to Clause 2(j) of the Central Control Order, 2015. The State Government soon thereafter issued another government order dated 7.7.2020 whereunder self-help groups were allowed preference to the exclusion of all other categories of persons and this is how the resultant dispute has arisen before this Court in the first two writ petitions which involve common questions of law.

19. The controversy in the first two writ petitions filed before this Court is centered round the government order issued on 7.7.2020 which *inter alia* is assailed on the ground that it seeks to defeat the very objects of 73rd Amendment made in the Constitution of India. It is thus argued that a whimsical discretion cannot be allowed to operate in place of a democratic norm once the decision making authority is conferred upon the Gaon Sabha to pass a resolution for selection of licencees to distribute essential commodities at the village level. Restricting the zone of consideration, therefore, is also questioned as violative of Article 14 and 19(1)(c) of the Constitution of India. It is further urged that narrowing down the zone of eligibility under the garb of rule of preference and confining it to the self-help groups alone for the purposes of grant of statutorily regulated licence by itself is violative of the object of Section 12(2)(e) of the Food Security Act, 2013 which embodies equal consideration.

20. The questions that arise for consideration before this Court may broadly be framed as under:

(i) As to whether the grant of licences for carrying out the objects of Public Distribution System, it is the government order dated 5.8.2019 which is to operate or the so called supplementary government order dated 7.7.2020 running in conflict with the earlier government order occupying the field and as to whether the impugned government order stands the tests of Article 14 of the Constitution of India and does not offend the mandate of Section 12 (2)(e) of the Food Security Act, 2013.

(ii) As to whether the contemplation and enforcement of exclusive preference in favour of self help groups by means of the impugned government order dated 7.7.2020 that too by sidetracking the role of Gaon Sabhas for passing resolution on the principle of majority vote is not in violation of the mandate of Article 14 read with Article 19(1)(c) of the Constitution of India as well as the relevant statute.

(iii) As to whether a Self-help group without having a juristic character would nevertheless be eligible and would fall within the scope of a public body or public institution for the purposes of allotment of fair price shop in the State of U.P.

21. Before consideration of the questions framed above, it may be necessary to take note of the prayer in the writ petitions. In Writ Petition No. 16086 (MS) of 2020 and 18232 (MS) of 2020, the validity of the government order dated 7.7.2020 has been questioned on the ground of lack of authority and being in violation of Article 14 read with Article 19(1)(c) and 21 of the Constitution of India. The scope of other writ petitions depends upon the outcome of aforesaid two writ petitions.

22. In brief it may also be worthy to note that the Patra Grahasthi Card holders are defined under the following criteria:

General Criteria		
Citizen of India	**Family**	**Landless Farmer**
	1. Mukhiya 2. Spouse of Mukhiya 3. Minor Children 4. Major children and dependents 5. Unmarried daughter 6.Mukhiya's Parents dependent on him	

Primary identification
1. All rural/urban families identified as of now in State as Antyodaya families. 2. All rural/urban families identified as BPL families except excluded.

Exclusion Criteria in rural areas
1. Income Tax payer. 2. Family with four-wheeler vehicles, tractor, AC or generator of 5 KV or more capacity 3. Families with five acres or more

irrigated land. 4. Income above two lacs per annum. 5. Family with more than one arm's licence

Inclusion Criteria in urban areas
1. Beggars, domestic helps, cobblers, Pheriwalas (unless excluded on the strength of exclusions as above). 2. Leprosy patients or acid victims. 3. Orphans. 4. Janitors. 5. Rickshaw Pullers. 6. SC/ST, other landless labourers. 7. Daily Wagers. 8. BPL families 9. Kachcha house dwellers. 10. Where Mukhiya is disabled or of unsound mind. 11. Transgenders.

23. This is broad classification of the eligibility criteria of beneficiaries and is not exhaustive. The women and children are separately prioritized under the Act, 2013.

24. Sri Sudhir Pandey, learned counsel for the petitioner has argued that Public Distribution System in the rural areas falls within the domain of U.P. Panchayat Raj Act, 1947 and insofar as the establishment of fair price shops in the rural areas is concerned, the Central and the State Government both in exercise of the powers conferred by virtue of Section 3 of Essential Commodities Act have issued Control Order in the year 2015 and 2016. The Control Orders were supplemented by the State Government order issued on 5.8.2019. The Control Orders lay down a complete mechanism for assessing the eligibility of persons and carrying out the selection process for allotment of fair price shops.

25. It is submitted that once the State Government by undertaking its composite legislative exercise i.e. essential and statutory devolved the selection process of dealers upon the Gaon Sabhas to strengthen Public Distribution System, it was thereafter impermissible for the executive authority of the State to act contrary to the object of local self governance. The impugned Government Order dated 7.7.2020 seeking to oust the role of Gram Sabhas defeats the purpose of 73rd Amendment made in the Constitution of India apart from being in conflict with the Government Order dated 5.8.2019 occupying the field.

26. Learned counsel for the petitioner has argued that the nature and extent of 'executive power' is not defined under law but what is not classified as a legislative or judicial function, is within the realm of executive function of the State in common parlance. Law is clear on the subject that the entries embodied in Schedule-XI of the Constitution of India do not confer authority of any kind upon the Gram Sabhas or Gram Panchayats unless the specific functions are sanctified by law. it is thus submitted that whatever is decentralized by the State in the spirit of Article 243-A and 243-G read with Part-IV of the Constitution of India cannot be frustrated without providing for a stronger reform executable by the third tier of governance itself. In other words, the fundamental rule of democracy must reach and serve the society in the matter of executive decisions too. For this purpose, Article 243-A of the Constitution of India clearly provides a guidance to the effect that the Gram Sabhas may exercise such powers and perform such functions at the village level as may by law be conferred by

the State Legislature. This must be read inclusive of the powers and functions conferred through delegated legislation which accomplishes the purpose of essential legislation promulgated by the Parliament or the State legislature and an inconsistent policy decision must be read subservient to such laws.

27. According to the learned counsel for the petitioners, the policy of the State is bound to adhere to the existing laws. The distribution of scheduled commodities through fair price shops, according to him, is to be understood by giving a full meaning to the inclusion of Entry-28 in Schedule XI of the Constitution of India and the laws made or applied in relation thereto within the spirit of Article 243-A and 243-G. Article 243-A for ready reference may also be extracted as under:

*"**243-A. Gram Sabha**- A Gram Sabha may exercise such powers and perform such functions at the village level as the Legislature of a State may, by law, provide."*

28. This Court would note that the executive function of the State may be devolved upon the Local Self-Government by law and supplemented through delegated legislation but once a function through composite legislative process is decentralizsed, the same would vest in the Gram Sabha or Gram Panchayat till the law reforms or strengthens the Panchayat Raj even further. The local Self-Government to the extent of decentralization of executive functions by law on the subjects mentioned in Schedule-XI of the Constitution of India thus assume legitimacy for carrying out such functions and to that extent, the executive authority of the State stands devolved upon the local self government. In other words, the Control Order issued by the Central Government in the year 2015 together with the Control Order, 2016 of the State as promulgated under Section 3 of the Essential Commodities Act besides the devolution of functions by the State vide government order dated 5.8.2019 upon the Gram Sabhas, leave no manner of doubt that the allotment of dealership for delivery of scheduled commodities to an agent was devolved upon the Gram Sabhas in the spirit of Article 243-A of the Constitution of India. This is a function akin to the election of Gram Pradhan for which an extraordinary general meeting of the Gram Sabha as per the provisions of Section 11 of the Panchayat Raj Act, 1947 is a condition precedent. The resolution passed by the Gaon Sabha becomes accordingly enforceable as per the provisions of Panchayat Raj Act, 1947 and the Rules framed thereunder.

29. The devolution of function relating to the selection of fair price shop dealers upon the Gram Sabhas would certainly help the targeted population residing in village areas to be served better and is necessary to reform Public Distribution System for its inclusion in Schedule-XI of the Constitution of India i.e. Entry-28. It may be worthwhile to note that the purpose to institutionalize the third tier of the government i.e. Gram Sabhas/Panchayats was to reach out to the people living in village areas and particularly those who are below the poverty line. The object of three-tier governance is none other than the effective implementation of the development schemes and projects to uplift the standards of livelihood at the village level through a democratic process. The law makers under Article 243-A and Article 243-G of the Constitution of India have clearly provided

that the governance by local authorities must be sanctified by law without which the functional independence of the local self government i.e. Panchayat Raj would not be a reality. Once the laws made by the State or the Central Government segregate the executive functions or any other function in the light of Schedule XI appended to the Constitution of India and devolve specific functions upon the Gram Sabhas or Gram Panchayats, such functions must stand vested with the local self government till they are reformed by law to strengthen the third tier of democracy in the spirit of Section 25 read with Section 26 of the Food Security Act, 2013.

30. The question as to whether it was right for the State Government to supplant the existing process of selection prescribed under the government order dated 5.8.2019 by a rule exercisable at the discretion of District Magistrate/Collector and that too by ousting the participatory rights of the eligible local villagers, in my humble view, the impugned government order dated 07.07.2020 defeats the very object and purpose of the Article 243-A together with Article 243-G of the Constitution of India when read with Section-15(xxix) of the U.P. Panchayat Raj Act, 1947. The reformation of selection process by means of the impugned government order dated 7.7.2020 is not only contrary to the own policy of the State but is wholly violative of Article 14 and 19(1(c) of the Constitution of India. This Court may also take note of the government order dated 14.1.2021 whereby the State Government while reiterating the enforcement of government order dated 5.8.2019 has clarified that self-help groups would also be eligible for participation in the selection process of fair price shop dealership but to apply the rule of preference exclusively in terms of government order dated 7.7.2020 is certainly unconstitutional. Therefore, this Court has no hesitation to hold that the operation of the impugned government order dated 7.7.2020 standing in conflict with the subsisting government order dated 5.8.2019 is not only inconsistent but violative of Article 14 of the Constitution of India, hence liable to be struck down.

31. The Court may also observe that the control of the State Government to approve a resolution of the Gaon Sabha is the only external control which may be exercised by the executive in relation to the process of selection. This authority is saved to effectuate the purpose of law and attach a finality to the resolutions passed by Gram Sabha in terms of the statutory government order dated 05.08.2019. The control with respect to the discharge of duties by the agents or licencees is also regulated under the U.P. Control Order, 2016 read with the government order dated 5.8.2019. The local redressal mechanism provided under the provisions of National Food Security Act, 2013 also comes to the aid of beneficiaries to strengthen the Public Distribution System.

32. Coming to the **second** question, this Court would note that the State Government in the counter affidavits filed has no where stated as to how restricting the zone of eligibility to the self-help groups alone would be just, reasonable or fair and would not offend the mandate of equality embodied under Article 14 of the Constitution of India which again is a fundamental rule of governance.

33. In the present case, the court is dealing with a controversy which involves

the welfare of people at the village level. Raising the standard of nutrition cum living of rural population through distribution of food grains is the duty for which the monetary support is owned by the State out of tax payers money and is thus a State largesse. The supply of food grains at the subsidised rates to alleviate poverty is a lofty object but the same can not be achieved unless there is decentralization of the primary functions to the third tier of governance at the grass root level. An effective and prompt mechanism of redressal of grievances at the local level coupled with legal service is also a condition precedent to actualise the purpose of law.

34. It cannot be doubted that the most transparent manner of practicing equality under Article 14 of the Constitution of India is either through a process of competition between equals or through the vote of majority by equals. Employment of fair price shop agents from amongst the local residents of the village is the basic rule. The rule of discretionary preference for certain categories of persons in terms of Section 12(2)(e) of the National Food Security Act, 2013 is aimed to achieve consumer friendly results through an individual or a juristic person. This provision includes participation of public bodies or public institutions such as Co-operative Societies, Gram Panchyats or Self-help Groups as well as the eligible local residents for a competitive service. The inclusion of public bodies/public institutions is not suggestive of any restriction rather it expands the competitive horizon between the various categories of persons so as to achieve the target of distribution of food grains more effectively and competitively. The expansion of competition for effective and faultless service when tested within the scope of definition of a 'person' defined under "The Competition Act, 2002" gives an idea, as to how wide, the connotation of a 'person' in legal parlance can understandably be stretched. In the present case, however, it is restricted to an individual and public bodies/public institutions of the description mentioned under Section 12(2)(e) of the National Food Security Act, 2013. Ousting an individual from the zone of eligibility for selection of an 'agent' is fundamentally wrong as no person has an existence without the presence of an individual. The exercise of the right embodied under Article 19(1)(c) is imaginary without the association of individuals, therefore, for any kind of employment or licencing by the State, an individual person cannot be ousted once he qualifies the prescribed criteria or the condition fixed under law. It is to be noted that the reservation for various categories of persons being applicable in the matter of allotment of fair price shops further lays emphasis on individual identity within the local limits of the village. The impugned government order dated 7.7.2020, surprisingly, brings altogether a novel identity to the 'Self-help groups'.

35. Learned counsel for the State has stated that any Self-help group comprising of larger number of individuals belonging to Scheduled Caste would qualify the group as 'Scheduled Caste Group' for the purposes of implementation of reservation policy.

36. This Court may strike a note of caution that Article 19(1)(c) within its ambit does not empower the State to recognise the identity of a juristic person on the basis of any attributes of caste, creed or religion. Any such association is an entity for the fulfillment of aims and objects

enshrined in its Articles of Association and Bye-laws. The welfare state i.e. India as an organisational structure under the Constitution of India does not have any identity based on caste, creed or religion. The sovereign recognition of our welfare state i.e. Bharat is territorial and this position is well defined under Article-1 of the Constitution of India. The right embodied under Article 19(1)(c) enables the individuals to bury all discriminations based on caste, creed or religion. The recognition of linguistic minorities or ethnic groups for development of their language, culture and faith is different and this liberty is protected within our Constitutional ethos of inclusive growth and unity to shape the universal order of mixed freedom in post-modern socio-liberal democracy.

37. The government order dated 7.7.2020 undoubtedly is violative of Article 14 of the Constitution of India, once it excludes the participation of eligible village residents and other juristic persons such as cooperative societies or Gram Panchayats at par with the Self-help Groups. The individual's right of consideration as compared to that of a juristic person for employment or grant of licence by the State stands on equal footing and no one can be eliminated or ousted in order to promote a monopoly in favour of any particular category of persons like the situation at hand. This is also against the spirit of service oriented competition that regulates the socio-liberal economy.

38. Moreover, the mandate of Section 12(2)(e) of the National Food Security is for an inclusive competition between the individuals and various categories of public institutions or public bodies such as Panchayat, Self-help Groups, Cooperative Societies etc. The Self-help Groups which are conceived under Section 12(2)(e) of the Act, 2013 are co-related to an institution like cooperative society, a Gram Panchayat or a registered society. The State Government has not projected any clarity in the matter of Self-help groups except that they are granted a unique identity number by some agency known as 'National Rural Livelihood Development Mission'.

39. Mere allotment of a unique ID by National Rural Livelihood Development Mission for the purposes of grant of licence to run a fair price shop on behalf of the State is not enough. Registration of Self-help groups and their functioning under well defined aims, objects and bye-laws coupled with the criteria of credibility are the relevant dimensions to fix accountability. The rural population has already suffered much on account of non-supply of food grains leading to food scams. The recognition of a self help group which is loosely packed, would be counter-productive and shall not serve the real purpose. It is for this reason that clause 2(j) of the Control Order, 2015 issued by the Central Government defines the 'fair price shop owner' slightly rigid.

40. This Court may note that the constitution of Self-helps Groups as postulated in Section 12(2)(e) is not ordinary. A Self-help Group of which reference is made must qualify the standards of a juristic person for the purpose of its existence and identity both so that there is no difficulty to fix accountability in the matter of irregularities or dereliction of duty coming to the notice of the State.

41. This does not suggest that the Self-help Groups are ineligible but what the law aims at is an accountable Self-help Group that has a legal existence in the eye of law, i.e., a body, which can sue and be sued besides having a functional identity above that of an individual. The unregistered Self-help Groups having unique ID from National Rural Livelihood Development Mission are free to promote the individual performance of women fair price shop dealers for whom there is 20% horizontal reservation. The object is to make the services faultless and promote women representation in Public Distribution System in order to achieve the goal of equitable distribution of food grains to the poorest on a competitive basis.

42. This Court, for the observations made above, has no hesitation to hold that the Government order dated 7.7.2020 insofar as it excludes the consideration of persons other than Self-help Groups is discriminatory and is violative of Article 14 of the Constitution of India. The impugned government order dated 7.7.2020 also offends the mandate of Section 12(2(e) of the Act, 2013 as well as Clause 7(2) of the Control Order, 2016 issued by the State Government. The government order dated 7.7.2020 impugned herein is equally against the competitive spirit of Section 12(2)(e) of the National Food Security Act, 2013 and seeks to create monopoly in favour of the Self-help Groups having a weak legal identity for the purposes of fixing accountability and thus any such body is susceptible to worsen the objects of Public Distribution System instead of bringing about any reform. For want of juristic sanctity, any benefit exclusively granted is, thus, non-est in the eye of law.

43. Lastly, when the issue in relation to Self-help Groups projected by the State was examined, it has transpired from the averments made in the counter affidavits that none of the Self-help Groups is a registered body having its perpetual succession in accordance with any Articles of Association and there are no by-laws regulating their functioning. It is rather an arrangement between a group of persons having scattered thoughts. In absence of any common objects and a unified mission to accomplish public services under any bye-laws, it is difficult, rather impermissible, for the State to recognize such Self-help Groups as public bodies or institutions. For recognition as a public body it is necessary that such a group has registered Articles of Association and bye-laws justifying its functioning as a legal entity under some statute. For the purposes of Section 12(2)(e), a Self-help Group is bound to have a legal sanctity so that the State may hold such a public body accountable towards any loss or irregularity.

44. The law makers in Section 12(2)(c) of the Act, 2013, have used the phrase 'such as' so as to draw a comparison between the legal entities. This Court may note that incentive payable to the fair price shop owner is a State largesse. The Self-help Groups, whose identity for want of registration or any such foundation is doubtful, cannot be termed as juristic persons within the meaning of public bodies or public institutions. Therefore, the registration of a group of persons associated under a scheme of Articles of association and regulation of its functioning under the by-laws is a condition precedent for the State to recognize the Self-help Groups as Public Bodies or Public Institutions. Even if the services rendered by a so-called Self-help Group are voluntary, yet the relationship of agency

between a self help group and State, must have a legal sanctity. The self help groups projected by the State in the present case lack the sanctity of a public body/public institution, in as much as, the associations are neither registered under any statute nor have they any perpetual succession. They can neither sue nor be sued. There are no bye-laws legally crystallized, hence the trappings of a public body or public institution are lacking for any reformative objects as envisaged under Section 12(2)(e) of the National Food Security Act, 2013.

45. In the result, the government order issued on 7.7.2020 being ultra vires to Article 14 of the Constitution of India and beyond the scope of Section 12(2)(e) of the National Food Security Act, 2013 is hereby declared as null and void. Any action in pursuance thereof is declared illegal and subject to reconsideration in terms of the government order dated 5.8.2019 and other supplementary government orders for finalising the establishment of fair price shops in accordance with law. The preference, if any, to the public bodies or public institutions shall be admissible only in a situation of deadlock i.e. equal voting by the villagers participating in the Gaon Sabha meeting scheduled as per the procedure prescribed under the government order dated 5.8.2019 or the law applicable in this behalf.

46. The other submissions put up by the State that there was a preference for the existing kerosene dealers who were granted licences at the village level is also misplaced for the reason that the Control Orders, 2015 and 2016 issued by the Central or State government do not leave any scope for any such preference, therefore, grant of licences on such a premise is also beyond the scope of law and impermissible.

47. In view of the discussion made above, Writ Petition No. 16086 (MS) of 2020 and Writ Petition No. 18232 (MS) of 2020 are allowed whereas the Writ Petition No. 17570 (MS) of 2020, Writ Petition No. 3496 (MS) of 2021 and Writ Petition No. 2662 (MS) of 2021 being inconsequential are dismissed.

48. No order as to cost.

49. Before parting, the Court shall be failing in its duty, if during the ongoing pandemic, the plight of underprivileged people goes unnoticed in the present scenario of mass destruction. The issues relating to distribution of food grains in the present situation of unemployment are larger in size particularly when the Gram Panchayats after election in U.P. have yet to assume functional role to cope with the Pandemic. The unmanaged hunger may equally be contributing to unnatural deaths like mismanaged health services. This Court may also not overlook the lack of mechanism whereunder the quality check of the food grains supplied to underprivileged is dutifully ensured and it is quite possible that hunger and malnutrition may be a cause of human loss too. This Court would humbly extend a request to this Court or the apex court dealing with suo motu petitions to include consideration on the issue of distribution of food grains to the vulnerable section of people and ensure the accountability of governance in relation to quantity and quality related issues that have undoubtedly multiplied manifold constituting a cognizable cause. The judiciary owes a legal obligation to the underprivileged citizens for which the constitutional courts are duty bound to go

into the State's obligation relating to the supply of quality food grains during this crisis failing which the health hazard shall assume unprecedented dimensions and may render the nation helpless.

50. Let a copy of this order be sent to the Chief Secretary, Government of U.P. as well as to the Ministry of Civil Supplies, Government of India for necessary action. A copy of this order may be sent to the Registrar General, Supreme Court of India, New Delhi and be also placed before the Registrar General of this Court to apprise the concerned Benches of the request extended hereinabove.

(2021)05ILR A246
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.05.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJEEV SINGH, J.

Criminal Appeal No. 40 of 1985

Jagdamba & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
G.K. Mehrotra, Arun Sinha, B.M. Sahai, Mahendra Nath Rai, S.P.Tripathi

Counsel for the Opposite Party:
Govt. Advocate

Indian Evidence Act, 1872- Section 3- Testimony of injured witnesses- Father and mother of the deceased persons - They are also the injured witnesses, and their presence on the spot cannot be doubted at all as the injury report of PW-1 corroborated the manner as deposed in his statement and similarly the injury report of PW-3 also corroborated with her statement, and the injury report of the aforesaid witnesses were duly proved by Dr. Harish Chandra Srivastava (PW-10). Where the witnesses are injured and their injuries stand corroborated from the medical evidence, then their testimony cannot be discarded merely on the ground that they are related witnesses.

Indian Evidence Act, 1872- Section 3- No independent witness was produced- it cannot be expected that the residents of other villages must or could have seen the occurrence. Settled law that merely not producing independent witnesses, where their presence was ordinarily not possible, would not dent the case of the prosecution.

Indian Evidence Act, 1872- Section 3- The oral testimony is corroborated with the medical evidence and as far as the participation of three accused in the crime in question is concerned, is fully established. When the ocular evidence with regard to the injuries of the deceased is corroborated by the medical evidence, then the same can be relied upon to secure the conviction of the accused.

Indian Evidence Act, 1872- Section 8- Enmity is a double edged weapon which cuts both the sides, and in the present case, the ocular evidence as well as the medical evidence relied by the prosecution are corroborating with each other, therefore, there was established motive for the crime in question. When enmity is admitted then it can very well constitute the motive for commission of the offence, as well asbeing a ground for false implication.

Falsus in Uno, Falsus in Omnibus- The maxim "falsus in uno, falsus in omnibus" has no application in India for the reason that some part of the statement of witness has not been accepted in India, and even if, the major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained, and it is the duty of the court to separate the grain from the the chaff. Since the

doctrine of "falsus in uno, falsus in omnibus" is not applicable in India therefore the case of the prosecution cannot be disbelieved on the ground that the witnesses have not given a truthful testimony with regard to to some of the accused or a part of the prosecution version.

Code of Criminal Procedure, 1973- Section 157- The Special report in relation to the said incident reached to the Bungalow of District Magistrate on 19.12.1982 at 08:15 p.m., whereas the incident was of 19.12.1982 at about 01:30 a.m., therefore, the learned trial court has committed error in considering this fact, but it is well settled that trial shall not be affected due to delay in sending Special Report of crime. It is settled law that mere delay in sending the Special Report will not vitiate the trial.

I**ndian Penal Code, 1860- Section 34- Common Intention- Section 34 of I.P.C. stipulates that the act must have been done in furtherance of common intention. It is not necessary that the prosecution must prove that the action done by a particular or a specified person. It can be invoked where some of the co-accused may be acquitted.** Section 34 of the IPC provides for joint liability of an offence committed in consequence of a premeditated concert and therefore some of the accused may be convicted with the aid of Section 34 while others may be acquitted. (Para 22(ii), (vii), (viii),(x),(xi),(xii),(xiv),(xv), 24)

Criminal Appeal rejected. (E-2)

Judgements/case law relied upon:-

1. Baleshwar Mahto & anr. Vs St. of Bih. & anr. (2017) 3 SCC 152

2. Mahendran Vs St. of T.N (2019) 5 SCC 67

3. Jafel Biswas & anr. Vs St. of W.B (2019) 12 SCC 560.

4. Abdul Sayeed Vs St. of M.P. (2010) 10 SCC 259.

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

1. Heard Shri Arun Sinha, learned counsel for the appellants and Ms. Nand Prabha Shukla, learned A.G.A. for the State and perused the lower court record.

2. The present appeal has been filed by the appellants namely **Jagdamba, Amerika Prasad, Chinta @ Chinta Ram @ Chinta Prasad @ Sheo Shankar and Bachhraj,** under Section 374 (2) Cr.P.C., against the judgment and order dated 16/17.01.1985 passed by learned Additional Sessions Judge-I, Gonda in Sessions Trial No.174 of 1983 (State Vs. Bhagwati and Others) arising out of Case Crime No.135 of 1982, under Sections 147, 148, 149, 324, 323, 302 I.P.C., Police Station Intiathoke, District Gonda, whereby **acquitting the co-accused persons** namely Bhagwati, Kalp Nath, Bharose @ Ram Bharose, Suggu @ Sukhdeo, Ram Kewal, Vishram and Girwar, and **convicting the appellants** namely Jagdamba, Amerika Prasad, Chinta and Bachhraj, under Sections 302/34 and 324/34 I.P.C. and sentenced them for life imprisonment with a further sentence of two years of Rigorous Imprisonment with a fine of Rs.500/-, in default of payment of fine, additional six months of rigorous imprisonment.

3. During pendency of the present appeal, the appellant No.1 namely Jagdamba had died, as a result, the appeal in relation to him was abated on 02.04.2019.

4. The prosecution case is that on 19.12.1982 at about 01:30 a.m., when Ram Dularey (complainant) was sleeping along with his wife Smt. Patiraji, son Chandrika Prasad, daughters Kamla Devi & Madhuri

Devi, relative Ram Gulam and son-in-law Kamla Prasad in the thatcher *(Chhappar)* lying west to his house, while his elder son Shanti Prasad was sleeping in the Charni (place used for keeping fodder) lying in front of the house and his other son namely Nanhey Prasad was sleeping in another Marha lying to the east of the house, the accused persons namely Jagdamba armed with Pharsa, Girwar & Amerika armed with Spears, Chinta & Bachha Raj armed with Gandasa and rest of the accused persons armed with lathi, arrived at the door of the complainant and on the barking of dogs, the complainant woke up and noticed the presence of accused persons in the light of torch and the lantern that was hanging onto the branch of Jack Fruit (Kathal) tree in front of the house; by that time, the accused persons entered in the Charni where Shanti Prasad was sleeping, and the accused persons namely Chinta Ram, Jagdamba and Bhulan @ Bachha Raj started inflicting blows with their respective weapons on Shanti Prasad while rest of the accused persons were holding him. The complainant raised alarm and he along with his, wife Smt. Patiraji, son Chandrika Prasad and relations rushed to save Shanti Prasad. In the meantime, Nanhey Prasad also woke up in his Marha and was sitting on cot. After committing the murder of Shanti Prasad, the accused persons had rushed to Marha of Nanhey Prasad and after entering therein, the accused persons namely Chinta Ram, Jagdamba and Bachhraj started inflicting blows with their respective weapons on Nanhey Prasad while other co-accused persons were holding him. As the complainant and his wife tried to save their son Nanhey Prasad, the complainant was assaulted by accused Jagdamba and Amerika, and his wife Patiraji was assaulted by Amerika. On the alarm raised by the complainant and his relations, the inhabitants of nearby village reached on the spot, and the accused persons ran away toward east. The deceased persons namely Shanti Prasad and Nanhey Prasad died on the spot and in the F.I.R., motive behind the incident was attributed to long standing enmity between the complainant and the accused persons.

5. The aforesaid written complaint was furnished at Police Station Intiyathoke, District Gonda by Ram Dularey (complainant) on 19.12.1982 at 08:45 a.m. and a case was registered against all the accused persons as Case Crime No.135 of 1982, under Sections 147, 148, 149, 324, 323, 302 I.P.C., the chick F.I.R. was prepared and the entry of lodging the F.I.R. was made in the G.D. Inquest of the bodies of the deceased namely Shanti Prasad and Nanhe Prasad was conducted on 19.12.1982 at 01:00 p.m. and 03:00 p.m. respectively. The injured persons namely Ram Dularey and Smt. Patiraji were also sent for medical examination and were medically examined in the emergency wing of District Hospital Gonda on 20.10.1982 between 01:40 p.m. to 03:00 p.m. The Investigating Officer also took in his possession the blood-stained clothes like Kurta, Angochha and piece of blanket from the charni where dead body of Shanti Prasad was found and he also took in his possession the blood-stained clothes of Nanhe Prasad like woolen sweater and dhoti from the thatcher (Chappar), where he was lying dead, and also took in his possession the blood-stained and simple earth from the charni and thatcher. From the place of incident, the Investigating Officer had also took in his possession two torches of witnesses namely Ram Gulam and Kamla Prasad, torch of the complainant and the lantern, and prepared memos but these articles were given in the Supurdagi

of concerned persons. The dead bodies of Shanti Prasad and Nanhey Prasad were sent for postmortem along with the necessary papers and the postmortem of the body of Shanti Prasad was conducted at mortuary on 20.12.1982 at 02:00 p.m., and the postmortem of body of Nanhey Prasad was conducted on 20.12.1982 at 03:00 p.m. The Investigating Officer had also prepared the site plan and sent the collected blood-stained clothes and earth for chemical examination and serologist's report.

6. The Investigating Officer had also recorded the statement of injured and other witnesses and on the basis of the statements of Ram Dularey (complainant/injured), Smt. Patiraji (injured) and other witnesses recorded under Section 161 Cr.P.C., documentary evidence including the postmortem report of the deceased which shows the antemortem injury and the injury report of the injured persons, the Investigating Officer came to the conclusion that the deceased persons namely Shanti Prasad and Nanhey Prasad were killed by the accused persons and the complainant as well as his wife Smt. Patiraji were also assaulted by them, therefore, the charge sheet under Sections 147, 148, 149, 324, 323, 302 I.P.C. was filed against the accused persons and the case was committed to the court of Sessions. The case was registered as Sessions Trial No.174 of 1983 and the combined charge under Sections 302/149 I.P.C. was framed against all the accused persons, separate charges under Sections 148, 324/149 I.P.C. were framed against accused Jagdamba, Chinta, Girwar, Amerika and Bachhraj while another separate charge under Sections 147 and 323/149 I.P.C. were framed against accused Ram Kewal, Vishram, Suggu, Kalpnath, Bharosey and Bhagwati, but the accused persons denied the respective charges and requested for trial to prove their case.

7. To prove its case, the prosecution in all examined 11 witnesses namely PW-1 Ram Dularey (complainant and father of the deceased as well as the injured/eye witness), PW-2 Chandrika Prasad (son of the complainant/eye witness), PW-3 Smt. Patiraji (wife of the complainant/eye witness), PW-4 Kamla Prasad (son-in-law of the complainant/eye witness), PW-5 Asharfi Lal & PW-6 Ram Sanehi (both witness of inquest report and memos), PW-7 Head Constable Keshav Prasad Tewari, PW-8 Constable Virendra Pratap, PW-9 Dr. R.V. Pandey (conducted postmortems), PW-10 Dr. Harish Chandra Srivastava (examined injured persons) and PW-11 R.P. Singh (Investigating Officer).

8. The prosecution has also relied on 35 documentary evidences i.e. Ext. Ka-1: Written complaint of complainant; Ext. Ka-2: Recovery memo and *Supurdagi* of two torches; Ext. Ka-3: Inquest report of the body of Shanti Prasad; Ext. Ka-4: Inquest report of the body of Nanhey Prasad; Ext. Ka-5: Recovery memo for taking into possession of blood-stained clothes of Shanti Prasad; Ext. Ka-6: Recovery memo for taking into possession of blood-stained clothes of Nanhey Prasad; Ext. Ka-7: Recovery memo for taking into possession of blood-stained and simple earth from *Charni* where Shanti Prasad was lying dead; Ext. Ka-8: Recovery memo for taking into possession of blood-stained and simple earth from *Marha* where Nanhey Prasad was lying dead; Ext. Ka-9: Recovery memo for taking into possession of *Supurdagi* of one Lantern; Ext. Ka-10: Recovery memo

for taking into possession of *Supurdag*i of one torch; Ext. Ka-11: Chick F.I.R. of Case Crime in question; Ext. Ka-12: G.D of lodging the F.I.R.; Exts. Ka-14 & Ka-15: Postmortem reports of the deceased persons namely Shanti Prasad and Nanhey Prasad respectively; Exts. Ka-16 & Ka-17: Medical reports of the injured persons namely Smt. Patiraji and Ram Dularey respectively; Exts. Ka-18 to Ka-27: relevant papers sent along with the body of deceased namely Shanti Prasad and Nanhey Prasad; Ext. Ka-28: Site plan; Exts. Ka-29 to Ka-31: Memo of search of the houses of accused persons; Ext. Ka-32: Charge sheet filed by the Investigating Officer against Bhagwati, Kalp Nath, Bharose @ Ram Bharose, Suggu @ Sukhdeo; Ext. Ka-33: Charge sheet filed by the Investigating Officer against Jagdamba Prasad, Amerika Prasad, Chinta Prasad @ Shiv Shankar, Bachhraj and Girwar; Exts. Ka-34 & Ka-35: Report of chemical analysis and serologist.

9. After completion of the statement of prosecution witnesses, the statement of accused persons under Section 313 Cr.P.C. was recorded and they denied all the allegations. According to them, they have been falsely implicated on account of enmity. The accused Bachhraj, Chinta and Vishram stated that they are brothers of Ram Kewal, who had instituted some complaint case against Ram Dularey (complainant). The accused Suggu stated that he is father of Ram Kewal, who had instituted some complaint case against the complainant, which was going on at the time of occurrence and the complainant had further been prosecuted in a theft case at his instance. The accused Jagdamba stated that his uncle namely Girwar Prasad had given some land to his brother-in-law namely Amerika, therefore, Ram Dularey had felt ill about the same as he wanted to take the land himself. The accused Bhagwati stated that he is Sarpanch of Nyaya Panchayat Dariapur and had decided a criminal case against Ram Dularey, which had been instituted by Girwar and Kalpnath and had also been a witness in a theft case against the complainant. The accused Amerika stated that he had taken some land from Girwar, as a result, complainant was annoyed with Girwar. The accused Girwar stated that he had given some land to Amerika that is why, the complainant was annoyed with him. The accused Ram Bharose stated that as Girwar had given some land to Amerika, the complainant was annoyed. The accused Kalpnath stated that he had prosecuted the complainant for theft, in which the complainant had been fined.

10. The accused persons in defence, examined DW-1 Shri Mathura Prasad Pandey, Petition Clerk of the office of District Magistrate, Gonda and got proved, a portion of statement under Section 161 Cr.P.C. of Ram Dularey (PW-1), a portion of statement under Section 161 Cr.P.C. of Chandrika Prasad (PW-2), a portion of statement under Section 161 Cr.P.C. of Smt. Patiraji (PW-3) and a portion of statement under Section 161 Cr.P.C. of Kamla Prasad (PW-4) as Ext. Kha-1, Ext. Kha-2, Ext. Kha-3 and Ext. Kha-4 respectively; and also got proved copy of chick F.I.R. of Case Crime No.135 of 1982, under Sections 147, 148, 149, 324, 323, 302 I.P.C. (Ext. Kha-5); signature of the District Magistrate over it (Ext. Kha-6); filed copy of injunction application of Suit No.159 of 1982 (Ram Dularey vs. Chunnu & Others) in the court of Munsif, Gonda (Ext. Kha-7); copy of the report of Process Server in Suit No.159 of 1982 (Ext. Kha-8); order of the court dated 27.03.1982 in

the said case (Ext. Kha-9); copy of the chick F.I.R. of Case Crime No.228, under Sections 379/411 I.P.C., P.S. Mankapur (State vs. Deo Narain) along with the copy of recovery of case property (Ext. Kha-10); copy of the questionnaire in criminal case under Section 107/116 Cr.P.C. (Ext. Kha-11); copy of the revision petition in re: Panchayat Revision No.6 of 1982 (Ram Dularey vs. Girwar), Ext. Kha-12; copy of the revision petition in Misc. Case No.14 of 1982 (Ram Dulare vs. Ram Kewal), Ext. Kha-13; copy of the revision petition in Misc. Case No.15 of 1982 (Ram Dularey & Others vs. Kalpnath), Ext. Kha-14; copy of the Kutumb register of village Dariapur Mafi concerning House No.109 (Ext. Kha-15); copy of the F.I.R. in Case Crime No.42 of 1977, under Sections 147, 148, 149, 366, 511, 395, 397 I.P.C. lodged against Ram Sabad & Others (Ext. Kha-16); copy of charge sheet in Case Crime No.42 of 1977 (Ext. Kha-17); copy of the order dated 08.05.1981 of the Judicial Magistrate, Gonda in Case No.293 of 1980, under Sections 379/411, 225 I.P.C. (State vs. Keshav Ram & Others), Ext. Kha-18; copy of the statement of Nanhey in S.T. No.155 of 1980, under Sections 302, 323/34 I.P.C. in the court of Additional Sessions Judge-I, Gonda dated 04.12.1980 (Ext. Kha-19); copy of the charge sheet in Case Crime No.66 of 1982, under Section 379 I.P.C. (Ext. Kha-20); photocopy of the marksheet of B.A. Part I in the name of Shiv Shanker Dayal Tewari (Ext. Kha-21); photocopy of marksheet of B.A. Part II (Ext. Kha-22); and copy of the judgment dated 13.06.1964 passed by Shri K.B. Srivastava in S.T. No.60 of 1964 (State vs. Deep Narain & 3 others, Ext. Kha-23.

11. After hearing the counsel for the prosecution, counsels for the accused persons and going through the material available on record, the judgment in question was passed by the court below which is under challenge in the present appeal.

12. Learned counsel for the appellants has submitted that the appellants except Amerika Prasad, belong to the same family tree to which informant belongs, and the appellant Amerika Prasad is the brother-in-law of the appellant Jagdamba in whose favour a sale deed was executed by Girwar, therefore, the informant was annoyed. He further submitted that no such incident was taken place, in the manner, as alleged by the informant, his family members and his relatives, but the correct facts are that some incident of dacoity was taken place, in which the sons of Ram Dularey (informant/PW-1) received injuries, as a result, they had died and in the said incident, informant and his wife namely Smt. Patiraji had also received injuries, but only on account of enmity, the appellants and other family members were falsely implicated. He further submitted that Ram Dularey (complainant and the father of the deceased persons/PW-1) has deposed before the trial court that his son Shanti Prasad was sleeping in the *Charni* and Nanhe Prasad was sleeping in *Marha* while he along with his son Chandrika Prasad, wife Patiraji and relatives Kamla Prasad and Ram Gulam was sleeping in another *Marha* in front of his house with torches and lantern hanging onto branch of Jack Fruit tree in front of the door. The accused persons arrived there in the fateful night at about 01:30 a.m. and the complainant woke up at the barking of the dogs. In the meantime, accused persons among whom, Jagdamba armed with pharsa, Chinta Prasad & Bachhraj armed with Gandasa,

Amerika & Girwar armed with spears and rest armed with lathis, entered in the *Charni,* and Chinta Prasad, Jagdamba and Bhulan @ Bachhraj started inflicting injuries with their respective weapons on Shanti Prasad while rest were holding him. He further submitted that the aforesaid incident is not possible and it is highly probable that he saw the said incident in the torch, and thereafter, the informant and others raised alarm, then Nanhey Prasad, who was sleeping in other Marha, had woke up and sat on cot. At the same time, the accused persons rushed to the *Marha* of Nanhey Prasad, and after entering into Marha, Chinta Prasad, Jagdamba and Bachhraj started inflicting injuries on him while rest were holding him. When the informant and his wife tried to intervene to save life of his son Nanhey Prasad, then Jagdamba and Amerika caused spear injuries to informant and America also caused injuries to the wife of informant.

13. Learned counsel for the appellants has submitted that Smt. Pati Raji (PW-3) has also reiterated the same version as given by Ram Dularey (PW-1) and stated that Amerika caused injuries to her when she tried to save her son Nanhey Prasad. He further submitted that PW-1 & PW-3 are father and mother of the deceased persons respectively and they are relative and injured witnesses. He further submitted that the learned court below has committed error in considering the evidence of PW-1 and PW-3 and again submitted that due to enmity, the false implication have been made by the informant and his family members. He further submitted that as per prosecution, Ram Dularey (PW-1), who was having inimical relation with accused persons, has raised alarm, but in place of causing any such injury to him, the accused persons caused injuries, first to Shanti Prasad and then to Nanhey Prasad, and the accused persons did not cause any such injury at the beginning to Ram Dulare (PW-1), Chinta Prasad (PW-2) and Smt. Patiraji (PW-3). The prosecution story that the PW-1 & PW-3 received injuries when they tried to save his son Nanhey Prasad, which is highly improbable.

14. Learned counsel for the appellants has submitted that as per the prosecution case, the nearby villagers also reached on the place of incident, but no such independent witnesses were produced by the prosecution. He further submitted that as per the prosecution case, the F.I.R. was lodged on the written complaint of Ram Dularey (PW-1) on 19.12.1982 at about 08:45 a.m. and chick report was prepared against the accused persons. Thereafter, the injured persons namely Ram Dularey (PW-1) and Smt. Patiraji (PW-2) were sent for medico-legal examination and their medico-legal report reveals that they were medically examined in the emergency wing of District Hospital Gonda on 20.12.1982 between 01:40 p.m. to 03:00 p.m., which is highly improbable as the injured persons were medically examined after a long period and it is obligatory on the part of the prosecution to explain the delay for medical examination but he fails to do so, therefore, the prosecution story is doubtful. He further submitted that as per the prosecution case, the accused persons armed with lathi had not assaulted anyone, which is also highly improbable.

15. Learned counsel for the appellants has submitted that the appellant Amerika has neither assaulted Shanti Prasad nor Nanhey Prasad (deceased persons) and learned court below has wrongly convicted him under Section 302/34 I.P.C., and he can only be convicted under Section 324

I.P.C. for causing injuries to the injured persons, and the accused persons, those were armed with lathis, were acquitted by the trial court. He further submitted that accused Chinta Prasad was 18 years old at the time of incident and though he was armed with spear, he did not assault either of the persons, who died or had been injured, therefore, his conviction is also wrong.

16. Learned counsel for the appellants has submitted that it appears from the prosecution case that the F.I.R. is ante timed as the injured persons, on whose complaint the impugned F.I.R. was lodged, were medically examined on 20.12.1982 from 02:00 p.m. to 03:00 p.m., and as per DW-1 Shri Mathura Prasad Pandey, Petition Clerk of the office of District Magistrate, Gonda, special report in relation to the said incident reached to the Bungalow of District Magistrate on 19.12.1982 at 08:15 p.m. He further submitted that as the incident was of 19.12.1982 at about 01:30 a.m., therefore, the learned trial court has committed error in considering all these facts and convicted the appellants.

17. Learned A.G.A. has opposed the arguments of learned counsel for the appellants and submitted that the incident was taken place on 19.12.1982 at about 01:30 a.m. and the F.I.R. in question was lodged on the same very day at about 08:45 a.m., on the written complaint of the injured Ram Dularey (PW-1), who proved the written complaint (Ext. Ka-1) and on his complaint, chick F.I.R. was prepared (Ext. Ka-11) and it was duly proved by PW-7 Head Constable Keshav Prasad Tewari along with the G.D. Entry of the incident, and the inquest of the body of the deceased persons were conducted by PW-11 R.P. Singh (Investigating Officer) and body was sent for postmortem and the postmortem was conducted by PW-9 Dr. R.V. Pandey, who supported the prosecution version and categorically stated that all the injuries, found on the body of the deceased persons, are to be caused by sharp edged weapon like Gandasa and Pharsa and the doctor has opined that the death of Shanti Prasad and Nanhey Prasad has been caused due to shock and hemorrhage and coma as a result of ante-mortem head injuries.

The ante-mortem injuries of deceased Shanti Prasad are as under:-

1. Incised wound 12 cm x 2 cm x bone deep (bone out) left side head across left ear middle (left ear pinna out).

2. Incised wound 18 cm x 2 cm x brain cavity deep left side head, 1.5 cm above injury No.1.

3. Incised wound 20 cm x 2.2. cm x brain cavity deep left side head- 2 cm above injury No.2.

4. Incised wound 10 cm x 1 cm x brain cavity deep- left side head, 2 cm above injury No.3.

5. Incised wound 8 cm x 1 cm x bone deep (bone partially cut) 6 cm above left eye brow.

6. Incised wound 5 cm x 0.5 cm x muscle deep, top of right shoulder.

7. Incised wound 3 cm x 0.1 cm x skin deep, dorsum and root of right index finger.

The ante-mortem injuries of deceased Nanhey Prasad are as under:-

1. Incised wound 6 cm x 1.5 cm x 2 cm- left side neck underneath skin, soft tissues, muscles, vessels cut.

2. Incised wound 0.9 cm x 1 cm x bone deep- left side head below left ear- left ear pinna partially cut.

3. Incised wound 10 cm x 1 cm x brain cavity deep, back of left side head 0.5 cm behind left ear.

4. Incised wound 9.5 cm x 1 cm x brain cavity deep back of left side head 9 cm behind left ear.

5. Incised wound 18 cm x 2 cm x brain cavity deep- left side head crossing injury No.4, 2 cm above left ear.

6. Incised wound 10 cm x 4 cm x muscle deep on outer part left shoulder.

18. Learned A.G.A. has also submitted that Dr. Harish Chandra Srivastava (PW-10) was produced before the court below, who conducted the medical examination of the injured persons namely Ram Dularey (complainant/PW-1) and Smt. Patiraji (PW-3), and he deposed before the court below that the injuries of Ram Dularey can be caused by sharp cutting object and were of serious nature, and the injuries of Smt. Patiraji can be caused by sharp cutting object.

The injuries of Ram Dularey (PW-1) are as under:-

1. Incised wound 3 cm x 1/2 cm x skin deep, margin clean cut transverse over back of left ear.

2. Incised wound 6 cm x 1 cm x bone deep over lateral aspect of left wrist joint.

3. Incised wound 2 cm x 1/5 cm x skin deep over tip or right index finger.

4. Incised wound 2 cm x 3/2 cm x bone deep over middle finger.

5. Incised wound 3 cm x 1/2 cm x bone deep over fourth finger right hand dorsal aspect.

The injuries of Smt. Patiraji (PW-3) are as under:-

1. Contusion 7 cm x 3 cm over front of right upper arm, 6 cm above elbow joint.

2. Punctured wound 2 cm x 1 cm x bone deep (5/2 cm) over left upper arm, 14 cm below.

19. Learned A.G.A. has also submitted that it is undisputed that the accused persons and the deceased as well as injured persons belong to the same family tree, and are closely associated to each other and are inimical to each other, therefore, motive cannot be denied. She also submitted that testimony of the injured witnesses, even if they are related witnesses, cannot be discredited merely on the ground that they are related witnesses. She also submitted that the manner of assault as deposed by the injured witnesses namely Ram Dularey (PW-1) and Smt. Patiraji (PW-3), and other eye witnesses namely Chandrika Prasad (PW-2) and Kamla Prasad (PW-4), are corroborating with the injuries found on the body of the deceased persons as well as the injured persons. She also relied on the judgment of

Hon'ble Supreme Court in the case of ***Baleshwar Mahto and Another Vs. State of Bihar and Another*** reported in (2017) 3 SCC 152. She also submitted that the F.I.R. cannot be said ante timed as PW-1 Ram Dularey (complainant) as well as PW-11 R.P. Singh (Investigating Officer) were cross-examined by the defence counsels in the trial, but they failed to ask any question to support the accused version, and the inquest of the body of the deceased persons namely Shanti Prasad and Nanhey Prasad were conducted on 19.12.1982 at 01:05 p.m. and 01:20 p.m. respectively in which description of the crime scene is mentioned.

20. Learned A.G.A. has also submitted that the injured persons were medically examined. She also submitted that Special report in relation to the incident was sent on the same day to the office of District Magistrate, Gonda, it was received in the office of District Magistrate, Gonda in the evening at 08:15 p.m., even then the prosecution story cannot be discredited as the prosecution story is corroborating with the ocular injured witnesses, other witness and with the antemortem injuries of Shanti Prasad and Nanhey Prasad as well as with the injury reports of the injured persons namely Ram Dularey (PW-1) and Smt. Patiraji (PW-3), and the learned trial court has rightly considered the evidence of the prosecution and convicted the appellants. She also submitted that on the basis of facts, seven persons out of eleven accused persons were acquitted by the trial court, which do not help the present appellants, therefore, the present appeal is liable to be rejected. She also relied on the judgments of Hon'ble Supreme Court in the case of ***Mahendran Vs. State of Tamil Nadu reported in (2019) 5 SCC 67*** and ***Jafel Biswas and Others Vs. State of West Bengal*** reported in ***(2019) 12 SCC 560.***

21. Learned A.G.A. has also submitted that though the appellant Amerika Prasad has neither assaulted Shanti Prasad nor Nanhey Prasad and only caused injuries to the injured persons, the learned trial court has rightly convicted him under Section 302/34 I.P.C. and the learned trial trial court acquitted the other accused persons after considering facts and circumstances of the case. She also submitted that though the accused Chinta had not assaulted either of the deceased persons, his common intention to commit offence cannot be denied with and the learned trial court has rightly convicted him. She also relied on the judgment of Hon'ble Supreme Court in the case of ***Abdul Sayeed vs. State of M.P. reported in (2010) 10 Supreme Court Cases 259.***

22. Considering the arguments of the learned counsel for the appellants and the learned A.G.A. and going through the trial court record, we deal the arguments of learned counsel for the appellants as under:-

(i) The prosecution had produced four witnesses of the fact before the trial court i.e. PW-1 Ram Dularey (eye witness/injured/complainant), PW-2 Chandrika Prasad (eye witness), PW-3 namely Smt. Patiraji (injured/eye witness) and PW-4 Kamla Prasad and it is undisputed that the aforesaid witnesses are relatives of the deceased.

(ii) As the learned counsel for the appellants has submitted that on account of enmity, the appellants and other accused

persons were implicated and the incident was not taken place in the manner as claimed by the prosecution, and the aforesaid witnesses are entrusted and relative witnesses, therefore, there testimonies are not reliable, it is evident that Ram Dularey (PW-1) in his testimony has stated the fact that how his sons namely Shanti Prasad and Nanhey Prasad were sleeping in Charni and Marha respectively while he along with his son Chandrika Prasad, wife Smt. Patiraji and relatives Kamla Prasad & Ram Gulam were sleeping in another Marha in front of his house, and the lantern was hanging with a branch of Jack Fruit (Katahal) tree in front of the door and they were having torches, and how the accused persons i.e. appellants along with other accused persons arrived there in the night of 19.12.1982 at about 01:30 a.m., whereafter on the barking of the dogs, the complainant woke up, in the meantime, accused persons among whom, Jagdamba armed with Pharsa, Chinta Prasad & Bachhraj armed with Gandasa, Amerika & Girwar armed with spears and rest of the persons armed with lathis, entered into the Charni where Shanti Prasad was sleeping and Chinta Prasad, Jagdamba, Bhullan @ Bachhraj started inflicting injuries with their respective weapons on Shanti Prasad while rest were holding him, and on at this moment, the complainant raised alarm on which, he along with his son Chandrika Prasad, wife Smt. Patiraji and his relatives Kamla Prasad and Ram Gulam rushed to the seen, and after murdering Shanti Prasad, the accused persons rushed to the other Marha in which Nanhey Prasad was sleeping, who had woke up and sat on the cot on the alarm raised by these witnesses, entered into Marha and the accused persons namely Chinta Prasad, Jagdamba and Bachhraj again started inflicting injuries on him while rest were holding him; as Ram Dulare (complainant) and his wife Patiraji tried to intervene to save their son Nanhey Prasad, Jagdamba and Amerika caused spear injuries to the complainant and Amerika Prasad also caused injuries to his wife Patiraji; both the sons of complainant died on the spot and the accused persons disappeared when the inhabitants of nearby villages started reaching on the place of incident on hearing the alarm; and PW-2 Smt. Patiraji has also narrated the same version of the prosecution story as deposed by PW-1 Ram Dularey which does not need to be narrated again, and she also stated particularly that the accused Amerika had caused injuries to her when she tried to intervene to save her son Nanhey Prasad.

(iii) Ram Dularey (PW-1) and Smt. Patiraji (PW-3) are father and mother of the deceased persons respectively and in all probabilities, they must be there on the door and themselves have reached the scene when their own sons were being murdered and they are also the injured witnesses, and their presence on the spot cannot be doubted at all as the injury report of PW-1 Ram Dularey (Ext. Ka-17) corroborated the manner as deposed in his statement and similarly the injury report of PW-3 Smt. Patiraji (Ext. Ka-16) also corroborated with her statement, and the injury report of the aforesaid witnesses were duly proved by Dr. Harish Chandra Srivastava (PW-10), therefore, the statement of the learned counsel for the appellants that the testimonies of PW-1 and PW-3 are not reliable is not acceptable.

(iv) PW-2 Chandrika Prasad has supported the prosecution story as stated by PW-1 and PW-3, and PW-2 & PW-4 have also supported the prosecution case as stated by PW-1 & PW-3 and stated that

they were sleeping in the Marha along with the PW-1, PW-3 and others, and they had woke up at the barking of the dog and had seen the occurrence; PW-2 Chandrika Prasad had also stated that his relations namely Kamla Prasad and Ram Gulam had come in the preceding evening from the date of incident at about 05:00 p.m. as on the next date mundan ceremony of son of Shanti Prasad was to take place; PW-4 Kamla Prasad also gave the same version and narrated the prosecution story with the fact that his relative namely Ram Gulam had also come there in the preceding evening on the invitation and had seen the occurrence; presence of Chandrika Prasad (PW-2) on the spot cannot be doubted because he must have remained there at his door and must have reached the scene when his two brothers were being murdered.

(v) With regard to the presence of Kamla Prasad (PW-4) on the place of incident, it has been submitted by the learned counsel for the appellants that his statement under Section 161 Cr.P.C. was recorded by the Investigating Officer on 18.01.1983 after about a month of the incident, therefore, his testimony should not to be accepted, but he failed to contradict his deposition stated before the trial court, therefore, this court is unable to accept the submissions of the learned counsel for the appellants as the learned trial court considering his testimony has observed that reasonable explanation has been offered by the Investigating Officer giving out the details as to how he was busy in the investigation;

(vi) The arguments of learned counsel for the appellants that the credibility of entrusted and relative witnesses i.e. Ram Dularey (PW-1), Chandrika Prasad (PW-2), Smt. Patiraji (PW-3) and Kamla Prasad (PW-4) are doubtful is not acceptable to this Court and the learned trial court has rightly considered the deposition of the injured witnesses namely Ram Dularey and Smt. Patiraji as well as other witnesses of fact namely Chandrika Prasad and Kamla Prasad.

(vii) The arguments advanced by the learned counsel for the appellants that no any independent witness was produced when the prosecution case is that at the time of incident, villagers of the nearby village reached on the spot, but as the witnesses disclosed that the accused persons fled away from the spot when the persons of nearby villages reached on the spot, therefore, the arguments of the learned counsel for the appellants has no force and this point was rightly considered by the trial court for the reason that the witnesses are illiterate, living in the village and their testimony cannot be read in isolation, and the village in which the occurrence took place is a hamlet of few house only i.e. of a complainant and some other persons, therefore, no independent testimony was possible from that hamlet; the residents of the near by villages, even if they reached on the spot on hearing the alarm, must took some time to reach there, therefore, it cannot be expected that the residents of other villages must or could have seen the occurrence.

(viii) As in the present case, the appellant No.1 namely Jagdamba (died) was said to be armed with Pharsa, Chinta and Bachhraj were said to be armed with Gandasa, Girwar and Amerika were said to be armed with spears and rest were said to be armed with lathis; and in the testimony

on oath in the trial court of PW-1 to PW-4, Chinta, Jagdamba and Bhullan @ Bachhraj were said to have inflicted injuries on both the deceased and rest were said to be holding the deceased; the postmortem reports of both the deceased (Exts. Ka-14 and Ka-15) reveals that they had sustained only incised wound, which in the opinion of Dr. R.U. Pandey (PW-9) could have been inflicted by Pharsa and Gandasa, the shape and cut size of the wounds which were up to 20 cms long also go to establish that the wounds were caused by Pharsa and Gandasa both, therefore, the oral testimony is corroborated with the medical evidence and as far as the participation of three accused namely Jagdamba, Chinta and Bachhraj in the crime in question is concerned, is fully established. The appellants-accused persons namely Jagdamba and Amerika Prasad have said to have inflicted injuries on PW-1 and PW-3 when they tried to intervene to save theirs sons, among whom Amerika was armed with spear; according to the injury report of PW-3 & PW-1 (Exts. Ka-16 & Ka-17), the injuries were opined to have been caused by sharp cutting object and Dr. H.C. Srivastava (PW-10) in his testimony in trial court has stated that injuies of Smt. Pati Raji (PW-3) must have been caused by sharp cutting object, and the injuries to Ram Dularey (PW-1) were caused by Pharsa though injury No.1 could have been caused by corner of the spear. In cross-examination, PW-10 has also mentioned that injury No.1 of Ram Dularey could have been caused by the blade size of spear and also stated that the spear usually cause punctured wound of which depth is larger than its length, therefore, the oral testimony is corroborated by the medical evidence; and so far as participation of appellants namely Jagdamba, Amerika Prasad, Chnita @ Chinta Ram @ Chinta Prasad @ Sheo Shankar and Bachcha Raj in the crime and part played by them is concerned, that is fully established in this case.

(ix) We have also gone through the decision of ***Hon'ble Apex Court*** in the case of ***Baleshwar Mahto and Another Vs. State of Bihar and Another*** reported in ***(2017) 3 SCC 152.*** Observation of Hon'ble Supreme Court at Para 12 reads as under:-

"12. Here, PW-7 is also an injured witness. When the eye-witness is also an injured person, due credence to his version needs to be accorded. On this aspect, we may refer to the following observations in ***Abdul Sayeed vs. State of Madhya Pradesh (SCC pp. 271-72, paras 28-30)***

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone."

"Convincing evidence is required to discredit an injured witness." [Vide Ramlagan Singh v. State of Bihar [(1973) 3 SCC 881:1973 SCC (Cri) 563:AIR 1972 SC 2593], Malkhan Singh v. State of U.P. [(1975) 3 SCC 311 : 1974 SCC (Cri) 919 : AIR 1975 SC 12], Machhi Singh v. State of Punjab [(1983) 3 SCC 470 : 1983 SCC (Cri) 681], Appabhai v. State of Gujarat [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696], Bonkya v. State of

Maharashtra [(1995) 6 SCC 447 : 1995 SCC (Cri) 1113], Bhag Singh [(1997) 7 SCC 712 : 1997 SCC (Cri) 1163], Mohar v. State of U.P. [(2002) 7 SCC 606 : 2003 SCC (Cri) 121] (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472], Vishnu v. State of Rajasthan [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302], Annareddy Sambasiva Reddy v. State of A.P. [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630] and Balraje v. State of Maharashtra [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211]

29. While deciding this issue, a similar view was taken ***in Jarnail Singh v. State of Punjab [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107],*** *where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29).*

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tube-well. In ***Shivalingappa Kallayanappa v. State of Karnataka [1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694]*** *this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.*

29. ***In State of U.P. v. Kishan Chand [(2004) 7 SCC 629 : 2004 SCC (Cri) 2021]*** *a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide* ***Krishan v. State of Haryana [(2006) 12 SCC 459 : (2007) 2 SCC (Cri) 214])****. Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."*

(x) The next argument advanced by the learned counsel for the appellants that due to long standing enmity, the appellants and other accused persons were implicated and stated that accused Girwar Prasad had given some land to Amerika Prasad, who was the brother-in-law of Jagdamba, and the complainant was keen to take the land himself, therefore, he was annoyed with Girwar; Chinta and Bachha Raj said that they are brother of Ram Kewal who had instituted complaint case against the complainant (PW-1) and his son Shanti Prasad (deceased) who had been prosecuted, and the accused persons have been implicated on account of that enmity; accused Chinta has also stated that at the time of occurrence, he was doing the course of B.A. at Gonda. As learned trial court considered the point of enmity established in between the parties and rightly dealt that the enmity is a double edged weapon which cuts both the sides, and in the present case, the ocular evidence as well as the medical evidence relied by the prosecution are corroborating with each other, therefore, there was established motive for the crime in question.

(xi) As the next arguments advanced by the learned counsel for the

appellants that the injured persons namely Ram Dularey (PW-1) and Smt. Patiraji (PW-3) were medically examined on the next day of incident i.e. on 20.10.1982 between 01:40 p.m. to 03:00 p.m. has created doubt as PW-1, PW-3, PW-11 R.P. Singh (Investigating Officer) and PW-10 Harish Chandra Srivastava were examined before the trial court and the opportunity to cross-examine them was also given to the accused persons, but neither the medical of the injured persons nor their injuries was challenged, but the ocular evidence of the aforesaid witnesses were corroborating with the medical evidences and the medical report was duly proved by Dr. Harish Chandra Srivastava (PW-10) and he opined that the injuries of Ram Dularey (PW-1) and Smt. Patiraji (PW-3) were one & a half days old, caused by sharp cutting object, therefore, this argument has no force and the learned trial court has rightly dealt the evidence of prosecution as well as the defence.

(xii) The next point argued by the learned counsel for the appellants that seven accused persons namely Bhagwati, Kalp Nath, Bharose @ Ram Bharose, Suggu @ Sukhdeo, Ram Kewal, Vishram and Girwar were acquitted by the court below, who were armed with lathi, on considering the evidence of the prosecution, therefore, the trial court has wrongly convicted the appellants on the basis of same evidence. As it is well settled that the maxim "falsus in uno, falsus in omnibus" has no application in India for the reason that some part of the statement of witness has not been accepted in India, and even if, the major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained, and it is the duty of the court to separate the grain from the the chaff. In the present case, learned trial court rightly appreciated the evidence of the injured witnesses as well as other witnesses in convicting the appellants, therefore, there is no illegality in the order.

(xiii) We have also gone through the decision of Hon'ble Apex Court in the case of ***Mahendran Vs. State of Tamil Nadu reported in (2019) 5 SCC 67.*** Observation of Hon'ble Supreme Court from Para Nos. 38-42 reads as under:-

"38. It is argued that the prosecution has put on trial twenty-four accused, but presence of A-11 and A-16 to A-24 was doubted by the learned trial court and they were acquitted on benefit of doubt. Five accused, A-10, A-12, A-13, A-14 and A-15 have been granted benefit of doubt in appeal as well. The argument that the entire case set up is based on falsehood and thus is not reliable for conviction of the appellants, is not tenable. It is well settled that the maxim "falsus in uno, falsus in omnibus" has no application in India only for the reason that some part of the statement of the witness has not been accepted by the trial court or by the High Court. Such is the view taken by this Court in Gangadhar Behera case [Gangadhar Behera v. State of Orissa, (2002) 8 SCC 381 : 2003 SCC (Cri) 32] , wherein the Court held as under: (SCC pp. 392- 93, para 15)

"15. To the same effect is the decision in State of Punjab v. Jagir Singh [State of Punjab v. Jagir Singh, (1974) 3 SCC 277 : 1973 SCC (Cri) 886] and Lehna v. State of Haryana [Lehna v. State of Haryana, (2002) 3 SCC 76 : 2002 SCC

(Cri) 526]. Stress was laid by the appellant-accused on the non- acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of "falsus in uno, falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno, falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. The maxim "falsus in uno, falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See Nisar Ali v. State of U.P. [Nisar Ali v. State of U.P., AIR 1957 SC 366 : 1957 Cri LJ 550]) Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. (See Gurcharan Singh v. State of Punjab [Gurcharan Singh v. State of Punjab, AIR 1956 SC 460 : 1956 Cri LJ 827] .) The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab v. State of M.P. [Sohrab v. State of M.P., (1972) 3 SCC 751 : 1972 SCC (Cri) 819] and Ugar Ahir v. State of Bihar [Ugar Ahir v. State of Bihar, AIR 1965 SC 277 : (1965) 1 Cri LJ 256] .) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely

from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of M.P. [Zwinglee Ariel v. State of M.P., AIR 1954 SC 15 : 1954 Cri LJ 230] and Balaka Singh v. State of Punjab [Balaka Singh v. State of Punjab, (1975) 4 SCC 511 : 1975 SCC (Cri) 601] .) As observed by this Court in State of Rajasthan v. Kalki [State of Rajasthan v. Kalki, (1981) 2 SCC 752 : 1981 SCC (Cri) 593] normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi v. State of Bihar [Krishna Mochi v. State of Bihar, (2002) 6 SCC 81 : 2002 SCC (Cri) 1220]. Accusations have been clearly established against the appellant-accused in the case at hand. The courts below have categorically indicated the distinguishing features in evidence so far as the acquitted and the convicted accused are concerned." (emphasis in original)

39. Therefore, the entire testimony of the witnesses cannot be discarded only because, in certain aspects, part of the statement has not been believed.

40. The judgment referred to by the learned counsel for the appellants in Ram Laxman case [Ram Laxman v. State of Rajasthan, (2016) 12 SCC 389 : (2017) 3 SCC (Cri) 793] is not applicable to the facts of the present case, as in that case, the Court found the testimony of the witnesses as undependable and unreliable so as to grant benefit to some accused while maintaining the conviction of the others. The Court noticed that the maxim "falsus in uno, falsus in omnibus" is not applicable. Therefore, if the witness is reliable and dependable then the entire statement cannot be discarded.

41. Similarly, in Noushad [Noushad v. State of Karnataka, (2015) 2 SCC 513 : (2015) 2 SCC (Cri) 134] the Court found that the statement of PW 11 that he has witnessed the incident with much of exactitude as to which accused assaulted his brother with what weapon cannot be said to have been really witnessed by him. Again, in Suraj Mal case [Suraj Mal v. State (UT of Delhi), (1979) 4 SCC 725 : 1980 SCC (Cri) 159], the Court was examining the legality of conviction under the provisions of the Prevention of Corruption Act, 1947. It was found that the evidence of witnesses against the two accused was inseparable and indivisible, when on such evidence one of the accused was acquitted and not the other accused.

42. All these judgments are in respect of appreciation of evidence of witnesses in the facts being examined by the Court. The general principle of appreciation of evidence is that even if some part of the evidence of witness is found to be false, the entire testimony of the witness cannot be discarded."

(xiv) The next argument advanced by the learned counsel for the appellants that the Special report in relation

to the said incident reached to the Bungalow of District Magistrate on 19.12.1982 at 08:15 p.m., whereas the incident was of 19.12.1982 at about 01:30 a.m., therefore, the learned trial court has committed error in considering this fact, but it is well settled that trial shall not be affected due to delay in sending Special Report of crime. In regard we have gone through the decision of ***Hon'ble Apex Court*** in the case of ***Jafel Biswas and Others Vs. State of West Bengal*** reported in ***(2019) 12 SCC 560***. Observation of Hon'ble Supreme Court at Para 19 reads as under:-

"19.The obligation is on the IO to communicate the report to the Magistrate. The obligation cast on the IO is an obligation of a public duty. But it has been held by this Court that in the event the report is submitted with delay or due to any lapse, the trial shall not be affected. The delay in submitting the report is always taken as a ground to challenge the veracity of the FIR and the day and time of the lodging of the FIR."

(xv) The next argument advanced by the learned counsel for the appellants that the appellant Amerika Prasad has neither assaulted Shanti Prasad nor Nanhey Prasad and only caused injuries to the injured persons, therefore, the learned trial court has wrongly convicted him under Section 302/34 I.P.C., and that the accused Chinta has not assaulted either of the deceased persons, therefore, his conviction is also wrong, but it is well settled that a person can also be held vicariously responsible for the act of others if he has the "common intention" to commit the offence. In regard we have gone through the judgment of ***Hon'ble Supreme Court*** *in the case of* ***Abdul Sayeed vs. State of M.P.*** *reported in* ***(2010) 10 Supreme Court Cases 259****. Observation of Hon'ble Supreme Court made in Para Nos.49-57 reads as under:-*

"49. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention" to commit the offence. The phrase "common intention" implies a prearranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the "same intention" or "similar intention" or "common object". The persons having similar intention which is not the result of the prearranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (See Mohan Singh v. State of Punjab [AIR 1963 SC 174 : (1963) 1 Cri LJ 100] .)

50. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the persons concerned had shared a common intention. (Vide Krishnan v. State of Kerala [(1996) 10 SCC 508 : 1996 SCC (Cri) 1375] and

Harbans Kaur v. State of Haryana [(2005) 9 SCC 195 : 2005 SCC (Cri) 1213] .)

51. Undoubtedly, the ingredients of Section 34 i.e. that the accused had acted in furtherance of their common intention is required to be proved specifically or by inference, in the facts and circumstances of the case. (Vide Hamlet v. State of Kerala [(2003) 10 SCC 108 : (2006) 2 SCC (Cri) 518], Pichai v. State of T.N. [(2005) 10 SCC 505 : 2005 SCC (Cri) 1617] and Bishna v. State of W.B. [(2005) 12 SCC 657 : (2006) 1 SCC (Cri) 696])

52. In Gopi Nath v. State of U.P. [(2001) 6 SCC 620] this Court observed as under: (SCC p. 625, para 8)

"8. ... Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action--be it that it was not overt or was only a covert act or merely an omission constituting an illegal omission. The section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a preconcerted or prearranged plan or one manifested or developed on the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case."

53. In Krishnan v. State [(2003) 7 SCC 56 : 2003 SCC (Cri) 1577] this Court observed that applicability of Section 34 is dependent on the facts and circumstances of each case. No hard-and-fast rule can be made out regarding applicability or non-applicability of Section 34.

54. In Girija Shankar v. State of U.P. [(2004) 3 SCC 793 : 2004 SCC (Cri) 863] it is observed that Section 34 has been enacted to elucidate the principle of joint liability of a criminal act: (SCC p. 797, para 9)

"9. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances."

55. In Virendra Singh v. State of M.P. [(2010) 8 SCC 407 : (2010) 3 SCC (Cri) 893 : JT (2010) 8 SC 319] this Court observed that: (SCC p. 421, para 42)

"42. Section 34 IPC does not create any distinct offence, but it lays down

the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a prearranged and premeditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the premeditation and though the plan may be formed suddenly. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34."

56. Section 34 can be invoked even in those cases where some of the co-accused may be acquitted, provided it can be proved either by direct evidence or inference that the accused and the others have committed an offence in pursuance of the common intention of the group. (Vide Prabhu Babaji Navle v. State of Bombay [AIR 1956 SC 51 : 1956 Cri LJ 147] .)

57. Section 34 intends to meet a case in which it is not possible to distinguish between the criminal acts of the individual members of a party, who act in furtherance of the common intention of all the members of the party or it is not possible to prove exactly what part was played by each of them. In the absence of common intention, the criminal liability of a member of the group might differ according to the mode of the individual's participation in the act. Common intention means that each member of the group is aware of the act to be committed."

23. In such circumstance, the learned trial court has rightly considered the deposition of injured witnesses coupled with medical evidence and other evidences.

24. The law on the point can be summarized to the effect that:-

(i) The testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and an injured witness will not let his actual assailant go unpunished merely with a view falsely implicate a third party.

(ii) Even if a portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained.

(iii) Trial will not be affected due to delay in sending Special report in relation to crime to the Magistrate.

(iv) Section 34 of I.P.C. stipulates that the act must have been done in furtherance of common intention. It is not necessary that the prosecution must prove that the action done by a particular or a specified person. It can be invoked where some of the co-accused may be acquitted

Thus, the deposition of the injured witness PW-1 and PW-3 as well as other

evidences has been rightly relied by learned trial court because there is no ground for rejection of prosecution evidences.

25. Thus, we find no reason to interfere with the aforesaid findings of the learned trial court. Hence, the judgment of conviction and order of sentence dated 16/17.01.1985 passed by learned Additional Sessions Judge-I, Gonda in Sessions Trial No.174 of 1983 (State Vs. Bhagwati and Others) arising out of Case Crime No.135 of 1982, under Sections 147, 148, 149, 324, 323, 302 I.P.C., Police Station Intiathoke, District Gonda against the appellants **namely Amerika Prasad, Chinta @ Chinta Ram @ Chinta Prasad @ Sheo Shankar and Bachhraj** is hereby affirmed.

26. In the result, this appeal fails and is accordingly **dismissed.**

27. From perusal of the record, it appears that the appellants are in jail and they shall remain in jail and serve out the sentence as awarded by the trial court.

28. Let the lower court record along with the present order be transmitted to the trial court concerned for necessary information and compliance forthwith.

29. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by it along with a self attested identity proof of the said person(s) (preferably Aadhar Card) mentioning the mobile number(s) to which the said Aadhar Card is linked, before the concerned /Authority/Official.

30. The concerned Court /Authority /Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)05ILR A266
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.05.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJEEV SINGH, J.

Criminal Appeal No. 540 of 2014

Nitin Singh ...Appellant(In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellant:
Siddhartha Sinha, Ajay Veer Singh, Atin Krishna, Prakhar Kankan, Sarojini Bala Yadav

Counsel for the Opposite Party:
Govt. Advocate

Code of Criminal Procedure 1973- Section 313- It is also evident that appellant-Amit Singh had categorically stated in his statement recorded under Section 313 Cr.P.C. that he wear trouser of 34 inches of waist, but the alleged recovered trouser was of 28 inches of waist, which is fabricated and no report of FSL is available and the weapon was also not produced before the court and the trial court failed to deal with the contents mentioned in statement under Section 313 Cr.P.C., as the enmity has been shown by the prosecution with the appellants.

Where the explanation given by the accused, in his statement u/s 313 Cr.Pc , is corroborated by the own material of the prosecution which on the other hand does not support the story of the prosecution, then its incumbent upon the trial court to consider the explanation of the accused.

Indian Evidence Act, 1872- Section 3- Chance Witness- Evidence of- The evidence of PW-1 informant and PW-2 are the chance witnesses and claimed themselves to be the eye witnesses of the incident- Their evidence does not appear to be reliable and trustworthy particularly the manner in which the incident has taken place in the night which does not found corroborated with the medical evidence, therefore, prosecution story creates doubt and benefit of doubt goes in favour of the appellants. Hence it would be unsafe to uphold the conviction and sentence of the appellants as has been ordered by the trial court-If there are inherent improbabilities in the prosecution story with ordinary course of human nature, then it would be safe not to convict the appellants merely on the testimony of the alleged eye witnesses.

It is settled law that the evidence of a chance witness requires cautious and close scrutiny and the same has to be discarded when his presence at the place of occurrence is doubtful and not corroborated with other material evidence.(Para 20, 21, 22)

Criminal appeal allowed. (E-2)

Judgements/ Case law relied upon:-

1. Amar Singh Vs State (NCT of Delhi), 2020 SCC online SC 826

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

1. Both the appeals have been filed by appellants namely Nitin Singh and Amit Singh against the judgment of conviction and order of sentence dated 29.03.2014, passed by Additional Sessions Judge-Court No.5, Faizabad in Session Trial No.31 of 2012, arising out of Case Crime No.552 of 2011, under Section 302 I.P.C. Police Station-Cantt, District Faizabad, whereby learned trial court has convicted the appellants, namely Nitin Singh and Amit Singh under Section 302 of the Indian Penal Code and sentenced them to undergo imprisonment for life and fine of Rs. 12,000/- each, in default of payment of fine to undergo additional imprisonment for one year. Both the appellants have filed two separate appeals. The aforesaid appeals are being decided by way of common judgment.

2. As per the prosecution story, on 22.03.2011 at about 10:00 p.m., the informant-Ashok Kumar Singh and Ram Kumar Singh riding on one motorcycle and Bhushan Veer Singh and Neeraj Singh riding on another motorcycle were returning from Faizabad to their village-Manapur, when they reached at Raipur canal bridge, they saw in the head light of their motorcycle that the appellants-Nitin Singh and Amit Singh were assaulting one person on the south lane of bridge with danda and axe. When the assailants saw that the bikers are approaching towards them, they left the person and ran away. Thereafter, informant and three other persons reached on the spot and found that the injured (Arun Kumar Singh) was real brother of the informant, they tried to move the injured, who was in pool of blood and found that he was dead. On the written complaint of Ashok Kumar Singh (informant), the FIR in question was lodged as Case Crime No.552 of 2011 (Exhibit K-7) and the same was entered into general diary. On the basis of FIR, the police officers reached on the spot and prepared the site plan and body was sent for postmortem, thereafter the postmortem was conducted on 23.03.2011 at 2:30 p.m.

3. The postmortem of the body of the deceased was conducted by Dr. B.M. Maurya, Medical Officer, who appeared before the trial court as PW-5. As per postmortem report, he found eight ante

mortem injuries and opined that the cause of death is due to coma as a result of antemortem injury. The ante mortem injury mentioned in the postmortem report are as follows:-

" (i) Abraded contusion of size 0.7 cm x 0.5 cm present on right side of forehead 5.0 cm above the middle of right eyebrow.

(ii) Four incised wound of size 4.0 to 4.5 cm length bone deep and 0.8 to 1.0 cm width present in area of 9.0 cm x 6.0 cm on left occipital region and is 5.0 cm postero superior to left ear. Underlying bone is fractured.

(iii) Incised wound of size 6.0 cm x 1.0 cm present on right parietal region and is bone deep 8.0 cm above right ear.

(iv) Contusion size 5.0 cm x 2.0 cm present on tip of left shoulder joint.

(v) Abraded contusion of size 10.0 cm x 3.0 cm present on lateral aspect of left arm 5.0 cm below the tip of left shoulder joint.

(vi) Abraded contusion of size 3.0 cm x 0.5 cm present on exterior aspect of left forearm 6 cm below the elbow joint.

(vii) Abraded contusion of size 3.0 x 1.0 cm present on exterior aspect of right elbow joint.

(viii) Abraded contusion of size 3.0 x 1.0 cm present on medial aspect of right forearm 9.0 cm above the wrist joint."

4. The injury and external condition of the body of the deceased clearly reveals that death of the deceased is a case of homicide.

5. On the basis of site plan, recovery memo, postmortem report and statements of the accused persons as well as of witnesses recorded under Section 161 Cr.P.C., the Investigating Officer came to the conclusion that it was a case of homicide which was caused by the appellants, thereafter, charge-sheet was filed and case was committed before the Court of Sessions, which was registered as S.T. No.31 of 2012 and charge was framed against the appellants on 18.02.2012, under Section 302 I.P.C.

6. In support of prosecution case, five witnesses appeared before the trial court as Ashok Kumar Singh (eye witness) PW-1, Ram Kumar Singh (eye witness) PW-2, Sub-Inspector- Bacchu Singh PW-3, Constable-Surendra Kumar Singh-PW-4 and Dr. B.M. Maurya-PW-5.

7. The prosecution has relied on twelve documentary evidences as Exhibit:Ka-1 is the written complaint of Ashok Kumar Singh (PW-1), Exhibit Ka-2 is the site plan, Exhibit Ka-3 is the site plan in relation to the recovery of axe and rectangular wooden rod, Exhibit Ka-4 is the arrest memo of both the appellants, Exhibit Ka-5 is the recovery memo by which the trouser of accused-Amit Singh was taken into custody, Exhibit Ka-6 is the recovery memo of bloodstained and plain mud, and one cycle found from the site, Exhibit Ka-7 is the chick FIR, Exhibit Ka-7A is the inquest report, Exhibit Ka-8 is the D.G. of rapat No.54 dated 22.03.2011, Exhibit Ka-9 is the postmortem report, Exhibit Ka-10 is the charge-sheet, Exhibit Ka-11 is the police Form-13 and Exhibit Ka-12 is the sample seal.

8. After closure of the evidence of prosecution, the trial court took the statement of appellants under Section 313 Cr.P.C., in which their defence was of total

denial. The appellants also produced two witnesses, namely Mansharam-(DW-1) and Pappu Lal-(DW-2).

9. After hearing, learned trial court had passed the judgment of conviction and order of sentence dated 29.03.2014, which is under challenge.

10. Heard, Sri Ajay Veer Singh along with Sri Atin Krishna, learned Counsel for the appellants and Sri Vishwas Shukla, learned A.G.A. for the State and perused the lower court record.

11. Learned counsel for the appellants submitted that the informant namely Ashok Kumar Singh (PW-1) deposed in his examination-in-chief that on 22.03.2011 at about 10:00 p.m. he was coming back to the village by one motorcycle along with Ram Kumar Singh, and Bhushan Veer Singh and Neeraj Singh on another motorcycle and when they reached to the bridge of Raipur Canal, then they saw in the head light of their motorcycle that the appellants namely Nitin Singh and Amit Singh were causing injury to one person on right lane of the bridge with axe and danda respectively. As the informant along with others approached near the appellants, then the appellants ran away towards the East side of the canal. Thereafter, informant (Ashok Kumar Singh) along with others went to the victim and found that the person lying on the ground was his brother, then he shook him and found that he was dead. They tried to catch the accused persons, but they disappeared. Thereafter, the informant went to the Police Station and made a written complaint, i.e., Exhibit Ka-1 and it was proved by him. The informant also deposed in his cross-examination that on the date of incident, he went to Hanuman Gadhi temple for offering his prayer. After visiting the temple, he was waiting for taxi and at the same time his brother Ram Kumar Singh also visited Hanuman Gadhi for offering his prayer, then he went along with his brother on his motorcycle at Naka, where Neeraj Singh and Bhushan Veer Singh met them, thereafter, they started journey together back to their village. Informant also deposed that he was the pillion rider and when he saw the incident, then he found that the person who was being assaulted was in bend position towards South West and his back was visual, due to which he could not identify the victim at the first instance that he was his brother, but he identified the assailants.

12. Learned counsel for the appellants submitted that as per the deposition of PW-1, deceased was in bend position, but no injury was found on his back, therefore, his statement is contradictory to the ante mortem injuries found in the postmortem report (Exhibit Ka-5) which was duly proved by Dr. B.M. Maurya (PW-5). He further submitted that the PW-1 deposed in his cross-examination that he went to the spot and oscillated the injured and also put the hand on the nose of the injured to verify whether he was breathing or not, then he found that there was no response from body of the injured and then he understood that he is no more. Learned counsel for the appellants further submitted that when the incident was seen by PW-1, he found that the victim was standing in bend position and within a minute, he reached to victim but he found him dead, which is highly improbable. Learned counsel for the appellants further submitted that the informant (PW-1) also deposed that when he touched his brother, then he found that

he was dead, therefore, he made no attempt to provide any medical aid.

13. Learned counsel for the appellants submitted that the autopsy of the body of the deceased was conducted by Sri. B.M. Maurya (PW-5) on 23.03.2011 and he was examined before the court below and in his cross-examination, he deposed that after receiving the injuries, the injured may have gone into coma, but there is a possibility of him being alive for sometime and if he had been subjected to medical facilities in time, then there was a possibility to save his life. PW-5 also deposed that after death, the dead body remains warm about one hour, therefore, the statement of PW-1 who is claiming as an eye witness are contradictory to the injuries found on the body of the deceased. Hence, the testimony of PW-1 who is the real brother of the deceased being a relative and interested witness is not reliable and the trial court has wrongly considered the testimony without considering the aforesaid facts.

14. Learned counsel for the appellants submitted that PW-2 (brother of PW-1) deposed in his statement that on the date of incident his brother met him near Hanuman Gadhi, then both were returning to their village by one motorcycle and on another motorcycle, Bhushan Veer Singh and Neeraj Singh. On 22.03.2011 at about 10:00 p.m. when they reached near the place of incident, then they saw in the head light of motorcycle that on the South lane of the bridge, Nitin Singh and Amit Singh armed with axe and danda were beating one person, then Ashok Kumar Singh (PW-1) and Ram Kumar Singh (PW-2) along with Bhushan Veer Singh and Neeraj Singh reached on the spot, and seeing them the appellants ran away. Thereafter, they identified that the person who was being beaten was the real brother of Ashok Kumar Singh (informant) and he was having injury on his head and arm. In his statement he also deposed that on the North point of the bridge, one house of Bhujwa is situated, but his testimony was not taken by the prosecution and he also deposed that when he left his motorcycle and reached on the spot, then they saw that the victim was fallen down. Learned counsel for the appellants submitted that neither PW-1 nor PW-2 stated in their statement that the cycle of the deceased was lying on the spot and this fact was also not mentioned in the FIR. The inquest was prepared by PW-3-In-charge, Station House Officer-Bacchu Singh and he categorically mentioned in the inquest report that no article was found near the body. It is highly improbable that when the deceased was coming back from his duty neither he was having any footwear nor any cycle, as in the inquest prepared by PW-3, he has written in the aforesaid column as Nil, but later, the recovery of cycle has been shown by preparing a separate recovery memo which is contradictory, therefore, the testimony of PW-2 is not reliable, as he is an interested witness.

15. Learned counsel for the appellants submitted that the statement of PW-3 Bacchu Lal, (S.H.O) was recorded before the trial court in which he categorically stated that in the inquest report, he has not mentioned any article or weapon found at the place of incident. The relevant part of the deposition of PW-3 is reproduced as under:-

पंचायतनामा के कालम नं0 3 "सम्पत्ति तथा उन हथियारों की सूची जो शव मे या उसके पास मिले हैं और उनके व्यवस्थापन की विधि" के सामने यदि कोई वस्तु शव में या शव के पास मिलती है तो उसका इन्द्राज पंचायतनामा किया जाता। चूंकि मुझे स्पाट पर शव के पास अगल–बगल कोई वस्तु नहीं मिली थी

इसलिए उक्त कालम के सामने मैने छपस लिख दिया गया है। स्पाट पर शव के पास अगल–बगल मृतक के जूते अथवा चप्पल या सैंडिल, कलम आदि कुछ भी नहीं मिला था।

PW-3 has also stated that as per the prosecution case, relevant part of the trouser of appellant-Amit Singh was sent along with the blood stained soil, plain soil and weapon to FSL, but no report of FSL is available on record. He also stated that call detail reports of appellants, Ashok Kumar Singh (PW-1) & Ram Kumar Singh (PW-2) and deceased had not collected to get their respective location at the time of incident. He also deposed before the trial court that the investigation was concluded by Sub-Inspector Bharat Ram Singh and submitted the charge-sheet against the appellants. Learned counsel for the appellants submitted that in the statement of appellant, Amit Singh, recorded under Section 313 Cr.P.C., he has categorically stated that he was falsely implicated and a false recovery of trouser was made by the Investigating Officer, as the size of waist of alleged recovered trouser was 28 inches, but he was wearing the trouser of waist having 34 inches, therefore, prosecution story is not reliable.

16. Learned counsel for the appellants submitted that Dr. B.M. Maurya (PW-5) who conducted the postmortem was produced before the trial court and he stated that injury Nos.1, 4, 5, 6, 7 and 8 may be caused with the blunt object, injury nos.1, 4 and 7 may be caused from falling on the ground, and injury nos.2 and 3 may be caused with heavy or small cutting weapon. He also stated that after causing such injuries, there is a possibility that the victim remains alive in coma, in case the medical facilities were provided, then there was a possibility to save his life, but in the present case, PW-1 as well as PW-2 deposed that when the injured fell down, they reached to him within a minute and they found that he was not breathing. PW-5 also deposed that after death, body remains warm for a period of one hour. In such circumstances, the testimony of PW-1 and PW-2 are contradictory with the testimony of PW-5 and the medical evidence, therefore, the court below has wrongly convicted the appellants.

17. Learned counsel for the appellants submitted that after recording the statements of the appellants under Section 313 Cr.P.C, two co-villagers namely, Mansharam and Pappu Lal as DW-1 and DW-2 were produced before the trial court. Mansharam-DW-1, has categorically deposed that he was working at Goyal Medical Store along with the deceased and he also deposed that duty of the deceased was in the store from 9:00 a.m. up to 7:00 p.m. and duty of DW-1 was from 11 a.m. up to 8:30/9:00 p.m. DW-1 further deposed that on the date of incident the deceased left the medical store at about 6:45 p.m. and DW-1 left the medical store at 9:00 p.m as he had to deliver medicine at one place and he stayed there for about 15 to 20 minute, then he moved towards his village and at about 10:00 to 10:15 p.m., he crossed the Canal Bridge (alleged place of incident) and no one was present there and thereafter, he also delivered medicine in Purwa and reached his house at 11 p.m., then PW-1 Ashok Kumar Singh and PW-2 Ram Kumar Singh reached at his house and asked for Arun Kumar Singh (deceased), as he had not reached his house, then DW-1 informed them that Arun Kumar Singh (deceased) left the shop in the evening, therefore, he is not aware about him. The

family members of DW-1 also informed that before DW-1 returned home, Ashok Kumar Singh (PW-1) and Ram Kumar Singh (PW-2) visited the house of DW-1 asking for Arun Kumar Singh (deceased). Mansharam-DW-1 was cross examined by the Government Counsel and the Government counsel failed to dislodged the evidence of DW-1. Pappu Lal-DW-2 is also the resident of the same village residing in front of the house of DW-1, he deposed that at about 11:00 p.m. Ashok Kumar Singh PW-1 and Ram Kumar Singh-PW-2 came to the house of DW-1 and asked about Arun Kumar Singh (deceased), then they were informed by DW-1 that the deceased left the shop in evening, but he is not aware about his current location. Ashok Kumar (PW-1) and Ram Kumar Singh (PW-2) also asked Pappu Lal (DW-2) about the whereabouts of the deceased, but he showed his unawareness about the same. Pappu Lal (DW-2) was also cross examined by Government Counsel and he categorically deposed that in the night he had no information about the death of Arun Kumar Singh (deceased) and on the next morning, it came into his knowledge that Arun Kumar Singh (deceased) was killed. Learned counsel for the appellants has submitted that the trial court had failed to test the deposition of DW-1 and DW-2. As DW-1 has categorically deposed that he crossed Raipur Canal Bridge at about 10:00 to 10:15 p.m., but as per the prosecution story, the incident was taken place at 10:00 p.m., therefore, the court below has wrongly convicted the appellants, as no one has seen the incident and due to inimical relations, the appellants were falsely implicated. Therefore, the appeal is liable to be allowed.

18. On the other hand, learned counsel for the State supported the view taken by the trial court and submitted that having regard to the facts and circumstances the trial court assessed in proper perspective and delivered a reasoned judgment. The conviction and sentenced passed against the accused is liable to be affirmed and the finding of the trial court does not require interference of this Court. Learned A.G.A further submitted that the F.I.R. was lodged by Ashok Kumar Singh (PW-1) and supported the prosecution story and stated that alleged incident was taken place at 10:00 p.m., thereafter, chik FIR was prepared at the same time. In-charge Station House Officer-Bacchu Singh (PW-3) reached on the spot and prepared the inquest and the body was sent for postmortem which was conducted by Dr. B.M. Maurya (PW-5). The ante mortem injuries corroborated with the prosecution story as deposed by PW-1 and PW-2. The recovery memo was prepared by PW-3 and he also recovered the trouser of Amit Singh. The weapon and trouser was sent for forensic examination. He also submitted that the statement of DW-1 and DW-2 was rightly considered by the court below, therefore, the appeal is liable to dismissed.

19. Considering the arguments of learned counsel for the parties and going through the record, it is evident that Ashok Kumar Singh (PW-1) and Ram Kumar Singh (PW-2) categorically deposed that the incident has taken place at 10:00 p.m. and they reached on the spot and found that Nitin Singh armed with axe and Amit Singh armed with danda were beating one person who was in bend position and after putting their motorcycles on stand, they rushed to the place of incident, then the appellants ran away and within a minute, they reached to the victim and found that the victim was the brother of PW-1, then, PW-1 shook the body and found that he was dead. Thereafter, they

chased the appellants, but the appellants ran away. It is also evident that a written complaint was lodged by PW-1 at the police station, then In-charge, Station House Officer-Bacchu Lal (PW-3) reached on the spot and prepared the inquest, but he did not mentioned any cycle or footwear in the inquest report and he categorically mentioned the same in the column of inquest report in which it has to be mentioned that the 'articles and arms' found near the body as Nil and thereafter, one recovery of cycle has been shown. It is also evident that PW-1 has stated that he saw the victim in a bend position, but no such injury is found on the back of the deceased. It is also evident that Mansharam (DW-1) and Pappu Lal (DW-2) were also examined and DW-1 has categorically stated that on the date of incident at about 6:45 p.m, Arun Kumar Singh (deceased) left the shop and he also stated that while crossing the bridge at about 10:00 to 10:15 p.m., he found no person and there was pin drop silence, thereafter, he delivered some medicines to the adjoining Purwa and at about 11:00 p.m. he reached his house, where his family members informed him that PW-1 and PW-2 visited the house asking for Arun Kumar Singh (deceased). At the same time, they came again and asked about Arun Kumar Singh (deceased) and informed that till now Arun Kumar Singh (deceased) has not come home and they asked the same from DW-2 and then they left. DW-1 and DW-2 were duly cross examined by the Government Counsel, but the prosecution failed to falsify their version that at 11:00 p.m., PW-1 and PW-2 came to the house of DW-1 and asked about Arun Kumar (deceased).

20. It is also evident that appellant-Amit Singh had categorically stated in his statement recorded under Section 313 Cr.P.C. that he wear trouser of 34 inches of waist, but the alleged recovered trouser was of 28 inches of waist, which is fabricated and no report of FSL is available and the weapon was also not produced before the court and the trial court failed to deal with the contents mentioned in statement under Section 313 Cr.P.C., as the enmity has been shown by the prosecution with the appellants. It is also evident from judgment of the trial court that the trial court has not considered the fact that DW-1 deposed before the trial court that at 11:00 p.m. PW-1 and PW-2 came to the house of DW-1 and asked about Arun Kumar Singh (deceased) and this fact was also not considered that at about 10:00 to 10:15 P.M., DW-1 passed through the bridge and no one was there.

21. The evidence of PW-1 Ashok Kumar Singh (informant) and PW-2 Ram Kumar Singh who are the chance witnesses and claimed themselves to be the eye witnesses of the incident. Their evidence does not appear to be reliable and trustworthy particularly the manner in which the incident has taken place in the night which does not found corroborated with the medical evidence, therefore, prosecution story creates doubt and benefit of doubt goes in favour of the appellants. Hence it would be unsafe to uphold the conviction and sentence of the appellants as has been ordered by the trial court.

22. As in the case of ***Amar Singh Vs. State (NCT of Delhi) reported in 2020 SCC online SC 826,*** the Hon'ble Apex Court is of the view that ordinarily Court are reluctant to disturb the concurrent view, but if there are inherent improbabilities in the prosecution story with ordinary course of human nature, then it would be safe not to convict the appellants merely on the

testimony of the alleged eye witnesses. The relevant paragraph Nos.29 to 32 of the judgment reads as under:-

"29. In the facts and circumstances of the case this was serious lapse on the part of the investigating officer. Though normally minor lapses on the part of the investigating officer should not come in the way of accepting eye witness account, if otherwise reliable. But in the circumstances of the case at hands where the conduct of sole eye witness is unnatural and there are various other surrounding circumstances which make his presence at the site of incident doubtful, such a lapse on the part of the investigating officer assumed significance and is not liable to ignored.

30. While emphasizing the importance of eliciting the opinion of medical witness in such circumstances this Court in the case of Kartarey v. State of U.P. has observed as under:--

"We take this opportunity of emphasizing the importance of eliciting the opinion of the medical witness, who had examined the injuries of the victim, more specifically on this point, for the proper administration of justice particularly in a case where injuries found are forensically of the same species, example stab wound, and the problem before of the Court is whether all or any those injuries could be caused with one or more than one weapon. It is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may sometimes, cause aberration of the course of justice".

31. The same has been again asserted by this Court in Ishwar Singh v. State of U.P. by observing as under:--

"It is the duty of the prosecution, and no less of the Court, to see that the alleged weapons of the offence, if available, is shown to the medical witness and is opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so sometimes, cause aberration of the course of justice. On the basis of the evidence on record it is difficult to say whether the injury to the deceased was caused by the knife with a broken tip which was ceased. These variations relate to vital parts of the prosecution case, and cannot be dismissed as minor discrepancies. In such a case, the evidence of the eye witness "cannot be accepted at its face value", as observed by this Court in Mitter Sen v. State of U.P."

32. The conviction of the appellants rests on the oral testimony of PW-1 who was produced as eye witness of the murder of the deceased. Both the Learned Sessions Judge, as well as High Court have placed reliance on the evidence of PW-1 and ordinarily this Court could be reluctant to disturb the concurrent view but since there are inherent improbabilities in the prosecution story and the conduct of eye witness is inconsistent with ordinary course of human nature we do not think it would be safe to convict the appellants upon the incorroborated testimony of the sole eye witness. Similar view has been taken by a Three Judge Bench of this Court in the case of Selvaraj v. The State of Tamil Nadu. Wherein on an appreciation of evidence the prosecution story was found highly improbable and inconsistent of ordinary course of human nature

concurrent findings of guilt recorded by the two Courts below was set aside."

23. Thus, in view of the forgoing discussion, we are not able to appreciate the reason given by the Courts below for convicting the appellants for the alleged offences. On the contrary, we are of the considered view that prosecution has failed to establish the guilt of the accused beyond reasonable doubt. The incident does not appear to have happened in the manner in which the prosecution wants the Court to believe it had happened.

24. In view of the discussion made hereinabove, the appellants become entitle for the benefit of doubt and appeal deserves to be allowed and is hereby allowed.

25. The Criminal Appeal No.669 of 2014 and Criminal Appeal No.540 of 2014 on behalf of appellants namely, ***Amit Singh and Nitin Singh*** stand **allowed.** They are said to be in jail. They shall be released forthwith, if not wanted in any other criminal case.

26. It is further directed that the appellants namely, Amit Singh and Nitin Singh shall furnish bail bond with sureties to the satisfaction of the court concerned in terms of the provision of Section 437-A Cr.P.C.

27. Let the lower court record along with the present order be transmitted to the trial court concerned for necessary information and compliance forthwith.

28. The party shall file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person(s) (preferably Aadhar Card) mentioning the mobile number(s) to which the said Aadhar Card is linked, before the concerned Court/Authority/Official.

29. The concerned Court/Authority/Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)05ILR A275
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.05.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJEEV SINGH, J.

Criminal Appeal No. 1989 of 2009

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

Counsel for the Appellant:
Nagendra Mohan, Arshad Hafeez Khan, Bhanu Dutt Dwivedi, Desh Ratan Mishra, Dinesh Kr. Sharma, Salil Mohan, Shishir Pradhan, Virendra Kumar Yadav

Counsel for the Opposite Party:
G.A.

Indian Penal Code, 1860- Section 34- Absence of common intention- Appellants Badey Lal, MunnaLal and Sipahi Lal alias Nanh could not be said to have any common intention to commit the murderof the deceased Khushi Ram along with appellant Kailash. Appellants Badey Lal, Munna Lal and Sipahi Lal alias Nanh also did not assualt the deceased Khushi Ram

with Lathies and Dandas- At the most, appellants Badey Lal, Munna Lal and Sipahi Lal alias Nanh are responsible for their individual act and not vicariously. Moreover, the prosecution has also not brought any evidence on record to show that appellants Badey Lal, Munna Lal and Sipahi Lal alias Nanh had any prior knowledge of the fact that deceased Khushi Ram would be shot by the accused-appellant Kailash, who was also running away from the place of occurrence because of the fact that accused- appellants had arrived with Lathis, dandas and countrymade pistol-The deceased, who was killed by the accused/appellant Kailash with a countrymade pistol and the deceased died on the spot, hence their conviction and sentence by the trial Court under Section 302/34 I.P.C. is liable to be set-aside. However, conviction of appellants Badey Lal, Munna Lal and Sipahi Lal alias Nanh under Sections 323/34 I.P.C. and their sentence to undergo six months' R.I. by the trial Court is liable to be confirmed as they with a common intention assaulted the three injured persons with lathies and dandas, who suffered simple injuries on their persons-The intention to kill the deceased was apparent from the conduct of the appellant Kailash, who did not spare the deceased Khushi Ram was a disabled person, hence he is individually responsible for his act of murdering the deceased.

Where it is apparent from the evidence of the prosecution that the appellants did not share a common intention with the other co-accused to commit the murder and there was absence of any premeditation, then the said appellants cannot be held to be vicariously and jointly responsible for the act of the other co-accused but would be vicariously responsible , under section 34 of the IPC, for assaulting the other injured persons while the other co-accused would be guilty of the offence u/s 302 simpliciter.

Indian Evidence Act, 1872- The trial Court found that evidence of recovery of the countrymade pistol on the pointing out of the said appellant cannot be reliable as no independent witnesses have supported the recovery of countrymade pistol. Moreso, no site-plan for recovery of the said countrymade pistol and catridges has been made by the Investigating Officer, but that alone cannot be a ground to acquit the appellant Kailash from the charges levelled against him because of the latches on the part of the investigating agency as the incident had taken place in a broad day light and the injured witnesses supported the prosecution case against appellant Kailash, which is fully corroborated by the medical evidence.

Where the offence committed by the accused is proved from the testimony of the eye witnesses then the latches and defects of the investigating agency with regard to the recovery of the fire arm on pointing out of the accused, would be irrelevant.

Accordingly, Criminal Appeal No. 1989 of 2009 rejected while Criminal Appeal No. 1982 of 2009 Partly allowed. (E-2)

Judgements/ Case law relied upon:-

1. Vineet Kumar Chauhan Vs St. of U.P. : AIR 2008 S.C. 780

2. Sadhu Singh Harnam Singh Vs The State of Pepsu : AIR 1954 SC 271

3. Dharam Pal & ors. Vs St. of U.P. : 1997 SCC (crl.) 1203

4. Pundalik Mahadu Bhane & ors. Vs St. of Maha. : 1998 SCC (Cri) 202

5. Balvir Singh Vs St. of M.P. : 2019 (199) AIC 242 (S.C.)

6. Virendra Singh Vs St. of M.P : (2010) 8 SCC 407.

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

(1) The four persons, namely, Kailash, Badey Lal, Munna Lal and Sipahi *alias* Nanh were tried by the

Additional Sessions Judge, Court No. 5, Barabanki in Sessions Trial No. 256 of 2007 : *State Vs. Bade Lal and others* for offences punishable under Sections 302/34, 307/34, 426, 504 and 506 of the Indian Penal Code. In addition, appellant-Kailash was also tried in the aforesaid sessions trial for the offence punishable under Section 3/25 of the Arms Act by the Additional Sessions Judge, Court No.5, Barabanki. Vide judgment and order dated 30.07.2009, the learned Sessions Judge acquitted appellants, Kailash, Badey Lal, Munna Lal and Sipahi alias Nanh, for offences punishable under Sections 307/34, 504, 506 and 426 of the Indian Penal Code but convicted and sentenced them in the manner stated hereinafter :--

(i) Under Section 302/34 of the Indian Penal Code to undergo imprisonment for life and to pay a fine of Rs.2000/- each, in default to undergo additional one year each rigrous imprisonment; and

(ii) Under Section 323 read with Section 34 of the Indian Penal Code to undergo six months' R.I.

The trial Court directed the sentences of appellants on all the counts to run concurrently.

(2) Aggrieved by his convictions and sentences, Kailash preferred before this Court Criminal Appeal No. 1989 of 2009, whereas Badey Lal, Munna Lal and Sipahi alias Nanh preferred Criminal Appeal No. 1982 of 2009.

(3) Since both these appeals arise out of a common factual matrix and impugned judgment, we are disposing them of by a common judgment.

(4) Shortly stated the prosecution case runs as under :--

The informant Nagesar Lonia (P.W. 1) is the younger brother of the deceased Khushi Ram, who was handicapped by leg. At the time of the incident, the informant Nagesar Lonia (P.W.1), deceased Khushi Ram, Smt. Ranjeeta Devi (P.W.2), Devi Deen (P.W.3), Ram Lakhan (P.W.4), and appellants, Kailash, Badey Lal, Munna Lal and Sipahi alias Nanh, were living in village Kyontala Majhari, Police Station Mohammadpur Khala, District Barabanki.

(5) Prior to the incident, enmity was subsisting between father of appellants, namely, Ratan on one hand and father of the informant, namely, Devi Deen (P.W.3) on the other with regard to a land.

(6) On 09.12.2006, at about 2.30 p.m., on seeing that goats of appellant Bade Lal, who is the pattidar of the informant-Nagesar Lonia, were grazing and damaging the crop of Lentil and Pea sowed in the field of the informant, then, the wife of the informant, namely, Ranjeeta Devi (P.W.2), was trying to oust the goats from the field. The wife of appellant Kailash, who was also present there, started altercation and on listening the hue and cry, the informant-Nagesar Lonia (P.W.1), father of the informant (Devi Deen P.W.3), and elder brother of the informant (Khushi Ram, deceased) reached on the spot and at the same time, appellants Badey Lal, Munna Lal and Sipahi alias Nanh and Kailash came there with lathi, danda and illegal firearm and by using abusive language to

the informant, his father Devi Deen (P.W.3), wife Ranjeeta Devi (P.W.2) and his elder brother Khushi Ram (deceased) on the spot also. On seeing this, informant, his father Devi Deen (P.W.3), wife Ranjeeta Devi (P.W.2) and his elder brother Khushi Ram (deceased) fled due to fear, upon which, appellants chased them and with intention to kill elder brother of the informant, Khusi Ram, who was handicapped by leg, appellant-Kailash fired upon him with a countrymade pistol at the west of the field of the chakroad, to which elder brother of the informant, Khushi Ram, died on the spot. Thereafter, appellants besieged the informant, his wife Ranjeeta Devi and his father Devi Deen also near the chak road and, thereafter, seriously injured them by beating them from Lathi, danda and butt of the illegal firearm. This incident was seen by Ramesh and Shiv Bhagwan, sons of Lal Bahadur and other persons of the village, who were present there. Thereafter, appellants fled away from the spot by threatening the informant to kill his family members. Due to non-availability of the conveyance, the informant left the deadbody of the deceased under the supervision of other family members on the spot and carried the injured persons to the police station.

(7) The informant got the FIR scribed by Jugal Kishore Dwivedi, resident of Village & Police Station Mohammadpur Khala, district Barabanki, who after scribing it read it over to him. He thereafter affixed his thumb impression on it. He then proceeded to Police Station Mohammadpur Khala and lodged it.

(8) The evidence of SI Jai Prakash Mishra (P.W. 6) shows that on 09.12.2006, he was posted as Head Constable at Police Station Mohammadpurkhala and on the said date, at 5:45 p.m., informant-Nagesar Lonia came and filed his written FIR on the basis of which he prepared the chik FIR.

(9) A perusal of the chik FIR shows that the distance between the place of incident and Police Station Mohammadpurkhala was 6 kilometers. It is significant to mention that a perusal of the chik FIR also shows that on its basis, a case crime no. 213 of 2006, under Sections 302/34, 307, 323, 504, 506, 427 I.P.C. was registered against appellants, Kailash, Badey Lal, Munna Lal and Sipahi alias Nanh. After lodging of the F.I.R., the informant, Dev Deen and Rajita Devi, who sustained injuries, were sent to Primary Health Centre, Fatehpur, wherein between 8.06 P.M. to 8.30 P.M., the Doctor examined them.

(10) The evidence of SI Omveer Singh (P.W. 12) shows that he took investigation of the case. At the time of incident, he was posted as Station Officer at Police Station Mohammadpurkhala. Immediately after lodging the F.I.R, he along with Constable Lalji Yadav and S.I. Sunil Kumar Singh (P.W.8) reached at the place of incident where deadbody of Khushi Ram was lying. On his direction, panchayatnama of the deadbody of Khushi Ram was conducted by S.I. Sunil Kumar Singh (P.W.8) on the next date of incident i.e. on 10.12.2006 as there was no proper arrangement of light. He sent the deadbody of deceased Khusi Ram for post-mortem along with Constable Lalji Yadav and also recorded the statement of informant, Nagesar Lonia, and on his pointing out, he inspected the place of incident and prepared the site plan. From the place of incident, he seized plain and blood stained earth in containers under a recovery memo. On 14.12.2006, he searched for the accused

persons and at about 05:30 a.m., he arrested appellants Munna Lal, Sipahi Lal and Kailash and on searching at that relevant time, one illegal 12 bore countrymade pistol, one live catridge and one empty catridge were recovered from the possession of Kailash, who confessed that he used the recovered countrymade pistol for murder of Khushi Ram. Thereafter, seizures were made under recovery memos. On 18.12.2006, he recorded the statement of witness Ramesh, Shiv Bhagwan, injured Ranjeeta and Devi Deen. On 2.01.2007, appellant Badey Lal was arrested and his statement was also recorded. On 4.01.2007, permission to add offence punishable under Section 25 of the Arms Act against appellant Kailash was taken. On 18.01.2007, he sent the case details to the Chief Judicial Magistrate for trial. Immediately thereafter, he was transferred.

(11) The evidence of P.W.10-S.I. Yashwant Singh (Investigating Officer) shows that after transfer of Omveer Singh (P.W.12), the investigation was entrusted to him on 05.02.2007. After satisfying with the incriminating evidence collected during the course of investigation by his erstwhile Investigating Officer, he submitted charge-sheet against the appellants, Badey Lal, Munna Lal, Kailash and Sipahi Lal alias Nanh.

(12) The post-mortem on the dead body of Khusi Ram was conducted on 10.12.2006, at 3.00 p.m., by Dr. Vidya Bhushan Pathak (P.W. 5), who found on his person ante-mortem injuries, enumerated hereinafter :--

"Fire arm wound of entry present on left side of neck just supraclavicular region size 7.0 x 3.0 c.m. Margins abraded inverted. Depth 4.5 c.m. oblique going upto vertebral body C 5, 6.

On Opening & exploration :- Underlying major vessels of neck torn, all underlying muscles & tissue in line of injury damaged reaching up to the 5th & 6th cervical vertebra which is fractured. Pelural of unclear left side torn. Twelve metallic pellets recovered from unclear vertebra vessels & bone & tissue. About 1.0 litre fluid clotted blood recovered from left plural cavity. Left lung collapsed."

The cause of death spelt out in the autopsy reports of the deceased person was shock and haemorrhage as a result of ante-mortem fire arm injury, which he had suffered.

(13) It is significant to mention that in his deposition in the trial Court, Dr. Vidya Bhushan Pathak (P.W. 5) has reiterated the said cause of death and also stated therein that the ante-mortem injuries suffered by the deceased person could be attributable to a fire arms like *katta* (countrymade pistol).

(14) The injuries of informant-Nagesar Lonia (P.W.1), Smt. Ranjeeta Devi (P.W.2) and Devi Deen (P.W.3) were conducted b y Dr.Abhay Goel (P.W.7) at Community Health Centre, Fatehpur on 09.12.2006 at 8.06 p.m. After examination, the following injuries were found by Dr. Abhay Goel (P.W.7) on the injured Nagesar Lonia (P.W.1), Ranjeeta Devi (P.W.2) and Devi Deen (P.W.3) :-

"Injured Nagesar Lonia

"(i) Contusion 3 cm x 2 cm over right side skull 5 cm above right ear;

(ii) Contusion 7 cm x 3 cm over right shoulder joint.

(iii) Contusion 6 cm x 12 cm over ant. Aspect of right leg 11 cm below right knee joint.

(iv) Complain of pain over right thigh.

O/E No visible injury or tenderness present."

Injured Ranjeeta Devi

"(i) Lacerated wound 5 cm x 0.5 cm muscle deep over right side skull 9 cm above right ear.

(ii) Contusion 7 cm x 3 cm over right scapular region. cm below right scapulla"

Injured Devi Deen

"(i) Lacerated wound 4 cm x 0.5 cm muscle deep on middle of skull 13 cm above right ear.

(ii) Contusion 7 cm x 4.0 cm over right shoulder joint.

(iii) Contusion 6 cm x 3.0 cm over left shoulder joint.

(iv) Lacerated wound 1.5 cm x 0.5 cm muscle deep on dorsum of index finger.

(v) Complaint of pain on left hip joint. O/E No ext. inj. seen."

(15) As per the opinion of Dr. Abhay Goel (P.W.7), the aforesaid injuries were caused by trauma from hard blunt object. All the injuries were fresh & simple in nature. In his deposition, Dr. Abhay Goel (P.W.7) has stated that the said injured were brought by Constable Gaya Prasad Yadav. He stated that the aforesaid injuries may be caused by Lathi, danda and butt of the katta.

(16) The case was committed to the Court of Session by the Chief Judicial Magistrate on 28.05.2007 and the trial Court framed charge against appellants under Sections 302/34, 307/34, 426, 504, 506 I.P.C. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(17) During trial, in all, the prosecution examined 12 witnesses. Two of them, namely, the informant Nagesar Lonia (P.W. 1) and Dev Deen (P.W.3) were examined as eye-witnesses and other witnesses were the formal witnesses and their evidence have been discussed above.

(18) We would first like to deal with the evidence of Nagesar Lonia (P.W. 1). Since in paragraph 4, 5, 6 and 7, we have set out the prosecution story primarily on the basis of the recitals contained in his examination-in-chief, for the sake of brevity, the same is not reiterated. P.W.1 Nagesar Lonia deposed that his land/farm is near the north of his village, in which lentils and peas were sown. Prior to 7 ½ months, at about 2.30 p.m., the goats of his *patidar* Bade Lal were grazing and damaging the crop of lentils and peas sown in his aforesaid farm. The wife of accused Kailash was herding the goats in his farm. When his wife Ranjeeta Devi, who went to look after the farm saw it, she forbade the wife of Kailash to do so and began ousting the goats. On this, a verbal altercation took place between his wife Ranjeeta Devi and

wife of Kailash. On hearing the hue and cry, he along with his father Devi Deen and his elder brother Khushiram reached the spot and began ousting the goats from the farm. Meanwhile, accused Bade Lal, Munna Lal, Sipahi Lal alias Nanhu carrying *lathi-danda* in their hands and accused Kailash carrying countrymade pistol, reached his farm hurling abuses. Thereafter, he, his father and his elder brother got scared looking these four persons and backed off. By the time, accused Kailash opened fire with the countrymade pistol held in his hand which hit his elder brother Khushi Ram, disabled with leg, who was just reaching the chakroad to the west of the farm. Having received the fireshot, he died on the spot itself. Bade Lal, Munna Lal and Sipahi Lal carrying *lathis* in their hands encircled and inflicted injuries to him, his wife Ranjeeta Devi and his father Devi Deen with intention to kill. On their clamour, his brother Naresh also known as Ramesh, Shiv Bhagwan and even other villagers arrived. When these persons forbade, all the aforesaid accused persons went away giving threats to kill us. Leaving the corpse of his brother Khushiram on the spot under the guard of villagers and family members, he, his wife and his father came to the police station through a hired jeep brought by his uncle. He got scribed the written report through Jugul Kishore Dwivedi in a hut shop outside the police station. Thereafter, he had scribed and read out the same whatever had been narrated by him. Then he marked his thumb impression on it and along with the injured persons, took the written report to the police station, handed over it to the Head Constable and got the case registered. The Head Constable saw their injuries and sent them on the same day with a constable to District Hospital Fatehpur for treatment where their medical examination had been conducted. They returned home after their medical examination had been conducted.

(19) P.W.1-Nagesar Lonia further in his deposition has also stated that the police officials had arrived at the spot in the night of incident. As there was no arrangement of light, they stayed there only. On the next day, in the morning, the Inspector took his statement at the place of occurrence, conducted inspection of the place of occurrence, prepared the Inquest Report in respect of the corpse of Khushiram, prepared other documents, sealed the corpse and handed over the same to the available constable for postmortem. The Inquest Report has been read out and he put thumb impression on that.

(20) P.W.2-Smt. Ranjeeta Devi has supported the statement of P.W.1 Nagesar Lonia and has stated that prior to 9 months 9-10 days, at about 2:30 p.m., in the afternoon, wives of Badey Lal and Kailash were grazing their goats of her field, wherein Lentil and Pea were sowed. At that time, she was washing utensils at the door of her house. On seeing the goats grazing her crops, she gone there and began ousting the goats. On this, wives of Kailash and Badey Lal, abused her. On hearing the hue and cry, her husband (Nagesar Lonia), her father-in-law (Devi Deen) and her elder brother-in-law (Khushi Ram), who was handicapped by leg, came to her in the field and at the same time, all four accused persons among whom Kailash carried *adhi* (countrymade pistol) and other accused persons Bade Lal, Munna Lal, Sipahi Lal alias Nanhu carried *lathi* reached there hurling abuses. The accused persons, with intention to kill them, approached them.

Due to fear, they went back in the western ridge of the field and when they reached at the chak road, Kailash armed with *adhi* (countrymade pistol) fired, which hit her brother-in-law Khushi Ram and consequently died on spot. The other accused persons assaulted her, her husband (informant) and her father-in-law (P.W.3-Devi Deen), for which injuries have been sustained by them. On our clamour, her brother-in-law Nagesar, Shiv Bhagwan and other villagers arrived, thereupon all the accused persons fled away. After the incident, she, her husband (informant) and her father-in-law went to police station and her husband (informant) had lodged the report. Thereafter, their medical examination was got conducted at the Government hospitals by the police officials.

(21) P.W.3-Devi Deen, who is father of the informant P.W.1-Nagesar Lonia, in his examination-in-chief, has deposed that the incident was about 4 months ago at 2-2:30 P.M. At that time, wife of his son Nagesar, namely, Ranjeeta Devi (P.W.2) was washing utensils, whereas he, his son Nagesar (P.W.1) and elder son Khushi Ram (deceased) sat at the door. At the place of farm land, wives of accused Badey Lal and Kailash were grazing the goats and when his daughter-in-law Ranjeeta gone to drive the goats and told her that they grazed the corps for which loss of paddy occurred, the wives of accused Badey Lal and Kailash abused her daughter-in-law. On hearing the hue and cry, he, Nagesar and Khushi Ram reached near Ranjeeta and at the same time, accused persons Badey Lal, Munna Lal, Sipahi Lal alias Nanh and Kailash came there. All the accused persons are real brothers. Kailash was armed with adha (countrymade pistol), wheras Munna Lal, Sipahi and Badey Lal was armed with lathi danda. When the accused persons came, they shouted "maro salo ko" (to kill them bastard), then, they moved backward and when Khusi Ram was at the boundary of the field co-joint to chak road, Kailash fired upon Khushi Ram by adha (countrymade pistol). Thereafter, he, his son Nagesar and his daughter-in-law went backward to the chak road, where Badey Lal, Munna Lal and Sipahi armed with lathi danda assaulted him, his son Nagesar Lonia and his daughter-in-law Ranjeeta, whereby they sustained injuries. On account of fire, Khushi Ram died on the spot. On hearing hue and cry, his son Ramesh and Shiv Bhagwan reached at the spot and they also seen the incident. Thereafter, he, his son Nagesar and his daughter-in-law Ranjeeta went to police station on the guard of other persons. His son Nagesar Lonia had lodged the report at the police station, from where they had been sent to hospital for medical examination by the police.

(22) The evidence of P.W.4 Ram Lakhan shows that the inspector and police came at 9:00 a.m. on next date of the incident and the deadbody of the deceased Khushi Ram was lying in the field of Devi Deen situate at the west side of land, wherein large number of people was there. The Inspector prepared inquest report and panchayatnama and after scribing it to him, he put thumb impresssion on it. Thereafter, deadbody of Khushi Ram was sent to post-mortam. The Inspector had also collected blood staind earth from the place of occurrence and kept in a container.

(23) The learned trial Judge believed the evidence of Nagesar Lonia (P.W.1), Smt. Ranjeeta Devi (P.W.2) and Devi Deen (P.W. 3) and found the appellants guilty for the offences punishable under Sections 302/34, 323/34 I.P.C. and, accordingly,

convicted and sentenced the appellants in the manner stated in paragraph 1. He, however, acquitted the appellants for the offences punishable under Sections 307/34, 504, 506 and 426 I.P.C. Appellant-Kailash was also acquitted for the offence punishable under Section 25 read with Section 3 of the Arms Act.

(24) It is pertinent to mention that the State of U.P. has not impugned acquittal of the appellants under Sections 307/34, 504, 506 and 426 I.P.C. and appellant-Kailash under Section 25 (3) of the Arms Act by preferring an appeal under Section 378 (1) of the Code of Criminal Procedure.

(25) As mentioned earlier, aggrieved by their convictions and sentences Kailash preferred Criminal Appeal No. 1989 of 2009 before this court and Badey Lal, Munna Lal and Sipahi alias Nanh also preferred another appeal i.e. Cri. Appeal No. 1982 of 2009 and since these appeals arise out of a common factual matrix and impugned judgment, we are disposing them of by common judgment.

(26) Heard Sri Shishir Pradhan, learned counsel for the appellant of Criminal Appeal No. 1989 of 2009 and Sri Desh Ratan Mishra, learned Counsel for the appellants of Criminal Appeal No. 1982 of 2009 and Ms. Nand Prabha Shukla, learned AGA for the State.

(27) Sri Shishir Pradhan, learned Counsel for the appellant of Criminal Appeal No. 1989 of 2009 has submitted that appellant-Kailash is in jail since 14.12.2006 i.e. since 14 years and three months. He submits that it is a case of sudden and grave provocation. The incident is the result of the sudden quarrel between the wife of the informant and the wife of appellant-Badey Lal on account of grazing of crop by the goats. According to the prosecution case, on hearing the altercation, all the accused who are real brothers from one side and the informant, his brother and father on the other side, came on the spot and altercation ensued between them. The intention of the appellant-Kailash was to create pressure upon opposite side. It has been argued that P.W.1, informant, had stated that he never ran away when he saw appellant-Kailash armed with Katta (countrymade pistol). This shows that the appellant-Kailash had no intention to kill but when appellant-Kailash was returning from place of occurrence, then, he open single fire in a heat of passion. Therefore, it is a case under Section 304 Part-II I.P.C. and not under Section 302 I.P.C.

(28) Elaborating his submission, Mr. Pradhan has submitted that in the F.I.R., appellant-Kailash has a role of single fire by Katta. As per post-mortem report, there is single fire arm injury to the deceased. This shows that there is no repetition of fire by Katta (countrymade pistol), hence the case would not travel beyond offence under Section 304 Part-II I.P.C. It has been further argued that appellant-Kailash was acquitted under Section 3/25 of the Arms Act by the trial Court as there was no independent witness to prove the recovery of countrymade pistol and the cartridges from him.

(29) Mr. Pradhan has relied upon the case of **Vineet Kumar Chauhan Vs. State of U.P.** : AIR 2008 S.C. 780 and **Sadhu Singh Harnam Singh Vs. The State of Pepsu :** AIR 1954 SC 271 has submitted that in a single fire case, conviction under

Section 302 I.P.C. is converted into under Section 304 Part-II I.P.C. and the sentence be reduced to already undergone as the appellant has already served more than 14 years, which would meet the ends of justice.

(30) Shri Desh Ratan Mishra, learned Counsel for the appellants of Criminal Appeal No. 1982 of 2009 has contended that the present incident arose at the spur of moment as the goats were grazing in the field claim by both the parties and the ladies of both the side entered into quarrel resulting the altercation of the accused persons and informant party. Appellants are said to have assaulted injured persons only with Lathi and Danda as a result of which they have received simple injuries. It has been argued that the deceased Khushi Ram has received only one injury in the nature of fire arm wound, which resulted in his death and about whom co-accused/appellant Kailsh was assigned the role of firing of single shot at the deceased. There is no allegation that Badey Lal, Munna Lal and Sipahi alias Nanh has exhorted to Kailash to fire at the deceased. He submits that on account of altercation between the parties, co-accused Kailash has fired firstly at the deceased and the appellants, Badey Lal, Munna Lal and Sipahi alias Nanh, who were armed with Lathi and Danda, have assulted the injured persons, who have received simple injury and they did not have any common intention to murder the deceased, who was shot dead by co-accused Kailash, hence their conviction under Section 302/34 I.P.C. by the trial Court is against the evidence on record and be set-aside.

(31) To strengthen his submission, Sri Mishra learned counsel for the appellants has relied upon the judgment of the Apex Court in the case **of Dharam Pal and others Vs. State of U.P.** : 1997 SCC (crl.) 1203 and **Pundalik Mahadu Bhane and others Vs. State of Maharashtra** : 1998 SCC (Cri) 202, respectively.

(32) Per contra, learned AGA, while supporting the impugned jumdgment, has vehmently argued that the trial Court, after relying upon version of the eye-witnesses, namely, P.W.1 Nagesar Lonia, Ranjeeta Devi (P.W.2) and Devi Deen (P.W.3), has rightly held guilty to the appellants for the offences punishable under Sections 302/34 and 323/34 I.P.C. It has been argued that under the penal code, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had a common intention to commit the acts or if the offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly, then also he can be vicarioulsy responsible. The doctor, who opined that injuries sustained by the injured, may be caused by a blunt object, like lathi, danda and butt of the katta. As per the prosecution case, the appellants, with common intention, chased the informant, his wife, his elder brother (deceased) and his father and after that appellant-Kailash fired a shot with countrymade pistol and thereafter, appellants injured the informant, his wife and his father by lathi, danda and butt of the countrymade pistol. Therefore, the trial Court has rightly punished the appellants under Section 302/34 and 323/34 of the Indian Penal Code. There is no illegality or infirmity in the impugned order.

(33) To stregthen her submission, learned AGA has placed reliance upon **Balvir Singh Vs State of M.P. :** 2019 (199) AIC 242 (S.C.), **Virendra Singh Vs.**

State of Madhya Pradesh : (2010) 8 SCC 407.

(34) We have examined the rival contentions advanced by the learned Counsel for the parties along with the impugned judgment and order passed by the trial Court and also perused the lower Court record.

(35) It transpires from the prosecution case that against four accused persons, namely, Badey Lal, Munna Lal, Sipahi alias Nanh, Kailash, a First Information Report was lodged by P.W.1-Nagesar Lonia for murder of his brother Khushi Ram (deceased) and injuries sustained by him (P.W.1-Nagesar Lonia), his wife Smt. Ranjeeta Devi (P.W.2) and his father Devi Deen (P.W.3) by the aforesaid accused persons.

(36) It is the specific case of the prosecution that deceased Khushi Ram was done to death by accused-appellant Kailash, who fired upon him with a countrymade pistol, which he carried at the time of incident. The injured witnesses, namely, P.W.1-Nagesar Lonia, Smt. Ranjeeta Devi (P.W.2) and Devi Deen (P.W.3) have categorically deposed that accused-appeallants, namely, Badey Lal, Munna Lal and Sipahi alias Nanh had assaulted by lathis and injured them.

(37) From perusal of the post-mortem of deceased Khushi Ram, it is apparent that he received one single injury on his person, which was a fire shot and the same has been attributed to the accused-appellant Kailash. The other three accused-appellants Badey Lal, Munna Lal and Sipahi alias Nanh had assaulted the injured with Lathis and Dandas. The deceased Khushi Ram did not receive any injury of blunt object except fire arm injury. The injured witnesses P.W.1-Nagesar Lonia, P.W.2-Smt. Ranjeeta Devi and P.W.3-Devi Deen had received injuries of blunt object, which were caused by accused-appellants Badey Lal, Munna Lal and Sipahi alias Nanh with Lathis and Dandas but the injuries were found to be simple in nature.

(38) Sri Desh Ratan Mishra, learned Counsel for the appellants has contended that conviction of appellants Badey Lal, Munna Lal and Sipahi alias Nanh under Section 302/34 I.P.C. for committing murder of deceased Khushi Ram and sentenced them for life by the trial Court for the said offence is contrary to the evidence on record.

(39) On examining the aforesaid argument of Mr. Mishra, learned Counsel for the appellants, it is apparent that though the incident had taken place for grazing by goats of accused-appellant Badey Lal in the field of the informant Nagesar Lonia, which was objected by the wife of the informant, namely, Smt. Ranjeeta Devi (P.W.2), who, on seeing the goats distructing her crops, went to oust the goats from her field, on which wife of the appellant Badey Lal started altercation. On hearing the hue and cry, injured P.W.1-Nagesar Lonia and P.W.3-Devi Deen and deceased Khushi Ram reached there and at the same time, accused-appellant Kailash armed with countrymade pistol and accused-appellants Badey Lal, Munna Lal and Sipahi alias Nanh armed with lathies and dandas arrived at the place of occurrence. On seeing the accused appellants, informant P.W.1-Nagesar Lonia, his wife P.W.2 Smt. Ranjeeta Devi, his father P.W.3 Devi Deen and his brother

Khushi Ram (deceased), who was a handicap by one leg, got scared and had moved backward and when Khushi Ram was at the boundary of the field co-joint to chak road, the accused-appellant Kailash, who was carrying countrymade pistol, fired shot to brother of informant, Khushi Ram, as a consequence thereof, the brother of informant Khushi Ram sustained fire arm injury, due to which he died on spot. This shows that appellants Badey Lal, Munna Lal and Sipahi Lal alias Nanh could not be said to have any common intention to commit the murder of the deceased Khushi Ram along with appellant Kailash. Appellants Badey Lal, Munna Lal and Sipahi Lal alias Nanh also did not assualt the deceased Khushi Ram with Lathies and Dandas. Therefore, the conviction of appellants Badey Lal, Munna Lal and Sipahi Lal alias Nanh under Section 302/34 I.P.C. and sentenced them for life by the trial Court cannot be sustained in the eyes of law as at the most, appellants Badey Lal, Munna Lal and Sipahi Lal alias Nanh are responsible for their individual act and not vicariously. Moreover, the prosecution has also not brought any evidence on record to show that appellants Badey Lal, Munna Lal and Sipahi Lal alias Nanh had any prior knowledge of the fact that deceased Khushi Ram would be shot by the accused-appellant Kailash, who was also running away from the place of occurrence because of the fact that accused-appellants had arrived with Lathis, dandas and countrymade pistol.

(40) In the aforesaid backgrounds, Sri Mishra learned Counsel for the appellants had placed reliance upon the judgment of the Apex Court in **Dharam Pal and others Vs. State of U.P**. (supra) and argued that the offence, if any, for which the appellants could be convicted and setenced, is under Section 323/34 I.P.C. as appellants Badey Lal, Munna Lal and Sipahi alias Nanh have only inflicted lathi and danda blows upon the three injured persons, who sustained simple injuries on their person and no internal damage was caused to them, as at the most, they may be said to have common intention to cause simple hurt to the three injured persons but certainly not any common intention to kill the deceased, who was shot dead by the accused/appellant Kailash and the deceased died on the spot. He has contended that in the case of **Dharam Pal and others Vs. State of U.P. (supra),** the Apex Court in a similar situation had set-aside the conviction of the accused under Section 302/34 I.P.C. and convicted the one of the accused under Section 325 I.P.C., who had caused lathi injuries to one of the prosecution witnesses.

(41) The other case, which has been relied by the learned Counsel for the appellants of Criminal Appeal No. 1982 of 2009, is the judgment of the Apex Court rendered in the case of **Pundalik Mahadu Bhane and others Vs. State of Maharashtra** (Supra) and in support of his contention, he has pointed out that the Apex Court had observed that in case of sudden and free fight between two groups, each of the persons involved therein would be liable for his individual act and not vicariously. In the said case, the accused assaulted the deceased with sticks resulting in grivous injuries on his person, the Apex Court has observed that the accused are liable to be convicted under Section 325 I.P.C. and not under Section 302/34 I.P.C.

(42) Taking into consideration the law laid down by the Apex Court, as has been referred to above and examining the evidence of P.W.1-Nagesar Lonia, P.W.2 Smt. Ranjeeta Devi and P.W.3-Devi Deen,

we are of the considered view that conviction of the appellants Badey Lal, Munna Lal and Sipahi Lal alias Nanh under Sections 302/34 I.P.C. and sentenced them to life by the trial Court is not sustainable as it is contrary to the evidence on record, as it is not borne out from the evidence on record that the said three appellants had any common intention to kill the deceased, who was killed by the accused/appellant Kailash with a countrymade pistol and the deceased died on the spot, hence their conviction and sentence by the trial Court under Section 302/34 I.P.C. is liable to be set-aside. However, conviction of appellants Badey Lal, Munna Lal and Sipahi Lal alias Nanh under Sections 323/34 I.P.C. and their sentence to undergo six months' R.I. by the trial Court is liable to be confirmed as they with a common intention assaulted the three injured persons with lathies and dandas, who suffered simple injuries on their persons.

(43) So far as appellant Kailash is concerned, it has been argued by Sri Shishir Pradhan, the learned Counsel for the appellant of Criminal Appeal No. 1989 of 2009 that it is a case of sudden quarrel between the parties and the appellant Kailash had only caused single injury by fire arm weapon on the deceased Khushi Ram and no repeated shot was fired by him, hence his conviction under Section 302/34 I.P.C. is liable to be set-aside as the case would not travel beyond the offence under Section 304 Part-II of the Indian Penal Code. Appellant Kailash had already served out more than 14 years in jail, hence, he may be released to the period already undergone. The aforesaid argument of Mr. Pradhan has no substance at all. It is to be noted that the prosecution case right from its inception is that the appellant Kailash was carrying a deadly weapon i.e. countrymade pistol at the time of the incident and he shot the deceased Khushi Ram, who was going back towards the chak road on seeing the accused/appellants arrived at the place of occurrence with lathi, danda and countrymade pistol. But the appellant Kailash shot with the countrymade pistol on the deceased Khushi Ram, who was a disabled person (not having one leg), as a consequence thereof, Khushi Ram succumbed to his injury on the spot and the incident was witnessed by P.W.1-Nagesar Lonia, P.W.-2 Smt. Ranjeeta Devi and P.W.3-Devi Deen, who were the real brother, brother-in-law and father, respectively, of the deceased Khushi Ram and are the injured witnesses also.

(44) All three prosecution witnesses, namely, P.W.1 Nagesar Lonia, P.W.2 Ranjeeta Devi and P.W.3 Devi Deen, who are injured witnesses, have categorically stated that it was appellant Kailash who fired shot on the deceased Khushi Ram with countrymade pistol, due to which, Khushi Ram succumbed to his injuries on the spot. The ocular testimony of the said three witnesses is also corroborated with the post-mortem report of the deceased as twelve metallic pellets were also recoverd from the body of the deceased during the course of post-mortem. It is to be noted that the intention to kill the deceased was apparent from the conduct of the appellant Kailash, who did not spare the deceased Khushi Ram was a disabled person, hence he is individually responsible for his act of murdering the deceased.

(45) Sri Pradhan, learned counsel in support of his submission has placed reliance upon the judgment of the Apex Court in the case of **Vineet Kumar**

Chauhan Vs. State of U.P. (supra), which, in our view, is not helpful to the appellant Kailash as from the facts of the said case, it is apparent that in the said case, the case was registered against accused under Section 302 I.P.C. and after six months, injured died on account of septicemia and toxemia due to bedsores, therefore, the case was converted into Section 304, Part II, I.P.C. Similarly, other case, which has been relied by the learned Counsel for the appellant of Criminal Appeal No. 1989 of 2009 i.e. **Sadhu Singh Harnam Singh Vs. The State of Pepsu (Supra)**, is also not of any help to the appellant Kailash because from the facts of the said case, it is apparent that it was a case of rash and negligent act and the Apex Court in the said case has set-aside the conviction under Section 302 I.P.C. and convicted the accused under Section 304 I.P.C. Thus, both the cases are distinuguishable from the facts and circumstances of the present case.

(46) It is true that appellant Kailash, who was also tried by the trial Court for the offence under Section 25 of the Arms Act but the trial Court found that evidence of recovery of the countrymade pistol on the pointing out of the said appellant cannot be reliable as no independent witnesses have supported the recovery of countrymade pistol. Moreso, no site-plan for recovery of the said countrymade pistol and catridges has been made by the Investigating Officer, but that alone cannot be a ground to acquit the appellant Kailash from the charges levelled against him because of the latches on the part of the investigating agency as the incident had taken place in a broad day light and the injured witnesses supported the prosecution case against appellant Kailash, which is fully corroborated by the medical evidence. Thus, the prosecution has proved his case beyond reasonable doubt against appellant Kailash and his conviction and sentence for the murder of deceased is fully jusified.

(47) In view of the foregoing discussions, we pass the following order :--

(A) **Criminal Appeal No. 1989 of 2009:--**

The conviction and sentence of the appellant Kailash for the murder of deceased Khushi Ram does not call for any interference by this Court as we are of the opinion that the appellant Kailash has murdered the deceased with a deadly weapon i.e. countrymade pistol, which was his individual act and he is responsible for the same, hence, he is convicted for the offence under Section 302 I.P.C. as **''simpliciter',** therefore, his conviction under Section 302/34 I.P.C. by the trial Court is modified to Section 302 I.P.C. and sentence to life imprisonment, accordingly. The conviction and sentence of the appellant Kailash for the offence under Section 323/34 I.P.C. by the trial Court is also hereby confirmed.

Appellant Kailash is in jail and he shall serve out the sentence as ordered by the trial Court.

The appeal stands **dismissed.**

(B) **Criminal Appeal No. 1982 of 2009 :-**

The conviction and sentence of appellant Badey Lal, Munna Lal and Sipahi alias Nanh by the trial Court for offence punishable under Section 302/34 I.P.C. is hereby set-aside. Hence, they are acquitted for the charges under Section 302/34 I.P.C.

However, their conviction and sentence under Section 323/34 I.P.C. by the trial Court is hereby confirmed. Their sentences are reduced to already undergone. They are on bail and they need not surrender. Their bail bonds are cancelled and sureties discharged.

Appellants are directed to file personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of the Code of Criminal Procedure, 1973.

The appeal is **partly allowed**.

(48) Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for necessary information and compliance.

(49) The party shall file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person (s) (preferably Aadhar Card) mentioning the mobile number (s) to which the said Aadhar Card is linked before the concerned Court/Authority/Official.

(50) The concerned Court/Authority/Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)05ILR A289
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2021

BEFORE

THE HON'BLE J.J.MUNIR, J.

Second Appeal No. 1873 of 1985
WITH
Second Appeal No. 2315 of 1985

Mahesh Chandra Sharma (deceased) **...Appellant**

Versus

Avinash Kumar **...Respondent**

Counsel for the Appellant:
Sri N.C. Rajvanshi, Sri M.K, Rajvanshi, Sri Vinay Kumar Mishra

Counsel for the Respondent:
Sri N.L. Agarwal, Sri Mahtab Alam, Sri N.L. Ganguly, Sri Pradyamna Kumar Yadav, Sri Rakesh Pratap Singh

A. Civil Law – Specific Performance of Contract – Uttar Pradesh Regulation of Money-Lending Act, 1976 - Code of Civil Procedure,1908 - Section 100 – The law of pleadings poses certain limitation on parties as well as the Courts – The law of pleadings ensures that no party can spring a surprise upon its adversary and render the latter without opportunity to defend itself. The courts cannot travel beyond pleadings and cannot grant relief which is not sought. Similarly, the court cannot receive evidence of facts which are not stated in the pleadings. (Para 10)

B. Maturity of cause of action – Code of Civil Procedure,1908 - Order VII Rule 11; Limitation Act, 1963- Article 54, Sections 2(j), 3 - Article 54 of the Act of 1963 would certainly not be relevant to the matter. It would be relevant for the purpose of reckoning limitation; not the maturity of the cause of action. In the opinion of this Court where a date is fixed for the purpose of performance of a contract relating to the sale of an immovable property, but the vendor says that he never entered into that agreement or it is forged, or raises a plea of non est factum or still more, like the case here, asserts that the contract does not at all embody the true intention of parties about

a solemn promise to sell the property, but one merely to serve as a security, the breach occurs as soon as this stand is taken (by the vendor). The cause of action arises immediately. (Para 11, 16)

The filing of a suit when there is cause of action though premature does not raise a jurisdictional question. A right that accrues on the expiry of a certain period of time is, no doubt, a deficiency, if the time stipulated by a contract has not expired. But, it would not lead to the Court being totally or inherently without jurisdiction. If that plea is promptly raised, the Court may return the plaint or dismiss the suit with liberty to bring it afresh, on the expiry of time when the cause of action matures. (Para 17, 20)

A plea as to non-maintainability of the suit on the ground of its being premature should be promptly raised by the defendant and pressed for decision. It will equally be the responsibility of the court to examine and promptly dispose of such a plea. The plea may not be permitted to be raised at a belated stage of the suit. (Para 20)

In the present case, where the defendant has disowned the suit agreement and his liability under it, giving rise to a mature and perfect cause of action before the suit was instituted. In view of the defendant's stand, there is absolutely no scope for the plaintiff to have waited for the two years contemplated under the suit agreement to expire. (Para 22)

No plea regarding prematurity was ever raised in the written statement. Had it been done, though in error, the suit might have been dismissed as premature, with liberty to sue afresh, when the cause of action had ripened. Here, since the plea about prematurity was never raised, it would indeed be the greatest travesty of justice to hold the plaintiff disentitled at the appeal stage, on that ground, where otherwise, both the Courts have found the plaintiff entitled to a decree for specific performance. This again, is the most hypothetical proposition on which the defendant's case can receive consideration. On facts, however, this proposition or this facet of the defendant's case need not be considered. (Para 23)

It must also be remarked that even if the suit were to be held as one instituted before time, the prematurity would not be one that relates to a jurisdictional fact. The Court, therefore, would have jurisdiction to entertain the suit and grant relief, particularly, when no plea to that effect was raised by the defendant before the Court of trial or in the grounds of appeal. (Para 24)

C. Admissibility of evidence – Indian Evidence Act, 1872- Section 65(c) - The objection as to mode of proof of document has to be taken at the earliest stage, when the document is laid in evidence and if not taken, it cannot be subsequently raised, once the document is admitted in evidence. The reason is not far to seek. If an objection about the mode of proof of a document were to be taken, as soon as it is laid, the person relying on the document can take steps to strictly prove the document in accordance with law. (Para 28)

The plaintiff, on his part, took steps to lay the necessary foundation for reception of secondary evidence by filing what appears to be a copy of the report dated 19.02.1982, lodged with Police Station Harduaganj, about loss of the suit agreement. The defendant waived formal proof of this document before the lower Appellate Court, a fact recorded in that judgment. In the opinion of this Court, therefore, sufficient foundation was laid by the plaintiff to lead secondary evidence about contents of the suit agreement and whatever objection about the mode of proof, if at all could be taken, was given up by the defendant before the lower Appellate Court. (Para 29, 30)

The courts below were held to be justified in law to admit secondary evidence of agreement dated 02.05.80.

D. Validity of decree of refund of earnest - Specific Relief Act, 1963 - Section 22(1)(b) – That relief could not have been granted, as the plaintiff has not at all sought relief regarding refund of any earnest money or deposit paid or made by him, in the alternative, if his claim for specific performance were to fail.

In a situation of that kind, to pass a decree for refund of earnest as the lower Appellate Court has done, would be impermissible in view of the provisions of Section 22 (1) (b) of the Specific Relief Act, 1963. (Para 32)

E. Specific Relief Act, 1963 - Section 20 - Once a suit for specific performance has been filed, any delay as a result of the court process cannot be put against the plaintiff as a matter of law in decreeing specific performance. However, it is within the discretion of the Court, regard being had to the facts of each case, as to whether some additional amount ought or ought not to be paid by the plaintiff once a decree of specific performance is passed in its favour, even at the appellate stage. (Para 33)

Bearing in mind the astronomical rise in prices of real properties, the Courts of late have introduced a principle where to do some equity to parties, who are not themselves directly responsible for the long delays of litigation, when compelled to specifically perform almost ancient contracts, are to be given succor that lends some relevance and sense in monetary worth of the present time. (Para 33)

There is nothing on record to show that the plaintiff, or for that matter, the defendant have, in any manner, contributed to the delay. It is a delay, resulting from the process of Court, which, cannot be put against the plaintiff to decline specific performance. At the same time, the lapse of time is so long that it has altered all monetary values and placed parties in a position that they could not have imagined in the day that they bargained the contract. To the parties who contracted, it is like time travel to the future. The demand of equity would, therefore, require the plaintiff to pay consideration for the sale, that has some monetary relevance in the present time. (Para 35)

This Court is of opinion that the plaintiff ought to pay consideration for the suit property reckoned at 1/4th value of its current market worth. This reduced consideration, the defendant must accept, to answer his old obligations that he has observed in utter breach. (Para 36)

Second Appeal no. 1873 of 1985 stands allowed with costs throughout.
Second Appeal no. 2315 of 1985 strands dismissed. (E-3)

Precedent followed:

1. Ganga Prasad Rai Vs Kedar Nath & anr., 2019 (3) ARC 624 (Para 10)

2. Malkhan Singh Vs Raghubir Singh, AIR 1981 Allahabad 96 (Para 11)

3. Smth Vs Heptanstall, AIR 1938 Rangoon 134 (Para 17)

4. Vithalbhai (P) Ltd. Vs Union Bank of India (2005) 4 SCC 315 (Para 18)

5. Section 65(c) of the Indian Evidence Act, 1872 (Para 28)

6. R.V.E. Venkatachala Gounder Vs Arulmigu Viswesaraswami & V.P. Temple & anr., (2003) 8 SCC 752 (Para 28)

7. Ferrodous Estates (Pvt.) Ltd. Vs P. Gopirathnam (Dead) & ors., 2020 SCC OnLine SC 825 (Para 33)

Precedent distinguished:

1. Harihar Prasad & ors. Vs Udaibir Singh & anr. 1978 AWC 79 (Para 13)

(Delivered by Hon'ble J.J. Munir, J.)

1. These two second appeals have arisen from a suit for specific performance of contract. Second Appeal No. 1873 of 1985 has been preferred by the plaintiff, whereas Second Appeal No. 2315 of 1985 has been brought by the defendant. Both appeals have been heard together. Second Appeal No. 1873 of 1985 shall be treated to be the leading case.

2. The facts giving rise to the two appeals are these :

Original Suit No. 144 of 1982 for specific performance of contract was instituted by Mahesh Chand against one Rampal Singh, seeking specific performance of a registered agreement to sell dated 02.05.1980, executed in favour of Mahesh Chand by Rampal Singh. Mahesh Chand is hereinafter referred to as the 'plaintiff', which includes reference to his legal heirs and representatives, since substituted in his stead. Rampal Singh, who died pending appeal before the lower Appellate Court and was substituted there by his sole heir and legal representative, Avinash Kumar, is hereinafter referred to as the 'defendant.'

3. The plaintiff's case is that a registered agreement to sell dated 02.05.1980 was executed between him and the defendant, where the defendant covenanted to sell, for an agreed sale consideration of Rs. 15,000/-, his 1/5th share in the agricultural land of Khata no. 254, plot no. 545, admeasuring 24 bigha 10 biswa 11 biswansi, situate at Village Azimabad Machhua, Pargana and Tehsil Koil, District Aligarh. The said land is hereinafter referred to as the "suit property'. The registered agreement to sell dated 02.05.1980 shall be called the 'suit agreement'.

4. It is the plaintiff's case that antecedent to the execution of the suit agreement, the defendant received, by way of earnest, a sum of Rs. 1440/-. The defendant further received a sum of Rs. 2,000/- at the time of execution and registration of suit agreement before the Sub-Registrar. Thus, out of the total sale consideration, the defendant received in earnest a total sum of Rs. 3440/-. It was covenanted between parties that the defendant would execute a sale deed conveying the suit property in favour of the plaintiff within two years of the date of the suit agreement. It is the plaintiff's case that he has been always ready and willing to perform his part of contract and is still ready and willing. The defendant has been elusive about the performance required of him in terms of the suit agreement and evaded his liabilities thereunder. The suit was instituted on 13.04.1982, alleging that the defendant, on 15.03.1982, refused to settle the matter amicably and out of Court.

5. The defendant contested the suit by filing a written statement dated 12.07.1982. The defendant denied the execution of the suit agreement. He pleaded that he never received a sum of Rs. 1,440/- by way of earnest. Rather, he received a loan from the plaintiff in the sum of Rs. 2,000/- agreeing to pay the plaintiff interest @ 3% per month. It was agreed inter partes that the loan, together with the accrued interest, would be repaid within a period of two years. The plaintiff, in order to evade the provisions of the of the Uttar Pradesh Regulation of Money-Lending Act, 1976 got the suit agreement executed, where Rs. 3,440/- were shown as earnest. The suit agreement was registered. The defendant has pleaded that for a fact, no agreement covenanting to transfer the suit property was in the parties' contemplation. The defendant has also averred that he paid a sum of Rs. 2,920/- to the plaintiff in August, 1981, liquidating the entire outstanding due to the plaintiff, the principal and the interest included. The plaintiff discharged the suit agreement by endorsing on its reverse that he does not wish to secure a sale deed and had received back his earnest. It is further averred by the

defendant that the plaintiff, however, did not return the suit agreement in original, where he made the last mentioned endorsement, telling the defendant that it was of no use to the defendant, as the plaintiff had already endorsed discharge thereon. The defendant has gone on to say that he is a simpleton and believed the plaintiff's last mentioned representations, leaving the suit agreement back with him. It has also been averred that the plaintiff has never been ready and willing to secure execution of the sale deed. It has also been asserted for a fact that the value of the suit property, contemporaneous to the execution of the suit agreement, was no less than Rs. 35,000/-. As such, there could be no reason for the defendant agreeing to sell the suit property for a sale consideration of Rs. 15,000/-.

6. The Trial Court, on the basis of pleadings of parties, and after hearing them, struck the following issues (translated into English from Hindi vernacular):

"(i) Whether the defendant executed the agreement dated 02.05.1980 in favour of the plaintiff agreeing to execute a sale deed for a sale consideration of Rs. 15,000/- and received an earnest in the sum of Rs. 3440/-?

(ii) Whether the plaintiff has always been ready and willing to perform his part of the contract?

(iii) To what relief, if any, is the plaintiff entitled?"

7. The Trial Court held in favour of the plaintiff on all issues and decreed the suit for specific performance. The defendant appealed the decree to the learned District Judge, Aligarh vide Civil Appeal No. 14 of 1984. The learned Third Additional District Judge, before whom the appeal came up for determination, partly allowed the same, setting aside the decree for specific performance granted by the Trial Court and substituting it by a direction for refund of the earnest. The plaintiff has also been held entitled to receive interest on the earnest money @ 6% per annum from the date of suit till realization. The plaintiff has been held entitled to receive costs from the defendant in the Trial Court and the lower Appellate Court. Aggrieved by the decree of the lower Appellate Court, both the plaintiff and the defendant have appealed to this Court under Section 100 of the Code of Civil Procedure1. The plaintiff has appealed from that part of the decree of the lower Appellate Court, by which specific performance has been denied. The defendant has appealed the other part, whereby he has been ordered to refund the earnest together with interest. This is how these two appeals have come up. The plaintiff's appeal was admitted to hearing by this Court on 04.11.1985, on the following substantial question of law :

"Whether the plaintiff could be refused the relief of specific performance simply because the suit was premature."

8 . The defendant's appeal was instituted later, on 20.12.1985. It was admitted to hearing on 21.02.1995 on the two substantial questions framed in the memo of appeal, as questions A and B. These read :

"A. Whether the courts below are justified in law to admit secondary evidence of agreement dated 02.05.1980?

B. Whether the decree for money passed by court below is justified in law in view of the fact that the real controversy has not been adjudicated upon."

9. Heard Mr. Vinay Kumar Mishra, learned Counsel for the plaintiff and Mr. Mahtab Alam, learned Counsel appearing for the defendant in both the appeals.

10. Mr. Vinay Kumar Mishra, learned Counsel, in support of the plaintiff's appeal, has urged that the substantial question of law framed in that appeal ought to be answered in the negative. He submits that the lower Appellate Court, like the Trial Court, has found for the plaintiff on all issues. The findings on those issues are pure findings of fact that cannot be reopened at the instance of the defendant here, or undone, answering the substantial questions of law said to be involved in the defendant's appeal. Mr. Mishra urges that no substantial question of law is involved in the appeal preferred by the defendant, which ought to be determined under sub-Section 5 of Section 100 of the Code. Learned Counsel has argued that so far as the plaintiff's appeal is concerned, the only point that has veered the lower Appellate Court away from the right course into setting aside the decree for specific performance granted by the Trial Court is an issue that was brought up during hearing of the appeal before the lower Appellate Court. The point on which the lower Appellate Court has accepted the defendant's case is that the suit is premature. Mr. Mishra, learned Counsel, submits that this was not at all a plea taken by the defendant in his written statement or at any stage during trial. Admittedly, this point does not figure as a ground in the memorandum of appeal filed before the lower Appellate Court. The point was sprung during hearing before the lower Appellate Court, and, surprisingly accepted with no basis to it in the parties pleadings, evidence, case, or submissions at any earlier stage of the proceedings. This kind of a plea could not be suddenly urged, according to the learned Counsel, at the hearing of the appeal before lower Appellate Court, with no basis to it. The lower Appellate Court, in its submission, grossly erred in permitting it to be urged, let alone accepting it. In support of his submissions under reference, learned Counsel has placed reliance upon a decision of this Court in Ganga Prasad Rai v. Kedar Nath and Another, 2019 (3) ARC 624. Learned Counsel for the plaintiff has invited the attention of the Court towards that part of the decision, where the principle forbidding the Court from examining a party's case never pleaded, has been expressed in the following words:

"41. The rules relating to pleadings are set out in Order 6 C.P.C. under the heading "Pleadings Generally". The case of a party is set forth in the pleadings in the plaint. The plaint must conform to the provisions of Order 6 C.P.C. The law relating to the pleadings is stated with clarity in the C.P.C. and settled with finality in various judgments of the courts. The party has to state its case in a concise form in the plaint/written statement by pleading all material facts. The pleadings should not be vague. However, while construing the pleadings, the courts do not adopt a hypertechincal approach. The purpose of the pleadings is also to alert the adversary to the case of the party. This will enable the adversary/opposite party to assert its defence and or refutal in its pleadings and tender its evidence in regard thereto. The law of pleadings ensures that no party can spring a surprise upon its adversary and render the latter without opportunity to defend itself. The law of pleadings poses certain limitations on parties as well as the courts. The courts cannot travel beyond pleadings and cannot

grant relief which is not sought. Similarly, the court cannot receive evidence of facts which are not stated in the pleadings."

11. On the merits of the plea, Mr. Vinay Kumar Mishra, learned Counsel, submits that the lower Appellate Court went utterly wrong in law in holding the suit to be premature. He points out that the reasoning of the lower Appellate Court is based on a flawed perception about the law relating to maturity of the cause of action. It is the learned Counsel's submission that the lower Appellate Court committed a manifest error of law in holding that the time period for performance being two years, determinable from the date of the suit agreement, which is one dated 02.05.1980, the suit instituted on 13.04.1982 was premature. He submits that the manifest error lies in ill appreciating the way the cause of action would arise in a case, where the defendant repudiates his liability under a contract to sell immovable property by disowning the covenant as an instrument not at all embodying a bona fide agreement between parties to sell. According to the learned Counsel, whenever the vendor says that for whatever reason he disowns a contract to sell or repudiates it in any manner, the period of time at the end of which performance falls due, becomes irrelevant. In the face of that kind of a stand by the vendor, cause of action arises immediately. It is here that the lower Appellate Court has erred in insisting, in the submission of Mr. Mishra, that the plaintiff ought to have waited for the passage of two years from the date of suit agreement before instituting the suit. In support of his submission, Mr. Mishra has placed reliance upon a decision of this Court in **Malkhan Singh v. Raghubir Singh, AIR 1981 Allahabad 96**. He has drawn the attention of this Court towards the decision **in Malkhan Singh** *(supra)*, where it is held:

"15. In regard to the last submission made by the learned counsel for the appellant that the suit was not maintainable as it was premature. In regard to this submission also. In my opinion, it has no substance. In regard to this question also there was no plea in the written statement nor any issue for any argument either before the trial court or the appellate court nor any grounds was taken before the lower appellate court or before this Court. The only argument which is now sought to be made is that the appellant could have executed the sale deed by 4th June, 1971 and since the suit was filed on 2-6-1971, the suit was premature. This argument is also fallacious. In the agreement the appellant had agreed to execute the sale deed by 4th June, 1971. On 6th May, 1971 a notice was sent to the appellant to execute the sale deed by virtue of the agreement dated 5-9-1970. This notice was not accepted by the appellant and was served by refusal. The case of the appellant throughout had been that he had not executed the agreement at all. In the circumstance, the suit cannot be said to be premature as it was filed after the appellant had clearly refused to execute the sale deed in favour of the plaintiff-respondent. In the circumstances, I do not find that the suit is premature. There is another aspect of the matter. On the date when the decree was passed by the trial court, the suit was clearly maintainable and even till that date the appellant had not signified his assent to execute the sale deed, therefore, it cannot be said that the decree passed by the trial court was in any manner illegal."

12. Mr. Mahtab Alam, learned Counsel for the defendant, has refuted the submissions of Mr. Mishra on both scores. He has urged that so far as the suit being premature is concerned, that plea is based on unrebutted facts discernible from the plaint. It is not a plea that had to figure in the written statement and tried in accordance with law. The point is one that lends itself to the exercise of power by the Court akin to that under Order VII Rule 11 of the Code. It is a case, where on a reading of the plaint, the Court could determine at any stage that the suit, when instituted, was clearly premature. According to Mr. Mahtab Alam, no evidence was required to prove it. As such, in the submission of learned Counsel for the defendant, the findings of the lower Appellate Court cannot be faulted on ground that there was no pleading by the defendant to consider or sustain such a plea.

13. Repelling the other submission of Mr. Mishra, the learned Counsel for the defendant submits that once a period of time is specified in a contract at the end of which performance falls due, a suit instituted prior to expiry of that period is clearly premature. In his submission, no cause of action arose in this case on the date when the suit was instituted, inasmuch as the period of two years reckoned from the date of execution of the contract was not yet over. Mr. Mahtab Alam, learned Counsel for the defendant, emphatically submits that the availability, including the prematurity of the cause of action, is to be judged with reference to the date when the suit was instituted. Subsequent events or the passage of time would not supply the want or contribute to the maturity of the cause of action. In support of his submission on this count, learned Counsel for the defendant has reposed faith in the decision of this Court in **Harihar Prasad and others v. Udaibir Singh and another 1978 AWC 79,** where it was held by Hari Swarup, J. thus :

"3. The last contention raised by the learned counsel is that the suit was liable to be dismissed as it was premature. The submission is that the alleged agreement was dated May 19, 1969 and, provided two months time to the transferor to execute the sale. The suit had been filed on July 11, 1969, i.e before the expiry of the two months period envisaged by the agreement.

4. There appears prima facie merit in each one of the contentions raised by the learned counsel for the appellant. However, in view of the fact that the suit had been instituted before the expiry of the two months' period contemplated by the agreement, the suit was liable to be dismissed on the ground that it was premature. I accordingly do not consider it necessary to deal with the other points raised by the learned counsel for the appellant for purposes of the decision of the appeal.

5. Article 54 of Schedule E to the Limitation Act prescribes the period of limitation for a suit for specific performance of a contract. The time for filing of the suit begins to run from:

"the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."

In the present case as the date was fixed as two months from the date of the agreement, the limitation will commence running from 19-7-1960 and the

suit could not have been filed before the date had expired.

6. Clause (e) of rule 1 of Chapter VII of the Code of Civil Procedure requires that the plaint shall contain the facts constituting the cause of action and the date when it arose. In the case of specific performance of a contract the cause of action arises only after the time for the performance of the contract expires. In the present case, the time to perform the contract had not expired till 11-7-1969 when the suit was filed. The plaintiff thus had no cause of action for maintaining the suit under Section 9 of the of the Specific Relief Act.

7. In Gulzar Singh v. Kalyan Chand, ILR XV 399 it was held that "a plaintiff is not entitled to a decree in his suit unless by proof or admission or default of pleading, he shows that when he instituted that suit he was entitled to a decree." In Dorga Prasad v. Secy. of State, AIR 1945 PC 62, it was pointed out that the relief claimed in the suit must be confined to matters existing at the date when the suit was instituted. In U Ba Maung v. U Chit Halaing, AIR 1941 Rangoon 27, the observation in Smith v. Heptanstall, AIR 1938 Rangoon 134 was repeated which was to the following effect:

"Nothing arising after action brought can either create a new, or complete a then incomplete, cause of action entitling the plaintiff to any relief in that same then existing suit."

Applying the principles of law laid down in these cases it must be held that the plaintiff had instituted the suit for specific performance of the alleged contract on a date when the suit did not lie because the defendant still had time to perform the contract and could not be held to committed default. The suit could have been filed only after the defendant had committed the default in performing the contract. No decree for specific performance of contract could thus be passed in favour of the plaintiff in the present suit. The relief available under the Specific Relief Act is a discretionary relief and the court could not have exercised its discretion in favour of the plaintiff in a suit for the filing of which the limitation had not even begun to run."

14. This Court has keenly considered the submissions advanced by learned Counsel for both parties and perused the record. Article 54, that figures in Part II of the First Division of the Schedule to the Limitation Act, 19632, reads as follows:

Description of Suit	**Period of Limitation**	**Time from which period begins run**
54. For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

15. The aforesaid Article is to be read in conjunction with the provisions of Section 2(j) and 3 of the Act of 1963. The Act is a statute of limitation that provides

for the time prescribed, within which various proceedings, including suits, appeals, revisions, or applications of different kind and in various jurisdictions have to be instituted. It is neither the purpose or the object of the Act of 1963 to mandate when the cause of action for a particular kind of a suit would arise or to determine when a cause of action for a particular suit would become mature. It is neither the subject nor the substance of this statute. In keeping with its object and subject, the Act nowhere forbids that a suit instituted prior to a point of time indicated in the schedule, when limitation would begin to run, is premature. The object and the subject of the Act is to fetter out old and stale claims that the law regards on ground of wider public policy, no longer worthy of determination on merits. The statute is designed to give effect to one of the most fundamental principles that the law comes to aid of the vigilant and not those who sleep over their rights. In keeping with the aforesaid purpose of the Act of 1963, the schedule indicates a point of time for limitation to commence. It does not mean at all that a suit instituted prior in point of time to that mentioned in the schedule to the Act, for a particular kind of suit, must be regarded as premature. The prematurity of the cause of action has to be tested on other parameters of the law. In a suit relating to breach of contract, of which a suit for specific performance is one specie, the maturity or prematurity of the cause of action may well depend on the terms of the contract.

16. Article 54 of the Act of 1963 would certainly not be relevant to the matter. It would be relevant for the purpose of reckoning limitation; not the maturity of the cause of action. In the opinion of this Court where a date is fixed for the purpose of performance of a contract relating to the sale of an immovable property, but the vendor says that he never entered into that agreement or it is forged, or raises a plea of non est factum or still more, like the case here, asserts that the contract does not at all embody the true intention of parties about a solemn promise to sell the property, but one merely to serve as a security, the breach occurs as soon as this stand is taken (by the vendor). The cause of action arises immediately. There is another facet of the matter. It is that submission of the learned Counsel for the defendant that the cause of action has to be judged with reference to the date when it arises and cannot be perfected pending suit, if it is premature on the date of the suit.

17. In view of what this Court has held regarding the maturity of the cause of action in the case of a suit for specific performance, where the vendor denies the existence of the contract or otherwise repudiates his liability, this facet of the defendant's plea does not require to be squarely determined. But, since this plea has been urged with much force and on the authority of **Harihar Prasad** *(supra),* it may well be examined. The principle that this Court followed in Harihar Prasad is founded on the authority of an old Rangoon decision in **Smith vs. Heptanstall, AIR 1938 Rangoon 134** which applies to what are called jurisdictional facts. These are facts which vest the Court with jurisdiction to try the suit. If these be wanting on the date when the suit was instituted, a pendente lite emergence of jurisdictional facts would not relate back to the date of institution of the suit and serve to supply a total lack of jurisdiction. But, this is not true of facts, such as expiry of the particular period of time at the end of which a right accrues. A right that accrues

on the expiry of a certain period of time is, no doubt, a deficiency, if the time stipulated by a contract has not expired. But, it would not lead to the Court being totally or inherently without jurisdiction. If that plea is promptly raised, the Court may return the plaint or dismiss the suit with liberty to bring it afresh, on the expiry of time when the cause of action matures.

18. The view that this Court takes is squarely supported by the decision of S.D. Agarwal, J. in **Malkhan Singh** *(supra)* on both facets of the matter that have been considered by His Lordship, as would appear from the decision in Malkhan Singh. The earlier decision in Harihar Prasad relied upon by the defendant was not considered in **Malkhan Singh**. If it were just these two conflicting authorities, both rendered by learned Single Judges of this Court, this Court's agreement with the principle laid down in **Malkhan Singh** might have necessitated reference to a larger Bench. But the issue is no longer res integra in view of the decision of the Supreme Court in **Vithalbhai (P) LTD. v. Union Bank of India (2005) 4 SCC 315.**

19. The appeal before their Lordships of the Supreme Court arose from a suit for eviction, mesne profits, declaration and perpetual injunction, brought by the lessor against his lessee, who held on a fixed term lease. However, on service of a notice to deliver vacant possession to the lessor on the date of end of the lease term, the lessee responded by refusing to vacate. He also denied the lessor's entitlement to recover possession on ground that the lessor's title had come to an end due to eviction by a paramount title holder. In those circumstances, the suit was instituted by the lessor twelve weeks prior to expiry of term of the lease. It was in those facts and circumstances that the lessee raised a plea about the suit being premature. The suit was tried on the original side of the Calcutta High Court, where the learned Single Judge repelled the plea about the suit being premature. On merits, the suit was decreed. A Division Bench, on appeal, reversed the decree, leading the unsuccessful lessor to appeal by special appeal. Their Lordships of the Supreme Court, after a consideration of the plaintiff's submissions about the suit not being premature, expressed opinion that it was not indeed premature. The plaintiff-lessor's submission in this regard and their Lordships remarks in **Vithalbhai (P) Ltd.** *(supra)* read thus:

"8. The learned counsel for the plaintiff-appellant submitted that in the present case the suit cannot be said to have been filed as premature on the date of its institution. He submits that in the response dated 8-11-1983, the defendant-respondent had clearly disputed the plaintiff's entitlement to evict the defendant-respondent on 25-6-1984, the date of expiry of the lease and therefore a cloud was cast on the title of the plaintiff. The plaintiff was therefore fully justified in bringing the suit after the receipt of the reply dated 8-11-1983. In the alternative, it was submitted that assuming that the suit was premature on the date of its institution, it became ripe during its pendency and was certainly so on the date on which the written statement was filed by the defendant, and that the court has the power to take notice of such event and, therefore, to decree the suit.

9. In our opinion, a suit based on a plaint which discloses a cause of action is not necessarily to be dismissed on trial

solely because it was premature on the date of its institution if by the time the written statement came to be filed or by the time the court is called upon to pass a decree, the plaintiff is found entitled to the relief prayed for in the plaint. Though there is no direct decision available on the point but a few cases showing the trend of judicial opinion may be noticed."

20. After the decisive remarks in paragraph no. 9 of the report in **Vithalbhai (P) Ltd.** *(supra),* their Lordships proceeded to undertake a copious review of authority on the point and summarized the position of the law:

"20. No amount of waiver or consent can confer jurisdiction on a court which it inherently lacks or where none exists. The filing of a suit when there is cause of action though premature does not raise a jurisdictional question. The claim may be well merited and the court does have jurisdiction to hear the suit and grant the relief prayed for but for the fact that the plaintiff should have waited a little more before entering the portals of the court. In such a case the question is one of discretion. In spite of the suit being premature on the date of its institution the court may still grant relief to the plaintiff if no manifest injustice or prejudice is caused to the party proceeded against. Would it serve any purpose, and do the ends of justice compel the plaintiff being thrown out and then driven to the need of filing a fresh suit -- are pertinent queries to be posed by the court to itself.

21. Where the right to sue has not matured on the date of the institution of the suit an objection in that regard must be promptly taken by the defendant. The court may reject the plaint if it does not disclose a cause of action. It may dismiss the suit with liberty to the plaintiff to file a fresh suit on its maturity. The plaintiff may himself withdraw the suit at that stage and such withdrawal would not come in the way of the plaintiff in filing the suit on its maturity. In either case, the plaintiff would not be prejudiced. On the other hand, if the defendant by his inaction amounting to acquiescence or waiver allows the suit to proceed ahead then he cannot be permitted to belatedly urge such a plea as that would cause hardship, maybe irreparable prejudice, to the plaintiff because of lapse of time. If the suit proceeds ahead and at a much later stage the court is called upon to decide the plea as to non-maintainability of the suit on account of its being premature, then the court shall not necessarily dismiss the suit. The court would examine if any prejudice has been caused to the defendant or any manifest injustice would result to the defendant if the suit is to be decreed. The court would also examine if in the facts and circumstances of the case it is necessary to drive the plaintiff to the need of filing a fresh suit or grant a decree in the same suit inasmuch as it would not make any real difference at that stage if the suit would have to be filed again on its having matured for filing.

22 We may now briefly sum up the correct position of law which is as follows:

A suit of a civil nature disclosing a cause of action even if filed before the date on which the plaintiff became actually entitled to sue and claim the relief founded on such cause of action is not to be necessarily dismissed for such reason. The question of suit being premature does not go to the root of jurisdiction of the court; the court entertaining such a suit and

passing decree therein is not acting without jurisdiction but it is in the judicial discretion of the court to grant decree or not. The court would examine whether any irreparable prejudice was caused to the defendant on account of the suit having been filed a little before the date on which the plaintiff's entitlement to relief became due and whether by granting the relief in such suit a manifest injustice would be caused to the defendant. Taking into consideration the explanation offered by the plaintiff for filing the suit before the date of maturity of cause of action, the court may deny the plaintiff his costs or may make such other order adjusting equities and satisfying the ends of justice as it may deem fit in its discretion. The conduct of the parties and unmerited advantage to the plaintiff or disadvantage amounting to prejudice to the defendant, if any, would be relevant factors. A plea as to non-maintainability of the suit on the ground of its being premature should be promptly raised by the defendant and pressed for decision. It will equally be the responsibility of the court to examine and promptly dispose of such a plea. The plea may not be permitted to be raised at a belated stage of the suit. However, the court shall not exercise its discretion in favour of decreeing a premature suit in the following cases: (i) when there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event; (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose; (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the court's jurisdiction; and (iv) where the lis is not confined to parties alone and affects and involves persons other than those arrayed as parties, such as in an election petition which affects and involves the entire constituency. (See Samar Singh v.Kedar Nath [1987 Supp SCC 663] .) One more category of suits which may be added to the above, is: where leave of the court or some authority is mandatorily required to be obtained before the institution of the suit and was not so obtained."

21. This Court, bearing in mind the facts of the present case, considers it appropriate also to refer to the remarks of their Lordships, next following the principle extracted. In paragraph no. 23 of the report in **Vithalbhai (P) Ltd**., it has been held:

"23. In the case at hand, the act of the plaintiff filing the suit before 25-6-1984 cannot be said to be malicious or intended to overreach the Court. The defendant's reply dated 8-11-1983 prompted the plaintiff in filing the suit inasmuch as the plaintiff reasonably thought that a cloud was already cast on his entitlement to recover the property and he should promptly approach the Court. True, the defendant could have changed his mind and thought of delivering the possession of the property to the plaintiff on or after 25-6-1984 -- the date whereafter only the suit could ordinarily have been filed and in that case there would have been no occasion at all for filing the suit. The defendant filed its written statement much after that date. The objection as to maintainability of the suit was taken in the written statement. If only it would

have been pressed for decision and the Court would have formed that opinion at the preliminary stage then the plaintiff could have withdrawn the suit or the Court could have dismissed the suit as premature. In either case, the plaintiff would have filed a fresh suit based on the same cause of action soon after 25-6-1984. By the time the suit came to be decided on 12-2-1992, the dismissal of the suit on the ground of its being premature would have been a travesty of justice when the plaintiff was found entitled to a decree otherwise. The learned Single Judge rightly overruled the defendant's objection and directed the suit to be decreed. The Division Bench ought not to have interfered with the judgment and decree passed by the learned Single Judge."

22. This being so, this Court, like the Courts below, has found it to be a case, where the defendant has disowned the suit agreement and his liability under it, giving rise to a mature and perfect cause of action before the suit was instituted. In view of the defendant's stand, there is absolutely no scope for the plaintiff to have waited for the two years contemplated under the suit agreement to expire.

23. In the present case, unlike **Vithalbhai (P) Ltd**. (supra), no plea regarding prematurity was ever raised in the written statement. Had it been done, though in error, the suit might have been dismissed as premature, with liberty to sue afresh, when the cause of action had ripened. Here, since the plea about prematurity was never raised, it would indeed be the greatest travesty of justice to hold the plaintiff disentitled at the appeal stage, on that ground, where otherwise, both the Courts have found the plaintiff entitled to a decree for specific performance. This again, is the most hypothetical proposition on which the defendant's case can receive consideration. On facts, however, this proposition or this facet of the defendant's case need not be considered.

24. It must also be remarked that even if the suit were to be held as one instituted before time, the prematurity would not be one that relates to a jurisdictional fact. The Court, therefore, would have jurisdiction to entertain the suit and grant relief, particularly, when no plea to that effect was raised by the defendant before the Court of trial or in the grounds of appeal. It must also be added that the prematurity does not fall into any of one or more of the five classes enumerated by the Supreme Court in Vithalbhai (P) Ltd. (supra), where premature institution cannot be ignored. Thus, relief of specific performance cannot be denied, holding the suit to be premature.

25. In view of what has been said above, the substantial question of law formulated and involved in the plaintiff's appeal, is answered in the negative in the terms hereinbefore detailed.

26. This Court now proceeds to consider the defendant's appeal. The first of the two questions required to be answered is whether the Courts below are justified in law to admit secondary evidence of the suit agreement. There is no issue on facts between parties that the suit agreement was never filed by the plaintiff on the basis of a stand that it was lost on 15.02.1982, when the plaintiff was proceeding from the District Court Post Office to his village, after dispatching the registered notice demanding execution of the sale deed. A report about the loss of this document was

made to the Police Station Harduaganj on 19.02.1982. It was in those circumstances that a certified copy of the suit agreement was filed. The issue assumed some special significance because of the defendant's case that he had refunded a sum of Rs. 2,920/- to the plaintiff, who had, upon receipt of the said sum, discharged the agreement by an endorsement made on the reverse of the document. This stand of the plaintiff was in keeping with his case that the suit agreement never embodied a transaction about the contemplated sale, but one that was no more than a security for repayment of money lent by the plaintiff.

27. The merit of this case of the defendant's has been carefully examined by the two Courts below. They have, for a fact, concurrently disbelieved him on this score for cogent reasons assigned. Some of the sterling features of the reasoning that have weighed with the two Courts below to disbelieve the defendant, are that the fact that the defendant did not take back the original agreement from the plaintiff, after the plaintiff had endorsed discharge of his debt and forsaken his right to specific performance, is a conduct which no prudent person would exhibit; the fact that the earnest money advanced under the agreement was a figure of Rs. 3,440/- and that admittedly refunded was a figure of Rs. 2,920/-, does not make it to be a case happy on figures about a case of refund of debt; the fact that in response to the notice of demand to execute the sale deed, no reply came from the defendant, pointing out that he had refunded the earnest and the transaction had ended. It is on the basis of all this evidence, amongst others, that the two Courts below have disbelieved the defendant's case of a discharge of the suit agreement upon repayment of the earnest. These findings, without quarrel, are pure findings of fact, not amenable to our scrutiny under Section 100 of the Code. The only issue involved, that predicates the substantial question of law under consideration, is whether secondary evidence of the suit agreement was validly admitted.

28. Mr. Mahtab Alam, learned Counsel for the defendant, submits that in the absence of foundation being laid for reception of secondary evidence, as postulated under Section 65(c) of the Indian Evidence Act, 1872, the Court could never have permitted it. The question pertains to admissibility of that evidence. Admissibility of evidence may arise generally in two situations : one where the document is impeached as inadmissible on account of some legal bar or its relevance, say a will that is not attested by two marginal witnesses, or secondly, it may arise in the context of the mode of proof of that document. The objection as to mode of proof of document has to be taken at the earliest stage, when the document is laid in evidence and if not taken, it cannot be subsequently raised, once the document is admitted in evidence. The reason is not far to seek. If an objection about the mode of proof of a document were to be taken, as soon as it is laid, the person relying on the document can take steps to strictly prove the document in accordance with law. Reference in this connection may be made to the decision of the Supreme Court in **R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Another, (2003) 8 SCC 752**, where it has been held :

"20. The learned counsel for the defendant-respondent has relied on Roman

Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."

29. However, if the party taking the objection urges it later on in appeal, the other side might be prejudiced unfairly in proving that what he could have easily done during trial. Here, the objection seems to have been taken by the defendant before the Courts below and urged with some seriousness before the lower Appellate Court. The plaintiff, on his part, took steps to lay the necessary foundation for reception of secondary evidence by filing what appears to be a copy of the report dated 19.02.1982, lodged with Police Station Harduaganj, about loss of the suit agreement.

30. Mr. Mahtab Alam, learned Counsel for the defendant, has urged before

this Court that the original report about the loss of the document was never filed and, therefore, the foundation laid for reception of secondary evidence is not valid. This Court is afraid that this objection is specious, because the defendant waived formal proof of this document before the lower Appellate Court, a fact recorded in that judgment. In the opinion of this Court, therefore, sufficient foundation was laid by the plaintiff to lead secondary evidence about contents of the suit agreement and whatever objection about the mode of proof, if at all could be taken, was given up by the defendant before the lower Appellate Court.

31. In view of what this Court has found, as hereinabove said, substantial question of law 'A' formulated in this appeal is answered in the affirmative.

32. The other substantial question of law marked as 'B' is about the validity of the decree of refund of the earnest passed by the lower Appellate Court. In our opinion, the said question hardly arises in this appeal, in view of what the two Courts below have held on facts. Both the Courts below have found it to be a case where specific performance ought to be decreed, considering the evidence and the conduct of parties, relevant to the issue. There is a remark by the lower Appellate Court, where it is said that the plaintiff has served a notice of demand to execute the sale deed and has said in his evidence that he has been ever ready and willing and is still ready and willing to secure execution of the sale deed in his favour, in terms of the suit agreement. It has also been recorded that to this assertion of the plaintiff's in his examination-in-chief, there is no cross-examination undertaken to contradict or impeach the plaintiff's stand in this regard. The two judgments have noticed overwhelming evidence that leans in favour of specific performance. Once there are valid conclusions recorded in favour of specific performance, there is little scope to examine whether the lower Appellate Court committed a manifest error in passing a decree for refund of the earnest. To the contrary, the lower Appellate Court proceeded to pass that decree, holding the suit to be premature, which this Court, in answering the substantial question of law formulated on the plaintiff's appeal, has held to be erroneous. Nevertheless, it must be said in the passing that if on findings of the Courts below, an issue about the validity of the decree directing refund of earnest were to arise, that relief could not have been granted, as the plaintiff has not at all sought relief regarding refund of any earnest money or deposit paid or made by him, in the alternative, if his claim for specific performance were to fail. In a situation of that kind, to pass a decree for refund of earnest as the lower Appellate Court has done, would be impermissible in view of the provisions of Section 22 (1) (b) of the Specific Relief Act, 1963. In this view of the matter, the substantial question of law marked 'B' really does not arise in this case at all.

33. The conclusions on the various substantial questions of law involved in the two appeals would inevitably lead to the restoration of the Trial Court's decree, directing specific performance. But, the question that still survives in the matter of passing that decree is about the terms on which the decree ought to be passed. Should it be passed strictly in terms of the suit agreement and on payment of the balance sale consideration contracted

between parties, or ought this Court require the plaintiff to pay something more to the defendant in view of the 39 long years, that have passed when the suit was instituted and the decision of this appeal? Bearing in mind the astronomical rise in prices of real properties, the Courts of late have introduced a principle where to do some equity to parties, who are not themselves directly responsible for the long delays of litigation, when compelled to specifically perform almost ancient contracts, are to be given succor that lends some relevance and sense in monetary worth of the present time. In this regard, reference may be made to the decision of the Supreme Court in **Ferrodous Estates (Pvt.) Ltd. v. P. Gopirathnam (Dead) and Others, 2020 SCC OnLine SC 825. In Ferrodous Estates (Pvt.) Ltd**. *(supra),* their Lordships undertook an extensive survey of their authority in the context of exercising discretion under Section 20 of the Specific Relief Act, 1963, vis-a-vis the issue of phenomenal increase in the price of real properties. It would be of immense profit to refer to what has been said in **Ferrodous Estates (Pvt.)** Ltd., which reads:

"41. Given section 20, the courts have uniformly held that the mere escalation of land prices after the date of the filing of the suit cannot be the sole ground to deny specific performance. Thus, in Nirmala Anand v. Advent Corporation (P) Ltd., (2002) 8 SCC 146, a three-Judge bench of this Court held:

"3. The appeal was heard by a two-Judge Bench. The learned Judges have concurred that the appellant is entitled to specific performance of the agreement dated 8-9-1966. There has, however, been difference of opinion between learned Judges on the condition in respect of additional amount that may be paid by the appellant to Respondents 1 and 2 and, therefore, the matter has been placed before this three-Judge Bench. The opinions of the learned Judges are reported in Nirmala Anand v. Advent Corpn. (P) Ltd. [(2002) 5 SCC 481] In the opinion expressed by Brother Justice Doraiswamy Raju, the appellant has been directed to pay a sum of Rs. 40,00,000 in addition to the sum already paid to Respondents 1 and 2 and in the view of Brother Justice Ashok Bhan, it would be unfair to impose the condition of payment of Rs. 40,00,000 and the appellant is entitled to specific performance of agreement to sell on the price mentioned in the agreement."

xxx xxx xxx

"5. The appellant is prepared and willing to take possession of the incomplete flat without claiming any reduction in the purchase price and would not hold Respondents 1 and 2 responsible for anything incomplete in the building. It has been concurrently held that she did not commit breach of the agreement to sell. She has always been ready and willing to perform her part of the agreement. The appellant is ready and willing to pay to Respondents 1 and 2 interest on the sum of Rs. 25,000. The breach was committed by Respondents 1 and 2 as noticed hereinbefore. It is evident that the appellant is ready to take incomplete flat and pay further sum as noticed, most likely on account of phenomenal increase in the market price of the flat during the pendency of this litigation for over three decades. We see no reason why the appellant cannot be allowed to have, for her alone, the entire benefit of manifold mega increase of the value of real estate property in the locality. In our view, it would not be unreasonable

and inequitable to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of the flat in question. There is no reason why the appellant, who is not a defaulting party, should not be allowed to reap to herself the fruits of increase in value.

6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."

xxx xxx xxx

"8. Having regard to the totality of the circumstances, we would direct the appellant to pay to Respondents 1 and 2 a sum of Rs. 6,25,000 instead of Rs. 25,000. The amount of Rs. 40,00,000 wherever it appears in the opinion of Justice Doraiswamy Raju, would be read as Rs. 6,25,000. All other conditions will remain."

42. In P.D'Souza v. Shondrilo Naidu, (2004) 6 SCC 649, this Court held:

"39. It is not a case where the defendant did not foresee the hardship. It is furthermore not a case that non-performance of the agreement would not cause any hardship to the plaintiff. The defendant was the landlord of the plaintiff. He had accepted part-payments from the plaintiff from time to time without any demur whatsoever. He redeemed the mortgage only upon receipt of requisite payment from the plaintiff. Even in August 1981 i.e. just two months prior to the institution of suit, he had accepted Rs. 20,000 from the plaintiff. It is, therefore, too late for the appellant now to suggest that having regard to the escalation in price, the respondent should be denied the benefit of the decree passed in his favour. Explanation I appended to Section 20 clearly stipulates that merely inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of sub-section (2) of Section 20.

40. The decision of this Court in Nirmala Anand [(2002) 5 SCC 481] may be considered in the aforementioned context.

41. Raju, J. in the facts and circumstances of the matter obtaining therein held that it would not only be unreasonable but too inequitable for courts to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of the flat in question, preserved all along by Respondents 1 and 2 by keeping alive the issues pending with the authorities of the Government and the municipal body. It was in the facts and circumstances of the case held : (SCC p. 501, para 23)

"23. ... Specific performance being an equitable relief, balance of equities have also to be struck taking into account all these relevant aspects of the matter, including the lapses which occurred and parties respectively responsible therefor. Before decreeing specific performance, it is obligatory for courts to consider whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into (sic consideration) the totality of circumstances of each case."

43. Bhan, J., however, while expressing his dissension in part observed : (SCC pp. 506 & 507, paras 38 & 40)

"38. It is well settled that in cases of contract for sale of immovable property the grant of relief of specific performance is a rule and its refusal an exception based on valid and cogent grounds. Further, the defendant cannot take advantage of his own wrong and then plead that decree for specific performance would be an unfair advantage to the plaintiff.

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40. Escalation of price during the period may be a relevant consideration under certain circumstances for either refusing to grant the decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend on the facts and circumstances of each case."

44. The learned Judge further observed that delay in performance of the contract due to pendency of proceedings in court cannot by itself be a ground to refuse relief of specific performance in absence of any compelling circumstances to take a contrary view. .....

xxx xxx xxx

45. The said decision cannot be said to constitute a binding precedent to the effect that in all cases where there had been an escalation of prices, the court should either refuse to pass a decree on specific performance of contract or direct the plaintiff to pay a higher sum. No law in absolute terms to that effect has been laid down by this Court nor is discernible from the aforementioned decision."

45. In Satya Jain v. Anis Ahmed Rushdie, (2013) 8 SCC 131, this Court held:

"40. The discretion to direct specific performance of an agreement and that too after elapse of a long period of

time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles. The parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act, 1963 cannot be entrapped within any precise expression of language and the contours thereof will always depend on the facts and circumstances of each case. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive without any real difficulty. It must however be emphasised that efflux of time and escalation of price of property, by itself, cannot be a valid ground to deny the relief of specific performance. Such a view has been consistently adopted by this Court. By way of illustration opinions rendered in P.S. Ranakrishna Reddy v. M.K. Bhagyalakshmi [(2007) 10 SCC 231] and more recently in Narinderjit Singh v. North Star Estate Promoters Ltd. [(2012) 5 SCC 712 : (2012) 3 SCC (Civ) 379] may be usefully recapitulated.

41. he twin inhibiting factors identified above if are to be read as a bar to the grant of a decree of specific performance would amount to penalising the plaintiffs for no fault on their part; to deny them the real fruits of a protracted litigation wherein the issues arising are being answered in their favour. From another perspective it may also indicate the inadequacies of the law to deal with the long delays that, at times, occur while rendering the final verdict in a given case. The aforesaid two features, at best, may justify award of additional compensation to the vendor by grant of a price higher than what had been stipulated in the agreement which price, in a given case, may even be the market price as on date of the order of the final court.

42. Having given our anxious consideration to all the relevant aspects of the case we are of the view that the ends of justice would require this Court to intervene and set aside the findings and conclusions recorded by the High Court of Delhi in Anis Ahmed Rushdie v. Bhiku Ram Jain [Anis Ahmed Rushdie v. Bhiku Ram Jain, RFA (OS) No. 11 of 1984, decided on 31-10-2011 (Del)] and to decree the suit of the plaintiffs for specific performance of the agreement dated 22-12-1970. We are of the further view that the sale deed that will now have to be executed by the defendants in favour of the plaintiffs will be for the market price of the suit property as on the date of the present order. As no material, whatsoever is available to enable us to make a correct assessment of the market value of the suit property as on date we request the learned trial Judge of the High Court of Delhi to undertake the said exercise with such expedition as may be possible in the prevailing facts and circumstances."

46. In K. Prakash v. B.R. Sampath Kumar, (2015) 1 SCC 597, this Court held:

"18. Subsequent rise in the price will not be treated as a hardship entailing refusal of the decree for specific performance. Rise in price is a normal change of circumstances and, therefore, on that ground a decree for specific performance cannot be reversed.

19. However, the court may take notice of the fact that there has been an

increase in the price of the property and considering the other facts and circumstances of the case, this Court while granting decree for specific performance can impose such condition which may to some extent compensate the defendant owner of the property. This aspect of the matter is considered by a three-Judge Bench of this Court in Nirmala Anand v. Advent Corpn. (P) Ltd. [(2002) 8 SCC 146], wherein this Court held : (SCC p. 150, para 6)

"6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."

20. As discussed above the agreement was entered into between the parties in 2003 for sale of the property for a total consideration of Rs. 16,10,000. Ten years have passed by and now the price of the property in that area where it situates has increased by not less than five times. Keeping in mind the factual position we are of the view that the appellant should pay a total consideration of Rs. 25 lakhs, being the price for the said property."

49. In Sunkara Lakshminarasamma v. Sagi Subba Raju, (2019) 11 SCC 787, this Court held:

"9. Shri A. Subba Rao, learned counsel for the appellants was however forceful in his arguments, insofar as the suit for specific performance is concerned. According to him, the appellants herein (defendants in the suit for specific performance) would be put to hardship if the decree for specific performance is confirmed, inasmuch as there has been a huge escalation in the price of the properties since the agreement of sale. Such plea of escalation in price cannot be accepted in view of the fact that the appellants in the first instance do not have the right to question the agreement of sale. As mentioned supra, since Veeraswamy was the absolute owner of the properties including the property involved in the suit for specific performance, he had the right to enter into an agreement of sale also. This property was bequeathed to

Veeraswamy under Ext. B-4 will by Padmanabhudu. Hence, Veeraswamy was the sole owner of the property. Consequently, he had entered into an agreement of sale with Sagi Subba Raju, as far back as on 19-9-1974. The suit was filed in the year 1978, which was later transferred to another court and the same was renumbered as OS No. 72 of 1983. Since 1978, this litigation is being fought by the prospective vendee. The property of about three-and-a-half acres was agreed to be sold by Veeraswamy in favour of the prospective vendee in the year 1974 for a sum of Rs. 51,000. Such price was agreed to between the vendor as well as the prospective vendee.

10. This Court cannot imagine the value of the property as it stood in the year 1974 in the said area i.e. at Bhimavaram Village in Andhra Pradesh. Be that as it may, we find that hardship was neither pleaded nor proved by the appellants herein before the trial court. No issue was raised relating to hardship before the trial court. A plea which was not urged before the trial court cannot be allowed to be raised for the first time before the appellate courts. Moreover, mere escalation of price is no ground for interference at this stage (see the judgment of this Court in Narinderjit Singh v. North Star Estate Promoters Ltd. [Narinderjit Singh v. North Star Estate Promoters Ltd., (2012) 5 SCC 712 : (2012) 3 SCC (Civ) 379]). Added to it, as mentioned supra, the appellants do not have the locus standi to question the judgment of the Division Bench since they are not the owners of the property. As a matter of fact, Veeraswamy, the vendor of the properties, had entered the witness box before the trial court and supported all his alienations in favour of the defendants. Therefore, in our considered opinion, the Division Bench has rightly concluded in favour of Sagi Subba Raju and against the appellants and granted the decree for specific performance." "

53. The resultant position in law is that a suit for specific performance filed within limitation cannot be dismissed on the sole ground of delay or laches. However, an exception to this rule is where immovable property is to be sold within a certain period, time being of the essence, and it is found that owing to some default on the part of the plaintiff, the sale could not take place within the stipulated time. ***Once a suit for specific performance has been filed, any delay as a result of the court process cannot be put against the plaintiff as a matter of law in decreeing specific performance. However, it is within the discretion of the Court, regard being had to the facts of each case, as to whether some additional amount ought or ought not to be paid by the plaintiff once a decree of specific performance is passed in its favour, even at the appellate stage.***

(Emphasis by Court)

34. Here, the suit was most promptly instituted, so much so that the lower Appellate Court held in error that it was premature. It was instituted as soon as the plaintiff became cognizant of the fact that the defendant disowned the nature of the suit agreement as a covenant to convey property. He pursued his part of the contract by serving a notice of demand to perform through registered post, followed by institution of the suit. A look at the calendar of proceedings would indicate that the suit was instituted on 19.04.1982. It was tried and decreed for specific

performance by the Trial Court on 29.11.1983. The defendant instituted an appeal from the original decree on 18.01.1984 and on the same date, it was admitted to hearing. The appeal was heard and allowed in part by judgment and decree dated 18.09.1985, substituting the decree of specific performance, with a direction for refund of the earnest with interest. The plaintiff's second appeal before this Court was instituted on 14.10.1985 and admitted to hearing on 04.11.1985, whereas the defendant's second appeal was presented on 20.12.1985 and admitted much later on 21.02.1995. Therefore, both these appeals have remained pending before this Court since the year 1985, that is to say, for a period of about 36 years. From the commencement of the suit to terminus of these appeals, it is a period of 39 years.

35. There is nothing on record to show that the plaintiff, or for that matter, the defendant have, in any manner, contributed to the delay. It is a delay, resulting from the process of Court, which, in our opinion, cannot be put against the plaintiff to decline specific performance. At the same time, the lapse of time is so long that it has altered all monetary values and placed parties in a position that they could not have imagined in the day that they bargained the contract. To the parties who contracted, it is like time travel to the future. The demand of equity would, therefore, require the plaintiff to pay consideration for the sale, that has some monetary relevance in the present time. Unfortunately, no material has been placed by parties before this Court to assess what would be current worth of the suit property. A photostat copy of the Collector's circle rate, relating to the area where the suit property is situate, was shown to the Court - virtually produced out of pocket by learned Counsel for the defendant at the hearing. This Court cannot assess the current market value of the property on the basis of the circle rate.

36. This Court is of opinion that the plaintiff ought to pay consideration for the suit property reckoned at 1/4th value of its current market worth. This reduced consideration, the defendant must accept, to answer his old obligations that he has observed in utter breach. The current market worth of the property, that is to say, on the date of our decree, shall be assessed by the Executing Court by requiring parties to produce exemplar sale deeds proximate in time, area and on other parameters known and relevant for the purpose of assessment of market value in the determination of compensation of properties acquired by the State. The Trial Court shall do so within a period of three months of the date of receipt of a copy of this judgment, after hearing both parties. The determination of market price made by the Trial Court shall be regarded as final and not open to objection. It will form part of this decree. Upon determination of market price of the suit property, the Trial Court shall liquidate the sale consideration payable by the plaintiff at 1/4th of the current market price determined by it and intimate both the plaintiff and the defendant about it within 15 days of the determination being made. The defendant shall proceed to execute the requisite registered sale deed in favour of the plaintiff, conveying the suit property in favour of the plaintiff and shall put the plaintiff in co-sharers' possession, of all his 1/5th share in the suit property within two months next of receipt of communication of the sale consideration payable, as determined by the Trial Court. The plaintiff shall bear the entire expenses of the

execution and registration of the sale deed. Any alienation, assignment, transfer or encumbrance made by the defendant pendente lite in favour of any third party, one, more or successive, shall all be treated as void and of no consequence. In the event of default by the defendant, the plaintiff would be entitled to execution of the sale deed in terms of this decree through the process of Court.

37. Second Appeal no.1873 of 1985 stands **allowed with costs** throughout and Second Appeal 2315 of 1985 stands **dismissed** with costs throughout. Let a decree be drawn up by the Decree Section forthwith.

38. Let a copy of this judgment be communicated to the Trial Court through the learned District Judge, Aligarh by the Joint Registrar (Compliance).

(2021)05ILR A313
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2021

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

FAFO (D) No. 144 of 2021

M/s Awasthi Motors, Kanpur Nagar ...Appellant

Versus

Managing Director M/s Energy Electricals Vehicle, New Delhi & Anr. ...Respondents

Counsel for the Appellant:
Sri Shashank Tripathi

Counsel for the Respondents:

A. Civil Law – Deposit of court fee on the valuation of plaint to maintain an application u/s 12A – Commercial Courts Act, 2015: Section 2(1)(i), 2(1)(c), 3, 12A, 16, 21A; Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018: Rule 3; Civil Procedure Code, 1908: Section 149, 26, Order IV Rule 1, Order VI Rule 15-A.

Legislative Intent – Commercial Courts Act, 2015 - Section 12A - If the context does not show nor demands otherwise, the text of a statutory provision couched in a negative form ordinarily has to be read in the form of command - By using prohibitive or negative word, i.e. 'not' in conjunction with the word 'shall' and by further qualifying the phrase with the word 'unless' before the words 'the plaintiff exhausts the remedy of pre-institution mediation', a clear and unambiguous intent has been expressed to make the provision of Section 12A (1) mandatory. (Para 16)

There are negative or prohibitive words used in S. 12A(1) of the Act to clearly indicate that pre-institution mediation is mandatory or stands by way of a pre-condition to the institution of a suit proceedings involving a 'commercial dispute' of a 'specified value'. Further, the second proviso to S. 12A(3), makes it plain that the time consumed in seeking pre-institution mediation is to be excluded for the purposes of institution of the suit. Thus, the pre-institution mediation must be carried out prior and even independent to the institution of the suit proceeding that may eventually to be instituted only in the case of a failed mediation. This is to ensure amicable final settlement between the parties without litigation-that often involves long delays. (Para 18, 19, 20)

Once the institution of the suit proceeding itself has been put in abeyance by the legislature, unless a pre-institution mediation is first carried out (except where urgent interim relief is sought), it cannot be contemplated how a condition inextricably linked to the institution of the suit, namely payment of court fee on the

valuation of the plaint, can be enforced at the stage of pre-institution mediation. (Para 23)

B. The application for pre-institution mediation is mandatory in nature. That application must be entertained and dealt with independent to the institution of the suit proceedings. In fact, the institution of a suit would depend directly on the fate of the pre-institution mediation and not vice-versa. It cannot be said that an application for pre-institution mediation may be entertained only after the suit proceeding had been first instituted. The status of plaint as regular or defective is irrelevant or extraneous to the maintainability of the application for initiation of pre-institution mediation. (Para 24, 28)

Though, by way of a general principle of law, the suit proceeding may never be instituted unless the issue of court fees has been satisfactorily dealt with, yet, in the context of S. 12A of the Act, that principle would stand excluded and it would never apply to a pre-institution mediation. The two concepts stand in mutual exclusion to each other. There is no conflict between the same, either. (Para 29)

Appeal allowed. Impugned order set aside. Matter remitted. (E-3)

Precedent followed:

1. Goswami Krishna Murari Lal Vs Shiam Sunder, 1984 All LJ 1034 (Para 14)

2. U.O.I. Vs A.K. Pandey, (2009) 10 SCC 552 (Para 16)

3. Govindlal Chhaganlal Patel Vs Agricultural Produce Market Committee, (1975) 2 SCC 482 (Para 17)

Precedent distinguished:

1. A. Nawab John & ors. Vs. V.N. Subramaniyam, (2012) 7 SCC 738 (Para 7)

Present appeal has been filed against order dated 04.01.2021, passed by Presiding Officer, Commercial Court, Jhansi.

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

1. Certified copy of the formal order filed today. Taken on record.

2. Defect reported stands cured. Office to allot regular number to the appeal.

3. Heard Shri Shashank Tripathi, learned counsel for the appellant.

4. The appeal has been heard on the following question of law:-

"Whether deposit of court fee on the valuation of the plaint is a pre-condition to maintain an application under Section 12A of The Commercial Courts Act, 2015 read with Rule 3 of The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018?"

5. Present appeal has been filed under Section 13(1)A of The Commercial Courts Act, 2015 (hereinafter referred to as the Act) against the order of the Presiding Officer, Commercial Court, Jhansi (hereinafter also referred to as the 'learned court below'), dated 4.1.2021. By that order, the learned court below has rejected the appellant's application - paper no.14C/2, praying for issuance of notice to the respondent for pre-institution mediation and settlement. Also, order has been passed rejecting the other application paper no. 15C/2 filed by the appellant praying for extension of time, to deposit the deficient court fee on the valuation of the plaint, pending pre-institution mediation.

6. Briefly, the appellant is a dealer in electronic vehicles (E-rickshaws and E-carts) manufactured by the company -

respondent no.1, of which respondent no.2 is the Managing Director. Bereft of unrelated details, it may be noticed, disputes have arisen between the parties arising from the appointment of the appellant as a dealer by the respondent company. The appellant claims to have transferred Rs. 4,36,000/- to the respondent through banking channel but corresponding supply of goods has not been made to the appellant. In such circumstances, the appellant presented a plaint before the learned court below, proposing to institute a suit against the respondents, seeking delivery of the goods (in lieu of the money paid by the appellant) and for compensation. Owing to deficiency of Court fees, it was registered as Misc. Case No. 17 of 2020.

7. At the same time, besides the plaint document, the appellant had moved an application under Section 12A of the Act before the learned Presiding Officer, Commercial Court, Jhansi, seeking pre-institution mediation. That application was numbered as paper no. 14C/2. It had also applied for extension of time to deposit the deficient court fees, as reported on the plaint in the Misc. Case No. 17 of 2020. It was numbered as paper no. 15C/2. By the impugned order, the learned court below has rejected those applications on the reasoning that the plaint presented by the appellant is deficient in court fee. Relying on General Rule Civil, Section 149 Civil Procedure Code, 1908 (hereinafter referred to as the 'Code') and the decision of the Supreme Court **in A. Nawab John & Ors. Vs. V. N. Subramaniyam, (2012) 7 SCC 738**, it has been held by the learned court below that - "*The Court proceedings are conducted by General Rule Civil. Admittedly the applicant appears is more keen to get the relief, without filing the basis of suit or filing the Court fee."*

8. Relying on Section 12A of the Act read with The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (hereinafter referred to as the 'Rules') it has been submitted, that law provides for a complete Code for initiation and conduct of pre-institution mediation-by way of a mandatory pre-condition to institute a suit proceeding under the Act. Inasmuch as the Act read with the Rules only requires payment of prescribed fees for conduct of pre-institution mediation, the learned court below could not have imposed any further condition on the petitioner to deposit the entire court fee payable on the plaint. The court fee may become due only on the failure of pre-institution mediation. He would further submit; the language of the aforesaid provisions is clear. If payment of court fee is enforced at this stage, the entire purpose of seeking pre-institution mediation would fail, resulting in failure of justice.

9. The application filed by the petitioner has been rejected by the learned court below by an ex-parte order, without issuance of any notice to the respondents. Further, the reason given by the learned court is - the non-payment of the court fee on the valuation of the plaint document. Thus, the dispute and the question arising from the order passed by the learned court below is strictly a matter between the court and the appellant. The opposite party has no right to be heard at this preliminary stage of the proceeding. Therefore, no notice is required to be issued to the respondents in the present appeal.

10. Having heard learned counsel for the appellant and having perused the record, in the first place, the controversy revolves around the provisions of Section 12A of the Act and the Rules, in the context of pre-existing provisions of the Code and the General Rule Civil, as made applicable to the proceedings under the Act. In that regard, it is seen, the provisions of Section 12A of the Act were introduced upon amendment made by Act no. 28 of 2018. Thereby, Chapter IIIA was added to the Act, with retrospective effect from 3.5.2018. Section 12A of the Act reads as below:

*"**12A. Pre-Institution Mediation and Settlement**.-(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.*

(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority authorised by the Central Government under sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

(5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996(26 of 1996)]".

11. Pursuant to enactment of Section 12A and in exercise of powers conferred under Section 21A of the Act, the Central Government has published and enforced the Rules. Relevant to the issue before this Court, Rule 3 of the Rules reads as below:-

*"**3. Initiation of mediation process**.- (1) A party to a commercial dispute may make an application to the Authority as per Form-1 specified in Schedule-I, either online or by post or by hand, for initiation of mediation process under the Act along with a fee of one thousand rupees payable to the Authority either by way of demand draft or through online;*

(2) The Authority shall, having regard to the territorial and pecuniary jurisdiction and the nature of commercial dispute, issue a notice, as per Form-2 specified in Schedule-I through a registered or speed post and electronic means including e-mail and the like to the

opposite party to appear and give consent to participate in the mediation process on such date not beyond a period of ten days from the date of issue of the said notice.

(3) Where no response is received from the opposite party either by post or by e-mail, the Authority shall issue a final notice to it in the manner as specified in sub-rule (2).

(4) Where the notice issued under sub-rule (3) remains unacknowledged or where the opposite party refuses to participate in the mediation process, the Authority shall treat the mediation process to be a non-starter and make a report as per Form 3 specified in the Schedule-I and endorse the same to the applicant and the opposite party.

(5) Where the opposite party, after receiving the notice under sub-rule (2) or (3) seeks further time for his appearance, the Authority may, if it thinks fit, fix an alternate date not later than ten days from the date of receipt of such request from the opposite party.

(6) Where the opposite party fails to appear on the date fixed under sub-rule (5), the Authority shall treat the mediation process to be a non-starter and make a report in this behalf as per Form 3 specified in Schedule-I and endorse the same to the applicant and the opposite party.

(7) Where both the parties to the commercial dispute appear before the Authority and give consent to participate in the mediation process, the Authority shall assign the commercial dispute to a Mediator and fix a date for their appearance before the said Mediator.

(8) The Authority shall ensure that the mediation process is completed within a period of three months from the date of receipt of application for pre-institution mediation unless the period is extended for further two months with the consent of the applicant and the opposite party."

12. Then, by virtue of Section 3 of the Act, at present thirteen 'Commercial Courts' have been created in the State of Uttar Pradesh for the purpose of ensuring speedy disposal of 'commercial disputes' of a 'specified value', not less than three lakh Rupees. Under Section 2(1)(c) of the Act, 'commercial dispute' has been defined as - disputes arising out of ordinary transaction of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents. Then, by virtue of Section 2(1)(i) of the Act, 'specified value', in relation to valuation of a suit involving a commercial dispute, has been defined to mean - the value of the subject matter in respect of a suit, not less than three lakh rupees or higher value as may be notified.

13. As to the applicability of the Code - to a suit in respect of a 'commercial dispute' of a 'specified value', Section 16 of the Act provides that the Code as amended by the Schedule to the Act, shall apply and the 'Commercial Court' shall follow the provisions of the Code as amended by the Act. By virtue of the Schedule to the Act, a proviso has been appended to Section 26 of the Code regarding institution of a suit

proceeding. Thus, the affidavit required under section 26(2) of the Code must conform to the prescription of Order VI, Rule 15-A, as introduced by the Schedule to the Act. Yet, in absence of any other manner being prescribed and by virtue of section 26(1) read with Order IV, Rule 1(1) of the Code (as applicable in Uttar Pradesh) read with section 16 of the Act, a suit involving a 'commercial dispute' of 'specified value' shall be instituted by the presentation of a plaint along with true copy/copies (for service of notice), to the Court or the appointed officer. Similarly, under Order IV, Rule 1(2) of the Code (as applicable in Uttar Pradesh), court fee chargeable for such service must be paid at the time of filing the plaint. Then, following the above, by virtue of Order IV, Rule (1)3 of the Code read with section 16 of the Act, no suit involving a 'commercial dispute' of a 'specified value' shall be deemed to be instituted unless it complies with the requirements specified in sub-rules (1) & (2).

14 . As to the meaning to be given to the word 'instituted' used in sub-section (1) of Section 12A, in ***Goswami Krishna Murari Lal Vs. Shiam Sunder, 1984 All LJ 1034***, in the context of a suit proceeding, it was held as under:

"...A suit is deemed to be instituted only when it is registered under the orders of the Court to which it is presented..."

15. What follows from the above is - a suit involving a 'commercial dispute' of a 'specified value' may be treated to have been instituted upon presentation of a plaint supported by affidavit on prescribed form, to the Court or the appointed officer. It must comply with sub-rules (1) & (2) of the Rule 1 of Order IV and also the General Rule Civil. However, even these mandatory steps of institution of a suit taken either individually or collectively and also their consequence have been specifically suspended, by law, by introduction of section 12-A to the Act.

16. Then under Section 12A(1) of the Act, the legislature has chosen to use the words 'shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation'. Therefore, a question arises whether the said phrase is mandatory or directory insofar as it provides for a pre-condition for institution of a suit involving a 'commercial dispute' of a 'specified value'. One may first look at the meaning and intent of the legislature gathered from the attending circumstances. By using prohibitive or negative word, i.e. 'not' in conjunction with the word 'shall' and by further qualifying the phrase with the word 'unless' before the words 'the plaintiff exhausts the remedy of pre-institution mediation', a clear and unambiguous intent has been expressed to make the provision of Section 12A (1) mandatory. The use of prohibitive or negative words leave no doubt as to the legislative intent. This principle had been applied by the Supreme Court ***in Union of India Vs. A.K. Pandey***, (2009) 10 SCC 552 while reading Rule 34 of the Army Rules, 1954 to be mandatory. There, it was observed as under:

"15. The principle seems to be fairly well settled that prohibitive or negative words are ordinarily indicative of mandatory nature of the provision; although not conclusive. The Court has to examine carefully the purpose of such provision and the consequences that may follow from non-observance thereof. If the context does not show nor demands

otherwise, the text of a statutory provision couched in a negative form ordinarily has to be read in the form of command. When the word "shall" is followed by prohibitive or negative words, the legislative intention of making the provision absolute, peremptory and imperative becomes loud and clear and ordinarily has to be inferred as such...."

17. Then, in ***Govindlal Chhaganlal Patel Vs. Agricultural Produce Market Committee***, (1975) 2 SCC 482**,** the Supreme Court again had the occasion to consider when a provision may be read as mandatory or directory in the context of the words 'shall' and 'may'. It was observed as under:

"13. Crawford on Statutory Construction (Edn. 1940, Article 261, p. 516) sets out the following passage from an American case approvingly:

"The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other."

Thus, the governing factor is the meaning and intent of the Legislature, which should be gathered not merely from the words used by the Legislature but from a variety of other circumstances and considerations. In other words, the use of the word "shall" or "may" is not conclusive on the question whether the particular requirement of law is mandatory or directory. But the circumstance that the Legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as peremptory. One of the fundamental rules of interpretation is that if the words of a statute are themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature. [Shriram v. State of Bombay, AIR 1961 SC 674 : (1961) 2 SCR 890, 898 : (1961) 1 Cri LJ 760] Section 6(1) of the Act provides in terms, plain and precise, that a notification issued under the section "shall also" be published in Gujarati in a newspaper. The word "also' provides an important clue to the intention of the legislature because having provided that the notification shall be published in the Official Gazette, Section 6(1) goes on to say that the notification shall also be published in Gujarati in a newspaper. The additional mode of publication prescribed by law must, in the absence of anything to the contrary appearing from the context of the provision or its object, be assumed to have a meaning and a purpose. In Khub Chand v. State of Rajasthan [AIR 1967 SC 1074 : (1967) 1 SCR 120, 124-25] it was observed that:

"The term "shall' in its ordinary significance is mandatory and the court shall ordinarily give that interpretation to that term unless such an interpretation leads to some absurd or inconvenient

consequence or be at variance with the intent of the Legislature, to be collected from other parts of the Act. The construction of the said expression depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other considerations."

18. In the present case, not only there are negative or prohibitive words used in sub-section (1) of Section 12A of the Act to clearly indicate that pre-institution mediation is mandatory or stands by way of a pre-condition to the institution of a suit proceedings involving a 'commercial dispute' of a 'specified value' but further, the second proviso to sub-section (3) of Section 12A further makes it plain that the time consumed in seeking pre-institution mediation is to be excluded for the purposes of institution of the suit. The legislative intent is thus unambiguous that the suit proceeding may be instituted only after the pre-institution mediation has failed. Thus, the pre-institution mediation must be carried out prior and even independent to the institution of the suit proceeding that may eventually to be instituted only in the case of a failed mediation.

19. Unless the pre-institution mediation were to be undertaken independent of the institution of the suit itself, the second proviso to sub-Section (3) of Section 12A of the Act would become a dead letter of law and would remain completely redundant. If a plaintiff would have to first institute a suit proceeding and thereafter seek mediation, there would arise no occasion when, for the purpose of computation of the period of limitation, any time consumed in conducting such mediation may ever be required to be excluded. In all such cases, the suit proceedings would always necessarily stand instituted, prior in time.

20. In the present case, there appears to be a clear purpose on part of the legislature to provide for pre-institution mediation, to ensure amicable final settlement between the parties without litigation - that often involves long delays. The whole purpose of enacting the Act and the amendment introduced by Act No. 28 of 2018 has been to ensure expeditious disposal. In that regard, the Objects and Reasons may be noted below:

"Statements of Objects and Reasons- *The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 was enacted for the constitution of Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and for matters connected therewith or incidental thereto.*

2. The global economic environment has since become increasingly competitive and to attract business at international level, India needs to further improve its ranking in the World Bank 'Doing Business Report' which, inter alia, considers the dispute resolution environment in the country as one of the parameters for doing business. Further, the tremendous economic development has ushered in enormous commercial activities in the country including foreign direct investments, public private partnership, etc., which has prompted initiating legislative measures for speedy settlement of commercial disputes, widen the scope of the courts to deal with commercial

disputes and facilitate ease of doing business. Needless to say that early resolution of commercial disputes of even lesser value creates a positive image amongst the investors about the strong and responsive Indian legal system. It is, therefore, proposed to amend the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

3. As Parliament was not in session and immediate action was required to be taken to make necessary amendments in the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, to further improve India's ranking in the 'Doing Business Report', the President promulgated the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018 on 3rd May, 2018.

4. It is proposed to introduce the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 to replace the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018, which inter alia, provides for the following namely:--

(i) to reduce the specified value of commercial disputes from the existing one crore rupees to three lakh rupees, and to enable the parties to approach the lowest level of subordinate courts for speedy resolution of commercial disputes;

(ii) to enable the State Governments, with respect to the High Courts having ordinary original civil jurisdiction, to constitute commercial courts at District Judge level and to specify such pecuniary value of commercial disputes which shall not be less than three lakh rupees and not more than the pecuniary jurisdiction of the district courts;

(iii) to enable the State Governments, except the territories over which the High Courts have ordinary original civil jurisdiction, to designate such number of Commercial Appellate Courts at district judge level to exercise the appellate jurisdiction over the commercial courts below the district judge level;

(iv) to enable the State Governments to specify such pecuniary value of a commercial dispute which shall not be less than three lakh rupees or such higher value, for the whole or part of the State; and

(v) to provide for compulsory mediation before institution of a suit, where no urgent interim relief is contemplated and for this purpose, to introduce the Pre-Institution Mediation and Settlement Mechanism and to enable the Central Government to authorise the authorities constituted under the Legal Services Authorities Act, 1987 for this purpose.

5. The Bill seeks to achieve the above objectives."

21. Thus, after 03.05.2018, no fresh suit involving a 'commercial dispute' of a 'specified value' shall be instituted, unless the (proposed) plaintiff first exhausts the remedy of pre-institution mediation. That is the exact prescription made by Section 12A (1) of the Act. The only exception may

arise if such a suit carries an urgent interim relief application. In that case the suit proceeding may be instituted even without seeking pre-institution mediation.

22. As as result, once it is disclosed that the proposed plaintiff proposes to institute a suit proceeding involving a 'commercial dispute' of a 'specified value' not involving any urgent interim relief, the Commercial Court, before whom such suit proceedings is proposed to be instituted must enforce on such proposed plaintiff the mandatory pre-condition of pre-institution mediation, prescribed by the Act. The legislature has left no discretion with the Courts, in that regard, by using words - "shall not" in sub-section (1) of Section 12A of the Act before the words - "be instituted" and the word "unless" thereafter.

23. Once the institution of the suit proceeding itself has been put in abeyance by the legislature, unless a pre-institution mediation is first carried out (except where urgent interim relief is sought), it cannot be contemplated how a condition inextricably linked to the institution of the suit, namely payment of court fee on the valuation of the plaint, can be enforced at the stage of pre-institution mediation. For that reason as well, the reasoning adopted by the learned court below cannot be accepted as correct.

24. The application for pre-institution mediation is mandatory in nature. That application must be entertained and dealt with independent to the institution of the suit proceedings. In fact, the institution of a suit would depend directly on the fate of the pre-institution mediation and not vice-versa. It cannot be said that an application for pre-institution mediation may be entertained only after the suit proceeding had been first instituted.

25. Also, with respect to any suit involving 'commercial disputes' of a 'specified value', not involving an urgent interim relief application, such an application must necessarily be filed on Form 1 appended to Schedule 1 to the Rules. It shall be entertained subject to it being complete in all respects. Filing of plaint with or without defects is not required or prescribed by the Act read with the Rules as a pre-condition of maintaining that application.

26. If the pre-institution mediation is a non-starter, then a report on Form 3 in Schedule 1 to the Rules would be submitted. It would allow for the exclusion of time - starting from the date an application for pre-institution mediation is filed, to the date of receipt of the non-starter report (by the proposed plaintiff), towards the computation of limitation to institute the suit. It is the plain effect of the second proviso to section 12A (3) of the Act read with Rule 3(4) of the Rules.

27. In all cases, for the purpose of pre-institution mediation the proposed plaintiff must disclose the nature of the dispute as a commercial dispute of a specified value and; the territorial and pecuniary jurisdiction of the Court to whom the application for pre-institution mediation is presented on Form 1, besides the proforma requirements already prescribed under the Rules.

28. Since, in my opinion, the institution of the suit proceeding is not a pre-condition to maintain an application under Section 12A of the Act read with the Rules, the reasoning adopted by the learned court below cannot be accepted as correct. The application seeking pre-institution mediation must be dealt with independent

of the filing/presentation of the plaint and it's status as regular or defective is irrelevant or extraneous to the maintainability of the application for initiation of pre-institution mediation.

29. Since the filing of the plaint is itself found to be, not a pre-condition to seek pre-institution mediation under Section 12A of the Act, the ratio of the decision of the Supreme Court in **A. Nawab John Vs. B.M. Subramaniam (supra)** is wholly distinguishable. That decision was based on the pre-existing law under the Code i.e. in the absence of any requirement for pre-institution mediation. Though, by way of a general principle of law, the suit proceeding may never be instituted unless the issue of court fees has been satisfactorily dealt with, yet, in the context of section 12A of the Act, that principle would stand excluded and it would never apply to a pre-institution mediation. The two concepts stand in mutual exclusion to each other. There is no conflict between the same, either.

30. Resultantly, though the application filed by the appellant seeking pre-institution mediation was wholly maintainable, by virtue of Rule 3 of the Rules, the appellant is required to pay pre-institution mediation fee. The appellant here is willing to deposit that fee, but the learned court below has erred and not allowed him to deposit the same.

31. Besides the reasons noted above, unless such course is adopted, the whole purpose of seeking pre-institution mediation in the commercial dispute would stand risk of failure as besides depositing the mediation fee at the stage provided under the Rules, the appellant would be further burdened to deposit the entire court fee. Yet, despite depositing the entire court fee and the mediation fee, the plaintiff would still have to await failure of the mediation before his suit proceeding would commence. This course, if adopted, would be self-contradicted and unreasonable besides being clearly not permitted by law and more time consuming.

32. Consequently, the order dated 4.1.2021 passed by the Presiding Officer, Commercial Court, Jhansi, is set aside and the matter remitted to that Court to pass an appropriate order, as expeditiously as possible. In doing so, it may remain open to the learned court below to also examine if there exists a *'commercial dispute'* of a *'specified value'* over which it has territorial and pecuniary jurisdiction. Then, it would be for the learned court below to pass appropriate order or issue appropriate direction requiring the appellant to deposit the pre-institution mediation fee, in accordance with law.

33. Once the pre-institution mediation fee would have been deposited by the appellant in terms of the direction issued by the learned court below, the pre-institution mediation would be carried out, strictly in terms of the Rules and the suit, if any, may be instituted, in accordance with law, if and when required, thereafter. It is only at that stage that the second proviso to sub-section (3) of Section 3 of the Act would come into play. Also, it is at that stage that the court fees on the valuation of the plaint may be charged and paid, in accordance with law. However, that stage has yet not arrived and the observations made in this order are only for the purposes of offering clarity as a

natural consequence of the reasoning given above.

34. The question of law (as framed above) is answered in the negative i.e. in favour of the appellant.

35. Accordingly, the present appeal is **allowed.**
