THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

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

2022 - VOL. VII
(JULY)

PAGES 1 TO 1299

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

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ALLAHABAD SERIES

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(2022)07ILR A6
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.07.2022

BEFORE

THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Application U/S 378 No. 142 of 2017

Smt. Shireen ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
P.K. Mishra

Counsel for the Opposite Parties:
Govt. Advocate, Anil Kumar Singh, D.P. Dutt Tiwari

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 372 - Indian Penal Code, 1860 - Sections 323, 498-A, 506 - Dowry prohibition Act,1961 - Section 3/4, Probation of Offenders Act, 1958 - Section 4 - No appeal to lie unless otherwise provided - An appeal is a creature of a statute and cannot lie under any inherent power - Unless same is provided either under Code of Criminal Procedure or by any other law for the time being in force no appeal, seeking enhancement of sentence at the instance of the victim, is maintainable. (Para - 7,8)

Appeal preferred by victim - against order of trial court as well as of first Appellate Court - instead of sentencing them to undergo imprisonment - trial Court gave benefit of Section 4 of Probation of Offenders Act - released on probation - appeal preferred by state against sentencing - dismissed by appellate Court. **(Para -6)**

(B) Criminal Law - The Code of criminal procedure, 1973 - Proviso to Section 372 Cr.P.C. - victim's right of appeal - restricted to three eventualities - acquittal of the accused- conviction of the accused for lesser offence- for imposing inadequate compensation. (Para - 8)

HELD:-No appeal can be maintained by victim under Section 372 CrPC on the ground of inadequacy of sentence. Appeal preferred by victim of crime against inadequacy of sentence not maintainable. **(Para - 9)**

Appeal dismissed. (E-7)

List of Cases cited:-

1. N.C.W. Vs St. of Delhi, (2010) 12 SCC 599

2. Parvinder Kansal Vs St. (NCT of Delhi), (2020) 19 SCC 496

(Delivered by Hon'ble Mohd. Faiz Alam Khan, J.)

1. No one is present either for the applicant or for respondents no. 2 to 6 when this case is taken up for hearing. Learned A.G.A. is however present for the State.

2. Instant appeal has been filed by the victim under Section 372 Cr.P.C. against the judgment and order dated 07.03.2013 passed by the Judicial Magistrate, Ambedkar Nagar whereby the trial Court has convicted the private respondents under Sections 323, 498-A, 506 I.P.C. and Section 3/4 D.P. Act, however, the accused persons/private respondents instead of sentencing to undergo imprisonment were given the benefit of Probation of Offenders Act, 1958 and released on probation and also against the judgment and order dated 30.09.2016 passed by the Appellate Court i.e. Additional Sessions Judge (Fast Track Court-II), Ambedkar Nagar, whereby the appeal preferred by the state against sentence was dismissed.

3. Perusal of the record would reveal that the instant appeal has been listed after

a long time as it was on 04.12.2017 this appeal was last listed and vide order dated 20.11.2017 the delay, which had occurred in preferring the appeal has been condoned by a co-ordinate Bench of this Court and the appeal was directed to be listed for admission.

4. Section 372 of the Cr.P.C., under which the instant appeal has been preferred, is reproduced for ready reference as under:-

"372. No appeal to lie unless otherwise provided.-- No appeal shall lie from any judgment or order of a criminal court except as provided for by this Code or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court."

5. Perusal of this Section would reveal that the same is starting with a Non-Obstante Clause declaring that no appeal shall lie from any judgment or order of a Criminal Court except as provided by this Code or by any other law for the time being in force. Thus, it is clear that the appeal could only be preferred in accordance with the scheme provided in the Cr.P.C. or provided by any other law for the time being in force. The proviso to Section 372 Cr.P.C. provides a right to the victim of an offence to prefer an appeal and it says that the victim (as defined under Section 2w (wa) of the Cr.P.C. may prefer an appeal against any judgment or order passed by the Court **acquitting the accused or convicting for a lesser offence** or **imposing inadequate compensation.** Thus, the appeal under Section 372 Cr.P.C. could only be filed on the happening of three situations namely

(i) When the accused person(s) have been acquitted;

(ii) When the accused person(s0 have been convicted for a lesser offence;

(iii) Where inadequate compensation has been imposed by the Court (s).

6. The instant appeal has been preferred by the victim against the order of the trial court as well as of the first Appellate Court and it is evident that though the accused persons were convicted by the trial Court for the offence committed under Sections 323, 498-A, 506 I.P.C. and Section 3/4 D.P. Act, however, instead of sentencing them to undergo imprisonment the trial Court has given them benefit of Section 4 of Probation of Offenders Act, 1958 and released themon probation and the appeal preferred by the state against sentencing has also been dismissed by the appellate Court.

7. The issue as to whether a victim of the crime may prefer an appeal under section 372 Crpc against inadequacy of sentence awarded to the accused persons is now no more res integra. Hon'ble Supreme Court in ***National Commission For Women v. State of Delhi,*** **(2010) 12 SCC 599** has held as under:-

"11. An appeal is a creature of a statute and cannot lie under any inherent power. This Court does undoubtedly grant leave to appeal under the discretionary power conferred under Article 136 of the Constitution of India at the behest of the State or an affected private individual but

to permit anybody or an organisation pro bono publico to file an appeal would be a dangerous doctrine and would cause utter confusion in the criminal justice system. We are, therefore, of the opinion that the special leave petition itself was not maintainable.

12. In Pritam Singh v. State [AIR 1950 SC 169 : (1950) 51 Cri LJ 1270] this Court while dealing with a criminal matter (after the grant of leave under Article 136 of the Constitution) considered the scope and ambit of this article and observed: (AIR pp. 171-72, para 9)

"9. On a careful examination of Article 136 along with the preceding article, it seems clear that the wide discretionary power with which this Court is invested under it is to be exercised sparingly and in exceptional cases only, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this article. By virtue of this article, we can grant special leave in civil cases, in criminal cases, in income tax cases, in cases which come up before different kinds of tribunals and in a variety of other cases. The only uniform standard which in our opinion can be laid down in the circumstances is that Court should grant special leave to appeal only in those cases where special circumstances are shown to exist. ... It is sufficient for our purpose to say that though we are not bound to follow them too rigidly since the reasons, constitutional and administrative, which sometimes weighed with the Privy Council, need not weigh with us, yet some of those principles are useful as furnishing in many cases a sound basis for invoking the discretion of this Court in granting special leave. Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against."

13. In P.S.R. Sadhanantham v. Arunachalam [(1980) 3 SCC 141 : 1980 SCC (Cri) 649] this Court was dealing with the locus standi of a private person, in this case the victim's brother, who was neither a complainant nor a first informant in the criminal case but had filed a petition under Article 136 of the Constitution of India. This Court observed that the strictest vigilance was required to be maintained to prevent the abuse of the process of court, more particularly, in criminal matters, and ordinarily a private party other than the complainant, should not be permitted to file an appeal under Article 136, though the broad scope of the article postulated an exception in suitable cases. It was spelt out as under: (SCC p. 145, para 7)

"7. Specificity being essential to legality, let us see if the broad spectrum spread out of Article 136 fills the bill from the point of view of "procedure established by law'. In express terms, Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on the Supreme Court to interfere in suitable cases. The discretionary dimension is considerable but that relates to the power of the court. The question is whether it spells by implication, a fair procedure as contemplated by Article 21. In our view, it does. Article 136 is a special jurisdiction. It is residuary power; it is extraordinary in its amplitude, its limit, when it chases injustice, is the sky itself. This Court functionally fulfils itself by reaching out to injustice wherever it is and this power is largely derived in the common run of cases from Article 136. Is it merely a power in the

court to be exercised in any manner it fancies? Is there no procedural limitation in the manner of exercise and the occasion for exercise? Is there no duty to act fairly while hearing a case under Article 136, either in the matter of grant of leave or, after such grant, in the final disposal of the appeal? We have hardly any doubt that there is a procedure necessarily implicit in the power vested in the summit court. It must be remembered that Article 136 confers jurisdiction on the highest court. The Founding Fathers unarguably intended in the very terms of Article 136 that it shall be exercised by the highest judges of the land with scrupulous adherence to judicial principles well established by precedents in our jurisprudence. Judicial discretion is canalised authority, not arbitrary eccentricity."

14. The Court then examined the implications of completely shutting out a private party from filing a petition under Article 136 on the locus standi and observed thus: (Arunachalam case [(1980) 3 SCC 141 : 1980 SCC (Cri) 649] , SCC p. 147, para 14)

"14. Having said this, we must emphasise that we are living in times when many societal pollutants create new problems of unredressed grievance when the State becomes the sole repository for initiation of criminal action. Sometimes, pachydermic indifference of bureaucratic officials, at other times politicisation of higher functionaries may result in refusal to take a case to this Court under Article 136 even though the justice of the lis may well justify it. While "the criminal law should not be used as a weapon in personal vendettas between private individuals', as Lord Shawcross once wrote, in the absence of an independent prosecution authority easily accessible to every citizen, a wider connotation of the expression "standing' is necessary for Article 136 to further its mission."

15. A reading of the aforesaid excerpts from the two judgments would reveal that while an appeal by a private individual can be entertained but it should be done sparingly and after due vigilance and particularly in a case where the remedy has been shut out for the victims due to mala fides on the part of the State functionaries or due to inability of the victims to approach the Court. In the present matter, we find that neither the State which is the complainant nor the heirs of the deceased have chosen to file a petition in the High Court. As this responsibility has been taken up by the Commission at its own volition this is clearly not permissible in the light of the aforesaid judgments."

8. In ***Parvinder Kansal v. State (NCT of Delhi),*** (2020) 19 SCC 496 Hon'ble Supreme Court has also held as under:-

"8. Chapter XXIX of the Code of Criminal Procedure, 1973 deals with "Appeals" and Section 372 makes it clear that no appeal to lie unless otherwise provided by the Code or any other law for the time being in force. It is not in dispute that in the instant case appellant has preferred appeal only under Section 372 CrPC. The proviso is inserted to Section 372 CrPC by Act 5 of 2009. Section 372 and the proviso which is subsequently inserted read as under:

***"372. No appeal to lie unless otherwise provided.**-- No appeal shall lie from any judgment or order of a criminal court except as provided for by this Code or by any other law for the time being in force:*

Provided that the victim shall have a right to prefer an appeal against

any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court."

A reading of the proviso makes it clear that so far as victim's right of appeal is concerned, same is restricted to three eventualities, namely, acquittal of the accused; conviction of the accused for lesser offence; or for imposing inadequate compensation. While the victim is given opportunity to prefer appeal in the event of imposing inadequate compensation, but at the same time there is no provision for appeal by the victim for questioning the order of sentence as inadequate, whereas Section 377 CrPC gives the power to the State Government to prefer appeal for enhancement of sentence. While it is open for the State Government to prefer appeal for inadequate sentence under Section 377 CrPC but similarly no appeal can be maintained by victim under Section 372 CrPC on the ground of inadequate sentence. It is fairly well-settled that the remedy of appeal is creature of the statute. Unless same is provided either under Code of Criminal Procedure or by any other law for the time being in force no appeal, seeking enhancement of sentence at the instance of the victim, is maintainable. Further we are of the view that the High Court while referring to the judgment of this Court in ***National Commission for Women v. State (NCT of Delhi) [National Commission for Women v. State (NCT of Delhi), (2010) 12 SCC 599 : (2011) 1 SCC (Cri) 774]*** *has rightly relied on the same and dismissed the appeal, as not maintainable."*

9. Above placed case laws makes it clear that no appeal can be maintained by the victim under Section 372 CrPC on the ground of inadequacy of sentence. Thus the appeal preferred by the victim of the crime against inadequacy of sentence is not maintainable and is ***dismissed*** as such.

(2022)07ILR A10
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.05.2022

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Application U/S 482 No. 2386 of 2022

Golu @ Vijay Kumar Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Petitioners:
Sri Shiv Bahadur Singh

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860- Sections 323 & 504 - SC/ST, Act-Section 3(1)(r), 3(1)(s)-quashing of cognizance and summoning order-dispute with regard to irrigation of the field arose between the informant and the servant of the applicant-parties entered into compromise without any compulsion with the passage of time-In the instant case, proceedings u/s 323, 504 are compoundable but the proceedings under SC/ST Act are not compoundable-Article 142 of the Constitution can be invoked for quashing of criminal proceedings arising out of 'non-compoundable offences'-the compromise between the parties be accepted-The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the

conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it.(Para 1 to 11)

The application is allowed. (E-6)

List of Cases cited:

Ramawatar Vs St. of M.P., CRLA No. 1393 of 2021

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard Dr. S.B.Singh, learned counsel for the applicant, Sri Rajeshwar Singh and Rakesh Chand Srivastava learned A.G.A. assisted by Madnesh Prasad Singh, learned State Law Officer for the State and perused the material on record.

2. The present 482 Cr.P.C. application has been filed praying for quashing of proceeding (including cognizance and summoning order) of S.T. No. 164 of 2019 arising out of Case Crime no. 30 of 2019, under Sections 323, 504 IPC and Section 3(1)(r) and 3(1)(s) of Schedule Caste and Scheduled Tribes (Prevention of Atrocities) Act, P.S. Aurai, District Bhadohi pending in the court of Additional District & Sessions Judge/Special Judge (SC/ST Act), Bhadohi Gyanpur pursuant to the compromise entered into between the parties.

3. Learned counsel for the applicant submit that an FIR had come to be lodged by the opposite party no. 2 owing to some misunderstanding and misgivings between the parties. With passage of time, they have been able to resolve their differences and have settled their dispute amicably in writing. It is further submitted that vide order dated 08.02.2022, a co-ordinate Bench of this Court had referred the matter for verification of the compromise, which has been verified but the learned Court below has further observed that since the matter pertains to offence under SC/ST Act, the same is refused to be accepted. Learned counsel for the applicant contends that the matter under SC/ST Act can be compromised and in support of his contention, he has relied upon a decision of the Hon'ble Apex Court dated 25.10.2021 passed in Criminal Appeal No. 1393 of 2021 ***Ramawatar Vs. State of Madya Pradesh.***

4. In the instant case, proceedings under Sections 323, 504 I.P.C. and Section 3 (1) (r) and 3 (1) (s) have been sought to be quashed on the basis of compromise entered into between the parties. Although Section 323, 504 I.P.C. are compoundable, but the sole question before this Court is as to whether proceedings under SC/ST Act can be quashed on the basis of compromise?

5. To consider the question, whether proceedings SC/ST Act can be quashed or not, the Hon'ble Apex Court in the case of **Ramawatar Vs. State of Madhya Pradesh (supra)** has framed following two questions for consideration:-

"1.whether the jurisdiction under Article 142 of the Constitution can be invoked for quashing of criminal proceedings arising out of "non-compoundable offences?

2.If yes, then whether the power to quash proceedings can be extended to offences

arising out of special status such as SC/ST Act Act."

6. The Hon'ble Apex Court after due consideration answered the first question in affirmative.

7. Dealing with the second question, the Hon'ble Apex Court in paragraph 14 has observed as under:

14. With respect to the second question before us, it must be noted that even though the powers of this Court under Article 142 are wide and far-reaching, the same cannot be exercised in a vacuum. True it is that ordinary statutes or any restrictions contained therein, cannot be constructed as a limitation on the Court's power to do "complete justice". However, this is not to say that this Court can altogether ignore the statutory provisions or other express prohibitions in law. In fact, the Court is obligated to take note of the relevant laws and will have to regulate the use of its power and discretion accordingly. The Constitution Bench decision in the case of Supreme Court Bar Assn. v. Union of India & Anr has eloquently clarified this point as follows:

"48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law- maker and its role travels beyond merely dispute-settling. It is a "problem solver in the nebulous areas" (see K. Veeraswami v. Union of India [(1991) 3 SCC 655 : 1991 SCC (Cri) 734] but the substantive statutory provisions dealing with the subject matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

8. In the instant case, the applicant has been charged with Section 3 (1) (r) (s) of SC/ST Act, which are quoted below:-

"3(1) (r) intentionally insults or intimidates with intention to humiliate a member of a Scheduled Caste or a Scheduled Tribes in any place within public view:

3(1) (s) abuses any member of a Scheduled Caste or a Scheduled Tribe by a caste name in any place within public view:"

9. From perusal of the record, it is apparent that parties have entered into compromise 22.12.2021, wherein it has been categorically stated in paragraph no.3 that the the dispute with regard to irrigation of the field arose between the informant and the servant of the applicant. On the other hand, no altercation between the informant and the applicant took place and the applicant settled the matter. Since the informant without any compulsion entered into a compromise and wishes to drop the present criminal proceedings against the accused-applicant, then the overriding objection of SC/ST Act would not be overwhelmed if the proceedings are quashed. It further appears that the opposite

party no. 2, who would be the key prosecution witness, if the trial were to proceed, has declared his unequivocal intent to turn hostile at the trial. In such circumstances, it is apparent that merits and truth apart, the proceedings in trial, if allowed to continue, may largely be a waste of precious time of the learned court below.

10. Considering the facts and circumstances of the case and the submissions advanced by learned counsel for the parties regarding the compromise entered into between the parties and taking all these factors into consideration cumulatively, the compromise between parties be accepted and further taking into account the legal position as laid down by the Apex Court in the case of **Ramawatar Vs. State of Madhya Pradesh (supra)**, the present application deserves to be allowed.

11. Accordingly, it is **allowed.** The proceedings of the S.T. No. 164 of 2019 arising out of Case Crime no. 30 of 2019, under Sections 323, 504 IPC and Section 3(1)(r) and 3(1)(s) of Schedule Caste and Scheduled Tribes (Prevention of Atrocities) Act, P.S. Aurai, District Bhadohi pending in the court of Additional District & Sessions Judge/Special Judge (SC/ST Act), Bhadohi Gyanpur is hereby quashed.

(2022)07ILR A13
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.06.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Misc. Bail Application No. 5473 of 2022

Atul Kumar Singh @ Atul Rai ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Kaustubh Singh

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973- Section 439 - Indian Penal Code,1860-Sections 120B, 167, 195A, 218, 306, 504 & 506-applicant is a Member of Parliament having 23 criminal history-victim registered her case against a 'Bahubali' , a criminal turned politician, who later on attempted to commit suicide along with her friend within the precincts of the Supreme Court-they were admitted to hospital in very serious and critical conditions and later on died-victim's dignity, honour and image were being besmirch and tarnished and she was subjected to cruelty both physically and mentally-Hence, the bail application is rejected.(Para 1 to 20)

B. There is responsibility of civil society as well to rise above the parochial and narrow considerations of caste, community etc and to ensure that a candidate with criminal background does not get elected. There is an unholy alliance between organized crime, the politicians and the bureaucrats and this nexus between them have become pervasive reality. Alarming number of criminals reaching Parliament and Election Commission of India are required to take effective measures to wean away criminals from politics and break unholy nexus between criminal politicians and bureaucrats.(Para 18 to 20)

The application is rejected. (E-6)

List of Cases cited:

1. Public Interest Foundation & ors. Vs U.O.I. & anr. (2019) 3 SCC 224

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

1. Present application under Section 439 Code of Criminal Procedure, 1973 has been filed by the accused-applicant seeking bail in FIR No.0309 of 2021 registered against the accused-applicant and another co-accused under Sections 120B, 167, 195A, 218, 306, 504 and 506 IPC, Police Station Hazratganj, District Lucknow.

2. The accused-applicant is a Member of Parliament, who got elected on

symbol of Bahujan Samajwadi Party from Ghosi Lok Sabha Constituency of Uttar Pradesh in 2019 General Elections of Lok Sabha.

3. The accused-applicant to his credit so far has 23 criminal cases, which include cases of kidnapping, murder, rape and other heinous offences. List of those cases including the present one and their status has been given in para 38 of the affidavit filed in support of the present bail application. The cases to the credit of accused-applicant which are given in para 38 of the affidavit are reproduced hereunder:-

"(i) Case Crime No.Nil, under Sections U.P. Gangsters Act, P.S. Lanka, District Varanasi;

(ii) Case Crime No.Nil, under Sections 66E I.T. Act, 120B IPC,

(iii) Case Crime No.209 of 2011, under Sections 307, 333, 120 IPC, 7 C.L.A. Act, P.S. Cantt, Varanasi;

(iv) Case Crime No.396 of 2011, under Sections 364, 302, 120B IPC,

P.S. Cantt, Varanasi;

(v) Case Crime No.211 of 2011, under Sections 386, 504 IPC, 7 C.L.A. Act, P.S. Cantt, Varanasi;

(vi) Case Crime No.397 of 2011, under Sections 307, 353, 333, 338,

224, 225, 419, 120B IPC, 7 C.L.A. Act, P.S. Cantt, Varanasi;

(vii) Case Crime No.401 of 2011 under Sections 147, 148, 149, 307,

120B IPC, P.S. Cantt, Varanasi;

(viii) Case Crime No.356 of 2011, under Sections 3(1) U.P. Gangsters Act, P.S. Cantt, Varanasi;

(ix) Case Crime No.511 of 2011, under Sections 3(1) U.P. Gangsters

Act, P.S. Cantt, Varanasi;

(x) FIR No.185 of 2018, under Sections 364, 504 and 506 IPC,

P.S.Cantt, Varanasi;

(xi) Case Crime No.881 of 2006 under Sections 376, 420, 504, 506 IPC, P.S.Phulpur, Varanasi;

(xii) FIR No.548 of 2019, under Sections 376, 540, 506, 504 IPC,

P.S.Lanka, Varanasi;

(xiii) Case Crime No.834 of 2017, under Sections 147, 148, 307, 342

IPC, P.S. Lanka, Varanasi;

(xiv) Case Crime No.09 of 2009, under Sections 342, 386, 504, 506, 427 IPC, P.S.Manduadeeh, Varanasi;

(xv) Case Crime No.11 of 2009, under Section 3/25 Arms Act, P.S.

Manduadeeh, Varanasi;

(xvi) Case Crime No.76 of 2009, under Sections 3(1) U.P. Gangsters

Act, P.S. Manduadeeh, Varanasi;

(xvii) Case Crime No.261 of 2010, under Section 110G Act, P.S.

Manduadeeh, Varanasi;

(xviii) Case Crime No.211 of 2011, under Sections 3/25 Arms Act,

P.S.Rohaniya, Varanasi;

(xix) Case Crime No.17 of 2011, under Sections 147, 148, 149, 302,

120B IPC, P.S. Rohaniya, Varanasi;

(xx) Case Crime No.545 of 2009, under Section 3(1) U.P. Gangsters Act, P.S.Rohaniya, Varanasi;

(xxi) Case Crime No.485 of 2009, under Sections 147, 148, 323, 504, 427, 452 IPC, P.S. Rohaniya, District Varanasi;

(xxii) Case Crime No.203 of 2009, under Sections 504, 506 IPC, P.S. Rohaniya, Varanasi; and

(xxiii) Case Crime No.225A of 2003, under Sections 147, 323, 504, 506 IPC, P.S. Rohaniya, Varanasi."

4. It is stated in para 38 of the affidavit that out of 23 cases, only 12 are still pending against the accused-applicant. The close scrutiny of the averments of para 38 of the affidavit would reveal that though the accused-applicant has secured acquittal in some of the cases against him but some of the heinous cases including murder and rape etc., are still pending against him in the Courts.

5. The background of the present case is that a case was registered against the accused-applicant being FIR No.548 of 2019 under Sections 376, 420, 406, 506 IPC at Police Station Lanka, District Varanasi on a complaint by the victim, who later on attempted to commit suicide along with her friend within the precincts of the Supreme Court India on 16.08.2021. They were admitted in very serious and critical conditions in Ram Manohar Lohia Hospital, New Delhi and later on died on 21.08.2021 and 24.08.2021 respectively.

6. Present accused-applicant is a "Bahubali, a criminal turned politician which is evident from his long criminal history of heinous offences given in para 38 of the affidavit. The police after investigating the offence filed a charge-sheet against the accused-applicant in the said FIR No.548 of 2019 (supra). In order toterrorize and put undue pressure on the victim/prosecutrix, the accused-applicant got several cases registered against her and her friend/witness so that they would not support the prosecution case.

7. On 10.11.2020, the victim gave an application to the Senior Superintendent of Police, Varanasi alleging that co-accused-Amitabh Thakur, an Ex IPS officer was manufacturing false documents/evidence against the victim and her friend to favour of present accused-applicant on monetary consideration. It was alleged that prosecutrix's dignity, honour and image were being besmirch and tarnished. The accused and co-accused were abating and drawing her close to commit suicide. She was being continuously harassed physically and mentally and subjected to cruelty to change her stand before the Court. The accused-applicant and his henchman were employing all kinds of undue pressure on her to change her stand before the Court and turn hostile. She made allegations against the co-accused-Amitabh Thakur, who in active connivance with the present accused-applicant, extended threat to her life. She also said that she would be compelled to commit suicide because of the accused-applicant and co-accused-Amitabh Thakur.

8. The victim and her friend-Satyam Prakash Rai, thereafter, on 16.08.2021 attempted to commit suicide outside the Gate No.6 of the Supreme Court and went live on Facebook making serious allegations against the accused-applicant and co-accused-Amitabh Thakur. Statements made by two victims live on Facebook have been treated as dying declarations.

9. The Director General of Police constituted a Two Members Committee

consisting of Director General, U.P. Police Recruitment and Promotional Board and Additional Director General, Women and Child Security Organization, Lucknow. The said Committee submitted its report on 27.08.2021. On the basis of said report, a written complaint was given by Sub Inspector Daya Shankar Dwivedi at Police Station Hazratganj, which is the basis of the FIR in question registered against the accused-applicant and co-accused.

10. Report of the two members team on the basis of which the FIR in question has been registered would mention that Bharat Singh, father of the accused-applicant gave an application on 03.03.2020 to S.S.P. Varanasi requesting him to get further investigation conducted under Section 173(8) Cr.P.C. in FIR No.548 of 2019 (supra) registered against the accused-applicant.

11. Then, Senior Superintendent of police, Varanasi marked the said application to the then Circle Officer, Bhelupur, Mr.Amresh Kumar Singh. Mr.Amresh Kumar Singh prepared a report on the application and in last paragraph of his report said that the FIR No.548 of 2019 (supra) was falsely lodged in conspiracy of the prosecutrix, her friend, Satyam Prakash Rai, Angad Rai and Vijay Shankar Tiwari and recommended for fresh investigation under Section 173(8) Cr.P.C. The case was pending in the Court but the Circle Officer, Amresh Kumar Singh made available the said report to co-accused-Amitabh Thakur and other persons under Right to Information Act despite the case being pending in the Court. This report was made public to defame the victim/prosecutrix and tarnish her character and dignity. It was made public to weaken the case against the accused-applicant. The Report of C.O. Bhelupur was a preliminary report on the application for further investigation, and final decision for further investigation was yet to be taken but the said report was made public in order to put undue pressure on the prosecutrix and her friend so that they should not support the prosecution case against the accused-applicant.

12. It is alleged that when the accused-applicant and his goons were not successful in breaking down/winning the victim and the witness, they put all kind of pressure and tortured them physically and mentally. Circle Officer, Bhelupur also assisted the accused-applicant. The victim and her friend were so much harassed and tortured that they became desperate as they perceived that they would not get justice. They had fears about their lives. Their dignity, character and image were being tarnished and besmirch. Under these circumstances, they went to Supreme Court, highest seat of justice and attempted suicide outside the Supreme Court gate and later on they died during the course of treatment. Co-accused-Amitabh Thakur ex-IPS officer has been granted bail by this court vide order dated 14.03.2022 but the case of the accused-applicant is different from the co-accused.

13. It is unfortunate and the greatest irony of the largest democracy of the world that as many as 43 percent of the Member of Lok Sabha who got elected in 2019 general elections are having criminal cases including cases related to heinous offences pending against them.

14. A constitution Bench of the Supreme Court in the case of **Public Interest Foundation & Ors vs Union of India & Anr : (2019) 3 SCC 224** has taken note of 244th Law Commission report in

which it was said that 30 per cent or 152 sitting M.P.s were having criminal cases against them, of which about half i.e. 76 were having serious criminal cases. This phenomenon has increased with every general election. In 2004, 24 per cent of Lok Sabha M.Ps. had criminal cases pending, which increased to 30 per cent in 2009 elections. In 2014, it went up to 34 per cent and in 2019 as mentioned above, 43 per cent Members of Parliament who got elected for Lok Sabha are having criminal cases pending against them. The Supreme Court has taken judicial notice of criminalization of politics and imperative needs of electoral reforms. There have been several instances of persons charged with serious and heinous offences like murder, rape, kidnapping and dacoity got tickets to contest election from political parties and even got elected in large number of cases.

15. The Supreme Court has said that this leads to a very undesirous and embarrassing situation of law breakers becoming law makers and moving around police protection. The Supreme Court in the said case has directed the Election Commission of India to take appropriate measures to curb criminalization in politics but unfortunately collective will of the Parliament has not moved in the said direction to protect the Indian Democracy going in the hands of criminals, thugs and law breakers. If the politicians are law breakers, citizens cannot expect accountable and transparent governance and the society governed by the rule of law be an utopian idea. After independence with every election, role of identities such as caste, community, ethnicity, gender, religion etc, has been becoming more and more prominent in giving tickets to winnable candidates. These identities coupled with money and muscle power has made entry of criminals in politics easy and every political party without exception (may be with some difference in degree and extent) uses these criminals to win elections. Giving tickets to candidates with serious criminal charges would break the confidence and trust of the civil society, law abiding citizens of this country in the electoral politics and elections.

16. No one can dispute that the present day politics is caught in crime, identity, patronage, muscle and money network. Nexus between crime and politics is serious threat to democratic values and governance based on rule of law. Elections of Parliament and State Legislature and even for local bodies and panchayats are very expensive affairs. The record would show that the elected members of Lok Sabha with criminal records are extremely wealthier candidates. For example, in 2014 Lok Sabha election 16 out of 23 winners having criminal charges in their credit related to murder were multi-millionaire. After candidates get re-elected, their wealth and income grows manyfold which is evident from the fact that in 2014, 165 M.Ps. who got re-elected, their average wealth growth was Rs.7.5 Crores in 5 years.

17. Earlier, "Bahubalis' and other criminals used to provide support to candidates on various considerations including caste, religion and political shelter but now criminals themselves are entering into politics and getting elected as the political parties do not have any inhibition in giving tickets to candidates with criminal background including those having heinous offence(s) registered against them. Confirmed criminal history sheeters and even those who are behind bars are given tickets by different political

parties and surprisingly some of them get elected as well.

18. It is the responsibility of the Parliament to show its collective will to restrain the criminals from entering into the politics, Parliament or legislature to save democracy and the country governed on democratic principles and rule of law.

19. There is responsibility of civil society as well to rise above the parochial and narrow considerations of caste, community etc and to ensure that a candidate with criminal background does not get elected. Criminalization of politics and corruption in public life have become the biggest threats to idea of India, its democratic polity and world's largest democracy. There is an unholy alliance between organized crime, the politicians and the bureaucrats and this nexus between them have become pervasive reality. This phenomenon has eroded the credibility, effectiveness, and impartiality of the law enforcement agencies and administration. This has resulted into lack of trust and confidence in administration and justice delivery system of the country as the accused such as the present accused-applicant win over the witnesses, influence investigation and tamper with the evidence by using their money, muscle and political power. Alarming number of criminals reaching Parliament and State Assembly is a wake up call for all. Parliament and Election Commission of India are required to take effective measures to wean away criminals from politics and break unholy nexus between criminal politicians and bureaucrats.

20. This unholy nexus and unmindfulness of political establishment is the result of reaching person like the accused-applicant, a gangster, hardened criminal and "Bahubali' to the Parliament and becoming a law maker. This Court, looking at the heinousness of offence, might of the accused, evidence available on record, impact on society, possibility of accused tampering with the evidence and influencing/ winning over the witnesses by using his muscle and money power does not find that there is a ground to enlarge the accused-applicant on bail at this stage. This bail application is thus, ***rejected.***

(2022)07ILR A18
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Criminal Misc. First Bail Application No. 10884 of 2020

Sompal ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Mahipal Singh, Sri Jagdev Singh

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 439 - Indian Penal Code, 1860-Sections 302, 304-B, 201, 498-A & 120-B - ¾ DP Act, 1961-deceased wife and her brother was murdered while they went to Fair along with applicant-husband but they did not return to the house at night-Next morning, the dead body of wife and her brother was recovered from two other places and the husband was absconded-Deceased wife died within a period of 1 and half year after her marriage-Post

mortem report reveals the cause of death due to ante-mortem fire arm injury-chain of events has been successfully established by prosecution and the applicant is actively participated along with two accused who were traced out during investigation.(Para 1 to 6)

The application is rejected. (E-6)

List of Cases cited:

1. Ramesh Dasu Chauhan Vs St. of Mah. (2019) 7 SCC 476

2. St. of Raj. Jaipur Vs Balchand @ Balia (1977) AIR 2447, 1978 SCR 1 535

3. Ram Govind Upadhyay Vs Sudarshan Singh (2002) 3 SCC 598

4. Neeru Yadav Vs St. of U.P. (2016) 15 SCC 422

5. Gurcharan Singh Vs St.(Delhi Admin.) (1978) 1 SCC 118

6. St. of U.P. Vs Amarmani Tripathi (2005) 8 SCC 21

7. Manno Lal Jaiswal Vs St. of U.P. & ors. (2022) SCC Online SC 89

8. Ashim Vs NIA (2022)1 SCC 695

9. Ishwarji Nagaji Mali Vs St. of Guj. & ors. (2022) SCC Online SC 55

10. Prahlad Bhati Vs NCT of Delhi & ors. (2001) 4 SCC 280

11. Mahipal Vs Rajesh Kumar (2020) 2 SCC 118

12. Smt. Y Vs St. of Raj. & ors. (2022) SCC Online SC 458

13. Manoj Kumar Khokhar Vs St. of Raj. & ors. (2022) 3 NCC 501

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

1.1- विक्रम सिंह (सूचनाकर्ता एवं मृतका व मृतक के भाई) की लिखित तहरीर पर आवेदक/ज्ञात अभियुक्त (मृतका के पति/मृतक के जीजा) के विरुद्ध, धारा 302, भारतीय दण्ड संहिता (भा.दं.सं.) के अंतर्गत अपराध कारित होने की प्रथम सूचना रिपोर्ट (0776 वर्ष 2019) दिनांक 08.08.2019 को 11:46 बजे, थाना कोतवाली शहर, जिला बिजनौर में अभिलिखित की गयी, जो संक्षिप्त रुप में निम्नलिखित है:-

"मेरी बहन जयवती उम्र करीब 22 वर्ष की शादीवर्ष पहले सोमपाल पुत्र रामौतार निवासी धमरौला थाना नूरपुर बिजनौर के साथ हुई थी। मेरी बहनोई सोमपाल व उसके परिजन मेरी बहन का देहज के लिये तंग व परेशान रखते थे इसी कारण मेरी बहन करीब 10 दिन पहले अपने मायके हमारे घर आई थी। कल दिनांक 7.8.2019 शाम के 7 बजे लगभग मेरा बहनोई सोमपाल हमारे घर आया था तथा जयवती को गज मेला दिखाने की बात कहकर मेले में ले गया गंज मेले में मेरा छोटा भाई अरविन्द जो हलवाई राधे की दुकान पर काम करता है। मेरा बहनोई मेरी बहन जयवती व भाई अरविन्द को मेले घुमाने की बात कहकर साथ ले गया था काफी देर तक इन लोगों के घर न आने पर हमने इनकी तलाश की तो प्रातः छः बजे लगभग मेरी बहन जयवती का रक्त रंजित राय हरिश्चन्द्र के गन्ने के खेत में पड़ा मिला तथा मेरे भाई अरविन्द उम्र करीब लगभग 21 वर्ष का शव पतराम के धान के खेत में पड़ा मिला है। मेरे भाई अरविन्द व मेरी बहन जयवती की हत्या सोमपाल ने अपने साथियों के साथ मिलकर कर दी है तथा सोमपाल फरार है दोनों शव मौके पर पड़े है। सोमपाल द्वारा कारित किये गये इस दोहरो हत्या कांड से गांव में भय का महोल है लोगों में काफी आक्रोश है तथा गांव के पास लेग गज मेले में अपरा तफरी का महोल पैदा हो गया है लोगों ने रास्तो से आना बन्द कर दिया है चारो तरफ भय का महोल है। सहाब रिपोर्ट लिखाने आया हूं। मेरी रिपोर्ट लिखकर आवश्यक कार्यवाही करने की कृपा करे।"

1.2- जांच के दौरान मिले साक्ष्य व गवाहों के कथन के अनुसार, दो अन्य अभियुक्त शालिम व कामिल की भी इस घटना में संलिप्तता पाई गई, अतः आवेदक व अन्य दो अपराधियों पर धारा 302, 304-

ख, 201, 498-क, 120-ख, भा.द.सं. व ¾ दहेज निषेध अधिनियम, 1961 के अन्तर्गत अपराध कारित करने में संलिप्तता सत्य पाई गई व आरोप पत्र दाखिल किया गया। आवेदक 17.08.2019 से कारागार में है तथा अभी तक विचारण पूर्ण नहीं हुआ है।

शव विच्छेदन आख्या:

2.1- मृतका जयवती के शव विच्छेदन आख्या के अनुसार, उनकी मृत्यु के कारण का अभिमत, मृत्यु पूर्व आग्नेयास्त्र द्वारा कारित चोट की वजह से निश्चेतावस्था था(Comma due to ante mortem fire arm injury) (मस्तिष्क के दाये भाग में धातुवत गोली पाई गई) व दाये ऑक्सिपिटल भाग में फटा हुआ घाव पाया गया तथा दायें ऑक्सिपिटो-पैराइटल भाग में प्रवेश घाव व आक्सिपिटल-पैराइटल हड्डी में फ्रैक्चर पाया गया।

2.2- मृतक अरविन्द के मृत्यु के कारण का अभिमत, मृत्यु पूर्व आग्नेयास्त्र द्वारा कारित चोट के कारण निश्चेतावस्था था। बायीं आंख की पलक के पाशविक भाग पर प्रवेश घाव व दायें ऑक्सिपिटल भाग में निकास घाव पाया गया।

आवेदक पक्ष:

3.1- आवेदक के विद्वान अधिवक्ता, श्री जगदेव सिंह ने प्रबलपूर्वक तर्क प्रस्तुत किये कि, आवेदक मृतका का पति व मृतक का जीजा है, अतः इस रिश्ते के नाते उसके पास इस अपराध को कारित करने का कोई भी कारण या उद्देश्य नहीं है। प्रथम सूचना तथ्य के वर्णन की भाषा, एक आम आदमी की न होकर, पुलिस द्वारा की जाने वाली कार्यवाही के किसी जानकार व्यक्ति के द्वारा लिखाई प्रतीत होती है।

3.2- आवेदक के विरुद्ध कथित रुप से मात्र एक ही साक्ष्य है, कि घटना की रात में 8 बजे अपने साथ मृतका व उसके भाई (मृतक) को उनके पैतृक घर से गज मेले में घुमाने के लिए गया था। घटना का कोई चक्षुदर्शी साक्ष्य नहीं है। आवेदक के विरुद्ध मात्र परिस्थितजन्य साक्ष्य है, जिसकी कढ़ियां आपस में नहीं मिल रही हैं तथा यह एक कमजोर साक्ष्य की श्रेणी में आता है।

3.3- आवेदक के विद्वान अधिवक्ता ने अपने कथन को और बल देने के लिये उच्चतम न्यायालय द्वारा **रमेश दासू चौहान प्रति महाराष्ट्र सरकार:(2019) 7 एस.सी.सी. 476** के मामले में दिये गये निर्णय पर इस न्यायालय का ध्यान आकर्षित करवाया कि जिन परिस्थितियों से अपराध कारित होने का अनुमान लगाया जाना है, उन्हे दृढ़ता और संजीदगी से स्थापित किया जाना चाहिए तथा परिस्थितियों को एक साथ मिलाकर एक श्रृंखला बननी चाहिये, जिससे इस निष्कर्ष तक पहुँचने में कोई पलायन न हो कि अपराध सभी मानवीय संभावनाओं के अन्तर्गत, केवल अपराधी ने ही कारित किया है, न की किसी अन्य के द्वारा कारित किया गया हो।

3.4- मृतका अपने पैतृक घर में कुछ दिनों पूर्व से अपनी इच्छा से रह रही थी। उसका आवेदक से कोई मनमुटाव नहीं हुआ था। आवेदक घटना के दिन अपनी ससुराल नहीं गया था तथा उस पर मनगढ़ंत आरोप लगाये गये हैं। उसको घटना के संबंध में कोई भी जानकारी नहीं है।

3.5- मृतका व मृतक के शव, एक दूसरे से करीब 700 मीटर की दूरी पर अलग-अलग खेतों में मिले थे, अतः यह संभावित है कि दोनों के साथ अलग-अलग कोई हादसा हुआ हो।

3.6- आवेदक के द्वारा कथित रुप से बताने व दिखाने पर, एक देशी कट्टा की बरामदगी की कार्यवाही असत्य है तथा उक्त कार्यवाही का कोई सार्वजनिक साक्ष्य भी नहीं है, अतः कथित बरामदगी, आवेदक के विरुद्ध कोई सारवान साक्ष्य नहीं माना जा सकता है।

3.7- प्रथम सूचनाकर्ता के धारा 161 दं.प्र.सं. के अन्तर्गत लिखित ब्यान में व उसके द्वारा दिये गये प्रथम सूचना तथ्य में भिन्नता है, कि आवेदक मृतक व मृतका को कथित रुप से अलग-अलग व अलग-अलग स्थान से मेला घुमाने ले गया था, जबकि प्रथम सूचना तथ्य के अनुसार आवेदक दोनों को एक साथ उनके घर से मेला घुमाने ले गया था।

3.8- आवेदक एक सम्मानित परिवार का सदस्य है, जिसको जमानत दिये जाने की दशा में

न्यायिक प्रक्रिया से भाग जाने की कोई उम्मीद नहीं है तथा वो वचन देता है कि गवाहों से न तो कोई छेड़छाड़ करेगा और न ही उन पर कोई दबाव डालेगा। वो दिनांक 17.08.2019 से जेल में है तथा विचारण अब तक पूर्ण नहीं हुआ है। त्वरित न्याय एक संवैधानिक अधिकार है, अतः आवेदक जमानत का अधिकारी है।

अभियोजन पक्ष:

4.1- अभियोजन/शासन का पक्ष, श्री चन्दन अग्रवाल, अतिरिक्त शासकीय अधिवक्ता ने प्रबलता के साथ प्रस्तुत किया कि, अन्वेषण के दौरान एकत्रित साक्ष्यों व साक्षियों के कथन से यह प्रथम दृष्टवा पूर्णतः विदित होता है, कि आवेदक घटना के दिन अपनी ससुराल आया और अपनी पत्नी (मृतका) व उसके भाई (मृतक) को पुरानी घटनाओ को भुलाकर शान्ति पूर्वक जीवन व्यतीत करने की दिशा में, मेले में रात को घुमाने ले गया। मृतक को हलवाई की दुकान से व मृतका को घर से ले गया था और सुबह दोनों के शव पृथक-पृथक जगह से बरामद हुए तथा आवेदक न तो रात में वापस आया और न ही इन दोनों के साथ किन परिस्थितियों में घटना घटित हुई के बारे में कुछ बता ही पाया। जहां तक प्रथम सूचना के तथ्य में तथा धारा 161 दं.प्र.सं. के अंतर्गत अभिलिखित कथन इस विषय पर भिन्नता का प्रश्न है, वो विचारण के समय का विषय रहेगा तथा विधि का अतिसामान्य नियम है कि प्रथम सूचना रिपोर्ट कोई ज्ञान कोष नहीं होता है।

4.2- भारतीय साक्ष्य अधिनियम की धारा 106 के अनुसार "जब भी कोई तथ्य विशेषतः किसी व्यक्ति के ज्ञान में है, तब उस तथ्य को साबित करने का भार उस पर है"। अतः वर्तमान प्रकरण में आवेदक जो अपनी पत्नी व उसके भाई को, अपने साथ घटना की रात में मेला घुमाने ले गया था और सुबह उन दोनों का शव बरामद हुए, उस पर यह भार है कि वो बताये कि उस रात उन दोनों के साथ क्या और कैसे घटित हुआ था, जो वो बताने में अब तक असफल रहा है।

4.3- जांच के दौरान मिले साक्ष्य व गवाहों के लिखित कथन से परिस्थितियों को एक साथ मिला कर प्रथम दृष्टया एक श्रृंखला बन रही है कि आवेदक अपनी पत्नी (मृतका) के प्रति न केवल क्रूरता कारित करता था, बल्कि दहेज की मांग भी करता था। घटना के दिन वो अपनी ससुराल गया व अच्छे आपसी सम्बन्ध बनाने का झांसा देकर दोनों को रात में मेले घुमाने के बहाने साथ ले गया व सुबह उनके शव मिले। आवेदक न तो वापस आया और न ही कोई सूचना दी। अतः दहेज मृत्यु का अपराध कारित किया तथा अपनी पत्नी व उसके भाई की हत्या अपने दो साथियों के साथ मिलकर कारित कर हत्या का अपराध भी कारित किया। यह श्रृंखला आवेदक व अन्य दो अभियुक्तों की प्रत्यक्ष रुप से अपराध में संलिप्तता दर्शाती है न की किसी और की।

4.4- आवेदक द्वारा अपने दो साथियों के साथ मिलकर अपनी पत्नी व उसके भाई की हत्या कर व उनके शवों को छिपाकर अपराध के साक्ष्य को विलोपन का अपराध भी कारित किया है। अतः वर्तमान जमानत का आवेदन निरस्त किया जाये।

जमानत की विधि:

5.(क) सारगर्भित धारणा से संभवत: मूल नियम, जमानत है न की कारागार (देखें : **राजस्थान राज्य, जयपुर बनाम बलचंद @ बलिया: (1977 एआईआर 2447, 1978 एससीआर (1) 535)।** भा.दं.सं की धारा 439 के तहत जमानत देने की शक्ति के व्यापक आयाम है तथा न्यायालय को असीमित तो नही परन्तु पर्याप्त विवेकाधिकार प्रदान किये गये है, जिसका उपयोग न तो सामान्य रुप से और न ही मनमाने रुप से, परन्तु न्यायसंगत रुप से करने के लिए प्रस्तावित किया गया है । (देखें: **राम गोविंद उपाध्याय बनाम सुदर्शन सिंह: (2002) 3 एससीसी 598 और नीरू यादव बनाम उत्तर प्रदेश शासन (2016)15 एससीसी 422)।**

(ख) जमानत देने के लिये विचारात्मक कारक है, अपराध होने की परिस्थितियों की प्रकृति और गंभीरता; पीड़ित और गवाहों के संदर्भ में आरोपी की स्थिति और हैसियत; आरोपी के न्याय प्रक्रिया से भागने की संभावना; अपराध दोहराने की संभावना; मामले में संभावित सजा की कठोर संभावना के साथ अपने स्वयं के जीवन को खतरे में डालना; गवाहों के साथ छेड़छाड़; मामले का इतिहास और साथ ही इसकी जांच और अन्य प्रासंगिक आधार, जो अन्य

महत्वपूर्ण कारकों पर ध्यान करते हुए, व्यापक रूप से निर्धारित नहीं किये जा सकते है।(देखें : **गुरचरण सिंह बनाम राज्य (दिल्ली प्रशासन), (1978) 1 एससीसी 118)**

(ग) प्रासंगिक कारक कौन से हो सकते हैं, इसका कोई निर्धारित नियम (स्ट्रेट जैकेट फॉर्मूला) कभी भी नियत नहीं किया जा सकता है, हालांकि, कुछ महत्वपूर्ण कारक जिन्हें अन्य कारकों के साथ हमेशा विचारणीय माना जाता है, वो हैं , प्रथम दृष्टया अभियुक्त की संलिप्तता, प्रकृति और आरोप की गंभीरता, सजा की गंभीरता, आरोपी का चरित्र, स्थिति और उसकी अवस्थिति से संबंधित है।**(देखें: उत्तर प्रदेश शासन प्रति अमरमणि त्रिपाठी, (2005) 8 एससीसी 21)**

(घ) **मन्नो लाल जायसवाल बनाम उत्तर प्रदेश शासन और अन्य: 2022 एससीसी ऑनलाइन एससी 89** में उच्चतम न्यायालय ने कहा है कि, जब अभियुक्तों को भारतीय दंड संहिता की धारा 149 के तहत दंडनीय अपराधों के लिए आरोपित किया गया है और जब उनकी उपस्थिति स्थापित हो जाती है और यह कहा गया हो कि वो विधि विरुद्ध जमाव के सदस्य थे, तो उनकी व्यक्तिगत भूमिका और/या व्यक्तिगत आरोपी द्वारा किया गया अत्युक्ति महत्वपूर्ण और/या प्रासंगिक नहीं होती है।

(ङ) **आशिम बनाम राष्ट्रीय जांच एजेंसी : (2022) 1 एससीसी 695** में, उच्चतम न्यायालय ने कहा है कि एक बार जब यह स्पष्ट हो जाये कि समयोचित विचारण संभव नहीं हो पायेगा और आरोपी कारागार में एक दीर्घ अवधि व्यतीत कर चुका है, तो न्यायालय आम तौर पर उसे जमानत पर छोड़ने के लिए बाध्य हो जाते है।

(च) आरोपी को जमानत पर रिहा करने का आधार मात्र इसलिए कि अभियोजन का मामला, परिस्थितिजन्य साक्ष्य पर आधारित है, नहीं हो सकता है, अगर जांच के दौरान साक्ष्य/तथ्य एकत्र किये गये हो और प्रथम दृष्टया घटनाओं की पूरी श्रृंखला स्थापित हो गई है। (देखें : **ईश्वरजी नागाजी माली बनाम गुजरात राज्य और अन्य 2022 एससीसी ऑनलाइन एससी 55)**

(छ) यह भी ध्यान में रखा जाना चाहिए कि जमानत देने के लिए विधायिका ने "साक्ष्य" के स्थान पर "विश्वास करने के लिए उचित आधार" शब्दों का प्रयोग किया है, जिसका अर्थ है कि जमानत देने से संबंधित न्यायालय केवल इतनी संतुष्टि कर सकता है कि क्या आरोपी के खिलाफ कोई वास्तविक मामला है और अभियोजन पक्ष आरोप के समर्थन में प्रथम दृष्टया साक्ष्य पेश करने में सक्षम होगा। (देखें : **प्रहलाद सिंह भाटी बनाम एनसीटी आफ दिल्ली और अन्य:(2001) 4 एससीसी 280)।**

(ज) मुक्त न्याय का एक मौलिक आधार है, जिसके लिए हमारी न्यायिक प्रणाली प्रतिबद्ध है, कि वो कारक जो न्यायाधीश के मानस में ज़मानत को अस्वीकृत या स्वीकृत करने के लिए मूल्यांकित किये गये, वो पारित आदेश में उल्लेखित किये जायें। मुक्त न्याय इस धारणा पर आधारित है कि न्याय न केवल किया जाना चाहिए, बल्कि स्पष्ट और निस्संदेह रूप से होता हुआ दिखना भी चाहिए। न्यायसंगत निर्णय देने का न्यायाधीशों का कर्तव्य इस प्रतिबद्धता का हृदय है। (देखें: **महिपाल बनाम राजेश कुमार,: (2020) 2 एससीसी 118 और सुश्री वाई बनाम राजस्थान राज्य और अन्य :2022 एससीसी ऑन लाइन एस सी 458)**

(झ) जमानत के आवेदन पर आदेश पारित करते समय विस्तृत विवरण का उल्लेख, इस धारणा के नाते नहीं किया जा सकता है, कि मामला ऐसा है जिसके परिणामस्वरूप दोषसिद्धि हो सकती है या इसके विपरीत, दोषमुक्ति हो सकती है। हालांकि, जमानत के आवेदन पर निर्णय लेने वाला न्यायालय मामले के भौतिक पहलुओं से अपने निर्णय को पूरी तरह से अलग नहीं कर सकता, जैसे आरोपी के खिलाफ लगाए गए आरोप ; अगर आरोप यथोचित संदेह से परे साबित होते हैं और इसके परिणामस्वरूप दोषसिद्धि होती है तो सजा की गंभीरता; अभियुक्त द्वारा गवाहों को प्रभावित करने की उचित आशंका; साक्ष्यों से छेड़छाड़; अभियोजन के मामले में निराधारता; आरोपी का आपराधिक पूर्ववृत्त; और आरोपी के विरुद्ध आरोप के समर्थन में न्यायालय की प्रथम दृष्टया संतुष्टि। (देखेः **मनोज कुमार खोखर बनाम राजस्थान राज्य और अन्य (2022)3 एनसीसी 501)।**

<u>विश्लेषण व निष्कर्ष:</u>

6.1- पक्षों के विद्वान अधिवक्ताओं के कथन को उपरोक्त वर्णित जमानत की विधि के परिपेक्ष में सुना व पत्रावली का सम्यक परिशीलन किया।

6.2- आवेदक मृतका का पति व मृतक का जीजा है। वर्तमान प्रकरण में मृतका की आवेदक के साथ शादी के मात्रवर्ष के भीतर शारीरिक क्षति द्वारा मृत्यु कारित हुई है और साथ ही साथ मृतका के भाई की भी हत्या हुई है।

6.3- प्रथम सूचना रिपोर्ट के तथ्य व जाँच के दौरान साक्ष्यों व गवाहों के कथनों में यह प्रथम दृष्टया स्पष्ट रुप से विदित होता है कि आवेदक घटना के दिन रात में अपनी पत्नी व उसके भाई को मेला घुमाने ले गया था। रात में कोई भी वापस नहीं आया तथा सुबह मृतका व मृतक का शव अलग-अलग स्थान से बरामद हुए तथा आवेदक फरार रहा। भारतीय साक्ष्य अधिनियम की धारा 106 के अन्तर्गत आवेदक पर भार है कि वो बताये कि मेले में साथ ले जाने के बाद व उनके शव मिलने तक उन दोनों के साथ, कैसे क्या घटित हुआ। यह भी विदित रहे कि यह भार आवेदक पर तब आयेगा जब अभियोजन परिस्थियों की श्रृंखला पूर्ण करने में कामयाब हो पायेगा और अगर वो ऐसे तथ्य साबित करने में असफल रहता तो अपराध सिद्ध होने की संभावना प्रबल हो जाती है। (देखें सवितरी सामान्तरे प्रति उड़ीसा राज्य:2022 एस.सी.सी. ऑन लाइन एस.सी. 673)

6.4- पत्रावली पर उपस्थित जांच के दौरान गवाहान के ब्यान, शव विच्छेदन रिपोर्ट व अधिवक्ताओं के कथन से प्रथम दृष्टया व केवल जमानत के आवेदन पर विचार करने के उद्देश्य से यह प्रतीत होता है कि आवेदक पूर्व में अपनी पत्नी के साथ दहेज की मांग के लिये उसके साथ क्रूरता करता था। घटना के कुछ दिन पूर्व से मृतका अपने पैतृक निवास पर रह रही थी तथा घटना के दिन आवेदक वहां जाता है व अपनी पत्नी व उसके भाई को अपने साथ मेले घुमाने ले जाता है, यह तथ्य स्वतंत्र गवाहों के ब्यान में भी उल्लेखित है तथा न तो आवेदक न ही उसकी पत्नी व उसका भाई रात में वापस आते हैं। सुबह दोनों के शव एक दूसरे से कुछ दूरी पर बरामद होते है तथा दोनों के शव पर मृत्यु पूर्व आग्नेयास्त्र कारित चोट पाई जाती है और एक देशी कट्टा आवेदक के दिखाने पर बरामद भी होता है।

6.5- उपरोक्त परिस्थितियों की कड़ी जोड़ी जाये तो प्रथम दृष्टया एक श्रृंखला बन जाती है तथा जाँच के दौरान आवेदक के दो साथियों का नाम भी उजागर होता है जिनकी भी अपराध में संलिप्तता पाई जाती है। प्रथम दृष्टया परिस्थियों की श्रृंखला का एक ही निष्कर्ष है कि आवेदक इस जघन्य अपराध में सक्रिय रुप से लिप्त रहा।

6.6- अतः उपरोक्त वर्णित जमानत की विधि को ध्यान में रखते हुए तथा महत्वपूर्ण कारक जैसे प्रथम दृष्टया अभियुक्त (आवेदक) की अपराध में संलिप्तता, आरोप की गंभीरता, मामले में संभावित सजा की संभावना व कठोरता व गवाहों से छेड़छाड़ की संभावना को भी ध्यान में रखते हुए, यह न्यायालय इस निष्कर्ष पर पहुँचता है कि आवेदक को जमानत नहीं दी जा सकती है।

6.7- अतः जमानत का आवेदन बलहीन होने के कारण निरस्त किया जाता है।

(2022)07ILR A23
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 3406 of 2014

Smt. Ramo Devi & Ors. ...Appellants
Versus
ICICI General Insurance & Ors. ...Respondents

Counsel for the Appellants:
Sri Sanjay Kumar Singh

Counsel for the Respondents:
Sri Rahul Sahai, Sri Vishwambhar Nath

(A) Civil Law – Motor Vehicles Act, 1988 - Section -166 -- Appeal - against rejection of claim petition - Accident - contributory negligence - deceased died due to injuries sustained when his bicycle was hit by a driver of motorcycle who drives it rashly & negligently - tribunal rejected the claim petition on the ground that appellants have failed to prove the accident - Court after considering all the evidence on record (i.e. site plan/testimony of eye witness/investigation report of police/admission of driver/post mortem report) - held - (i) tribunal cannot dismiss the petition unless proved otherwise, (ii) burden of proof in claim petition under MV Act, cannot to be considered as in Civil or Criminal Cases, (iii) Motorcycle in question was involved in the accident (iv) both deceased and driver of motorcycle are co-author of the accident - principles of '*res ips loquitur*' - contributory negligence drawn to the tune of 50% each - therefore, impugned order is requires to be quashed. (Para - 13, 19,20, 21)

(B) Civil Law – Motor Vehicles Act, 1988 - Section -166 - Appeal - against rejection of claim petition - quantum of compensation – accident took place before 9 years and record of case is available before appellate Court - no issue of any complicated questions - in the light of various Judgments of Hon'ble Apex Court - court can decide the compensation here - instead of relegating the parities to the tribunal - therefore, as per the law lay down by the Hon'ble Apex Court - the compensation computed at Rs. 23, 05,472/- with 7.5% rate of interest & - Appeal Allowed. (Para - 28, 30, 31, 32)

(C) Civil Law – Motor Vehicles Act, 1988 - Section - 166 - Income Tax Act, 1961 - Section - 194- A(3)(ix): - Appeal - Tax deduction - in the light of judgment of Hon'ble Apex court in case of *'Smt. Hansaguri P. Ladhani's case* **- insurance company is entitled to deduct the appropriate amount under the head of 'TDS' accordingly - directions are also issued to the tribunal to follow the guidelines issued in case of** *'Bajaj Allianz General Insurance Com. Pvt. Ld. Vs UOI & ors.'*.(Para - 34, 35)

Appeal allowed. (E-11)

List of Cases cited: -

1. Smt. Minakshi Srivastava & ors. Vs Dheeraj Pandey & ors., F.A.F.O. No. 3425/ 2016, decided on 11.03.2022,

2. Sunita & ors. Vs Raj. Sate Road Transport Corporation & anr., 2019 (1) T.A.C. (S.C.),

3. Mangla Ram Vs Oriental Insurance Co. Ltd. & ors., 2018 (4) Supreme 525

4. Smt. Kaushnuma Begum & ors. Vs The New India Assurance Co. Ltd. (2001) 2 SCC 9.

5. Vimla Devi & ors. Vs National Insurance Co. Ltd.& ors., 2019 (133) ALR 768.

6. Anita Sharma Vs New India Assurance Co. Ltd. (2021) 1 SCC 171

7. Dulcina Fernandes & ors. Vs Joaquim Xavier Cruz & anr., AIR 2014 SC 58.

8. Reliance General Insurance Co. Ltd. Vs Subbulakshmi & ors., passed in C.M.A. No. 1482 of 2017 [C.M.P. No. 7919 of 2017. (CMA Sr. No. 76893 of 2016)]

9. Puspabai Purshottam Udeshi Vs Ranjit Ginning and Pressing Co., 1977ACJ 343 (SC).

10. FAFO No. 1818/2012 (Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors.) decided on 19.7.2016

11. Bithika Mazumdar Vs Sagar Pal, (2017) 2 SCC 748

12. Vimal Kanwar & ors. Vs Kishore Dan & ors., 2013 0 Supreme(SC) 441

13. Sarla Verma & ors. Vs Delhi Transport Corporation & anr., 2009 LawSuit (SC) 613

14. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 LawSuit (SC) 1093

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

16. A.Vs Padma V/s. Venugopal, Reported in 2012 (1) GLH 442

17. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd., reported in 2007(2) GLH 291

18. Smt. Sudesna & ors. Vs Hari Singh & anr., Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001

19. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd., First Appeal From Order No.2871 of 2016, decided on 19.3.2021

20. Bajaj Allianz General Insurance Company Pvt. Ltd. Vs U.O.I.& ors., vide order dated 27.01.2022

(Delivered by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the claimants-appellants who are legal heirs of the deceased have challenged the judgment and order dated 17.10.2014 passed by Motor Accident Claims Tribunal/ District Judge, Ghaziabad (hereinafter referred to as "Tribunal') in M.A.C.P. No. 224 of 2013. The appellants' claim petition for compensation on account of the death of the sole bread earner came to be dismissed by the Tribunal.

2. The brief facts as culled out from the record, placed before this Court are that on 09.01.2013 deceased Rajendra Kumar Pal was returning to his house after completing his duty from Ghaziabad Railway Station. At about 7:30 PM, when the deceased reached near Ghantaghar and when the deceased beside the road, a motorcycle bearing no. DL 13 SF 1906, which was being driven very rashly and negligently by its driver, hit the deceased and fled towards Mohan Nagar.

3. The deceased being on bicycle is not dispute and the accident occurred between the bicycle driven by the deceased and the motorcycle driven by the opponent.

4. In this accident, deceased sustained serious injuries. He was taken to Narendra Mohan Hospital from where he was referred to Max Hospital, Delhi where on 21.01.2013 he died during treatment on account of injuries sustained in the aforesaid accident. It is also averred that at the time of accident, the deceased was serving in Northern Railway. The First Information Report of the accident was lodged at police station Kotwali, District Ghaziabad.

5. Heard Mr. Sanjay Kumar Singh, learned counsel for the appellants and Mr. Rahul Sahai, learned counsel for the Insurance Company. None is present on behalf of owner.

6. It is submitted by learned counsel for the cliamants-appellants that learned Tribunal has rejected the claim petition of the appellants on the ground that appellants have failed to prove that the accident occurred due to rash and negligent driving of the motorcycle in question, though involvement of vehicle is accepted by the learned Tribunal but learned Tribunal has failed to appreciate the evidence in right perspective. It is also submitted that Investigating Officer has submitted the charge sheet against the Sachin Kumar who was driving the motorcycle at the time of accident.

7. It is further submitted by learned counsel for the claimants-appellants that learned Tribunal has not considered the averments made by driver of motorcycle in his written statement where he has admitted

the accident. Although, he has maintained that he was not negligent while driving the motorcycle. Learned counsel for the appellants has submitted that factum of accident is accepted by the driver of the motorcycle yet the learned Tribunal has not placed reliance on the aforesaid averment. It is next submitted that site plan, prepared by the Investigating Officer during the investigation, is not taken into consideration by learned Tribunal even the evidence of eye witnesses have been discarded/brushed aside. It is submitted that finding recorded by the learned Tribunal are perverse and bad in the eye of law and against the settled legal position for deciding claim petition arising out of motor accident.

8. Mr. Rahul Sahai, learned counsel for the Insurance Company has submitted that on the basis of evidence on record, it is nowhere proved that the motorcycle in question was involved in the aforesaid accident. It is further submitted that First Information Report was lodged against unknown vehicle and after two months of the accident, an application was given to the police authorities mentioning that the motorcycle no. DL 13 SF 1906 was involved. Evidence in this regard is totally concocted as to how the informant knew the number of offending motorcycle after two months of the accident.

9. It is further submitted by learned counsel for the Insurance Company that learned Tribunal meticulously examined the evidence on record and found that entire evidence regarding the accident, involving the aforesaid motorcycle are based on concocted story, hence, learned Tribunal is justified in not relying the evidence led by the claimants-appellants and the claim petition is rightly rejected. It is further submitted that there is no illegality or infirmity in the impugned judgment, which calls for any interference by this Court.

10. Having heard learned counsel for the parties. Certain aspects as prelude, we require our attention:-

(a) No doubt the First Information Report was lodged against the unknown vehicle but it is to be kept in mind that the informant was not the eye witness of the accident.

(b) The involvement of vehicle was known to the informant, he moved an application to the police authorities.

(c) Investigation is conducted by the police in order to reach to the logical conclusion that vehicle was involved, hence, it would not make any difference whether initially the F.I.R. was lodged against unknown vehicle as F.I.R. is only staring point of investigation. However, on completion of investigation, charge sheet was submitted against Shri Sunil Kumar-driver of the motorcycle and once the F.I.R., charge sheet and post-mortem report are filed before the learned Tribunal, prima facie, they would prove that the accident had occurred with the vehicle in question. The postmortem report of the deceased goes to show that he died out of injuries sustained in vehicular accident. The driver of the motorcycle admitted the factum of the accident in his written statement filed before the learned Tribunal which has not been proved to be in collusion by the insurance and it is also not proved by leading any cogent evidence that the vehicle was not involved.

11. We are supported in our view by the recent pronouncement of Division Bench of this Court in ***Smt. Minakshi***

Srivastava and Others Vs. Dheeraj Pandey and Others, F.A.F.O. No. 3425 of 2016, decided on 11.03.2022, where the factum of accident is accepted by the owner will apply and enure for the benefit of these claimants.

12. Learned counsel for the appellants has relied on the aforesaid decision of this Court in ***Smt. Minakshi Srivastava (Supra),*** wherein it is held that once the owner has accepted the involvement of vehicle in accident, the Tribunal cannot dismiss the claim petition unless proved otherwise. In this case on hand, although in his testimony, the driver of the motorcycle has deposed that accident did not take place by his motorcycle but in his written statement he has stated that accident did not take place due to his negligence, accident occurred due to the negligence of the deceased by not complying with the traffic rules. Hence, when the factum of the accident is admitted by the driver, his evidence against the pleadings cannot be accepted.

13. Perusal of impugned judgment goes to show that though the learned Tribunal has held that the burden of proof in claim petition under Motor Vehicles Act, 1988 cannot be considered as in civil or criminal cases yet the learned Tribunal has fallen in error in not considering the matter under beneficial piece of legislation. The learned Tribunal has come to conclusion that claimants did not prove that respondent-3 was driving the vehicle at the time of the accident, but the charge sheet was submitted against the driver-respondent no.3, was primary evidence of his driving the vehicle which has not been rebutted nor proved to be concocted as it is in evidence of driver of motorcyclist/respondent no.3 as D.W.-1 that he was coming from Chhapraula and going to Mohan Nagar. Hence, we hold that the motorcycle was involved in the accident.

14. The evidence on record comprises of oral testimony of witnesses and the documentary evidence in support of the said accident and injuries caused to deceased. The post-mortem report shows that the deceased died due to the injuries which he had sustained in the accident and hence, it is a homicidal death, which is proved. In our case, the case title ***Sunita and Others Vs. Rajasthan Sate Road Transport Corporation and Another, 2019 (1) T.A.C. (S.C.)*** will also be applicable to the facts of this case. The decision of the Supreme Court in the case of ***Mangla Ram Vs. Oriental Insurance Co. Ltd. and Others, 2018 (4) Supreme 525***, relied by the appellants goes to show that pleadings of parties will have to be scrutinized in a holistic manner.

15. We are fortified in our view by the decisions of Apex Court in ***(a) Smt. Kaushnuma Begum And Ors vs. The New India Assurance Co. Ltd. (2001) 2 SCC 9., (b) Vimla Devi and others Vs. National Insurance Company Limited and others, 2019 (133) ALR 768; (c) Anita Sharma v. New India Assurance Co. Ltd. (2021) 1 SCC 171 (d) Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & Anr., AIR 2014 SC 58,*** and on the decision of Madras High Court in ***Reliance General Insurance Co. Ltd. Vs. Subbulakshmi and Others, passed in C.M.A. No. 1482 of 2017 [C.M.P. No. 7919 of 2017. (CMA Sr. No. 76893 of 2016)]*** and the decision of Apex Court referred in the said case namely ***Puspabai Purshottam Udeshi Vs. Ranjit Ginning and Pressing Co., 1977ACJ 343 (SC)***, the ratio laid in these decisions would

be applicable in such matters where Tribunal takes hyper technical stand in dismissing the claim petition which is filed under the beneficial piece of legislation. Despite the fact that judgment of ***Smt. Kaushnuma Begum And Ors vs. The New India Assurance Co. Ltd. (2001) 2 SCC 9*** was very much in vogue, the Tribunal has dismissed the claim petition holding that there are discrepancies in the evidence of prosecution witnesses.

16. Now, we take up the issue of negligence as to who was negligent in the accident. 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.

17. 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.

18. 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."

19. The learned Tribunal has failed to consider the above aspect while dismissing the claim petition. Hence, this appeal requires to be allowed and the impugned judgment and award of the Tribunal dismissing the claim petition being against the mandate of law and facts requires to be quashed.

20. The First Information Report was lodged by the brother of the deceased and it was averred that at the time of accident, the deceased was coming from Ghaziabad Railway Station on his bicycle after

completing his duty. When the deceased took turn from G.T. road towards his house, the vehicle hit him from behind but in oral testimony, the witnesses twisted the statements and deposed that at the time of accident, deceased was stationary on bicycle beside the road, which cannot be accepted. Moreover, the site plan also goes to show otherwise. The site plan is in-consonance with the averments of F.I.R. that the accident took place when the deceased took turn towards his house from G.T. road. Copy of site plan is annexed in paper book, which goes to show that there was a divider on G.T. road and there is also a cut in the divider for crossing the road towards otherwise. The accident had taken place at the point where there is opening in the divider and the deceased is shown going and turning towards his right side from the road and offending motorcycle is shown coming from behind. The driver of motorcycle should have slowed down the speed of motorcycle, when he was approaching the place of accident in the divider because it is used for crossing the road and if it would have been done by the driver of the motorcycle, the accident could have been avoided.

21. In fact whether the deceased was also negligent has also to be decided and that he took turn towards right side from middle of the road without ensuring that any vehicle is not coming from behind because if this precaution would have been taken by the deceased, then also the accident could have been avoided. But it is seen that neither the driver of the motorcycle nor the deceased took any precaution due to which the accident could have been avoided. Both are co-authors of the accident. Hence, we hold that driver of the motorcycle and the deceased were both negligent in driving in their respective vehicles, hence, we hold the negligence of the driver of motorcycle and the deceased to the tune of 50% each.

22. The counsel for the respondent contended that no amount can be granted as the petition was dismissed and requested to reject the appeal and to the alternative or remand the same to the Tribunal to decide the compensation. The contentions are rejected in view of the decision in ***Bithika Mazumdar Vs. Sagar Pal, (2017) 2 SCC 748,*** and this Court feels that as nine years have elapsed from filing of appeal and that the record is before this Court, instead of directing the parties to go before the Tribunal only for the assessment of compensation as the deceased was a salaried person which could cause further delay rather it would be more justifiable if this Court decides the quantum as this Court has to decide only quantum under Section 166 of the Act, 1988 which would be the final amount payable to the claimants.

23. The compensation to be awarded is on the settled legal principles enunciated in the judgments of the Apex Court relating to persons who was in government job. Therefore, we are deciding the compensation here. Hence, we decide the compensation here without relegating the petitioners to the MACT as the record is here. There is no dispute about the salary which is proved by cogent evidence and, therefore, as nine years have already elapsed. We rancher to decide the compensation here without relegating the parties to the Tribunal as the other issues have been decided by the Tribunal meaning thereby that the policy of the vehicle was invoked and there was no breach of policy. The driver of the motorcycle had proper driving licence and, therefore, the

Tribunal's view is so vulnerable that it cannot stand the scrutiny of this Court.

24. Now, we take up the issue of quantum of compensation payable to the appellants-claimants. As per the claim petition, the deceased was serving in Northern Railway in account section and was getting salary at Rs.61,635/- per month.

25. Learned counsel for the appellants-claimants has submitted that Senior Section Officer/Accounts of Northern Railway is produced as P.W.-4 before the learned Tribunal who has proved the income of the deceased. It is also submitted that deceased was a government servant, hence he was entitled to get compensation for future loss of income also.

26. Learned counsel for the Insurance Company has submitted that net income of the deceased is shown at Rs.30,926/- per month, which is to be taken into consideration. The accident of the deceased had taken place on 09.01.2013, hence, salary slip for the month of December, 2012 is relevant, which is on record. The aforesaid salary slip is proved by P.W.-4 Ashok Kumar, Senior Section Officer/Accounts, Northern Railway, who has deposed before the learned Tribunal on producing the original records.

27. As per the testimony of P.W.-4, the gross monthly salary of the deceased was Rs.61,635/-. As per the judgment of Hon'ble Apex Court in ***Vimal Kanwar and Others VS. Kishore Dan and Others, 2013 0 Supreme (SC) 441,*** the component of income tax would be deducted from the salary and provident fund shall not be deducted. Hence, out of gross salary, Rs.6,425/- towards income tax and Rs.700/- towards deduction for railway society and Rs.30 for insurance shall be deducted. Hence, the computable salary comes at Rs.54,480/- per month.

28. The age of the deceased was 57 years, hence in light of the decision of the Apex Court in the case of ***Sarla Verma and Others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC) 613*** and ***National Insurance Co. Ltd. Vs. Pranay Sethi and Others, 2017 LawSuit (SC) 1093,*** and due to being employed and having the age of 57 years, 15% shall be added towards future prospects in the income of the deceased.

29. Keeping in view the number of dependents, 1/3rd shall be deducted for personal expenses. The multiplier of 9 has to be applied. Under the non pecuniary head, claimants-appellants shall be entitled to get Rs.15,000/- for loss of estate and Rs.15,000/- for funeral expenses. Apart from it, wife of the deceased shall also be entitled to get Rs.40,000/- for loss of consortium. In this way, claimants shall get Rs.70,000/- under the head of non pecuniary damages with increase of 10% for every three years as per the judgment of *Apex Cour*t in **Pranay Sethi** *(Supra)* rounded off Rs.1,00,000/-.

30. The total compensation payable to the appellants are computed herein below:

(i) Annual income Rs.54,480/- per month X 12 = Rs.6,53,760/- per annum.

(ii) Percentage towards future prospects : 15%. Rs.98,064/-

(iii) Total income : Rs.6,53,760 + Rs.98,064/- = Rs.7,51,824/-

(iv) Income after deduction of 1/3rd : Rs.5,01,216/-

(v) Multiplier applicable : 09

(vi) Loss of dependency : Rs.5,01,2016 X 09 = Rs.45,10,944/-

(vii) Amount under non pecuniary head: Rs.70,000/- +30,000/- = 1,00,000/-

(viii) Total compensation: Rs.45,10,944/- + Rs.1,00,000/- = Rs. 46,10,944/-

(ix) Amount after 50% deduction towards contributory negligence :

Rs.46,10,944/- - Rs23,05,472/- = Rs.23,05,472/-

31. 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."

32. In view of the above, the appeal is **allowed.** Judgment passed by the Tribunal is set aside. 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.

33. 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 be passed by Tribunal.

34. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291*** and this High Court in 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 claimants 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) and in ***First Appeal From Order No.2871 of 2016*** (Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.) decided on 19.3.2021 while disbursing the amount.

35. The Tribunal shall follow the guidelines issued by the Hon'ble Apex Court in ***Bajaj Allianz General Insurance Company Pvt. Ltd. Vs. Union of India and Others,*** vide order dated 27.01.2022, as the

purpose of keeping compensation is to safeguard the interest of the claimants. Since long time has elapsed, the amount be deposited in the Saving Bank Account of claimant(s) in a nationalized Bank without F.D.R.

(2022)07ILR A33
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ A No. 6432 of 2019

Sangram Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ishan Deo Giri, Sri Pawan Giri

Counsel for the Respondents:
C.S.C.

A. Service Law – Suspension – Enquiry - Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 - Rule 4(1) - The law is certain that the prosecution must stand on its own legs basing its findings on the evidence that has been led by it. It matters little as to whether the accused has made out a plausible defence or not. (Para 2)

Even if the petitioner had not replied to the charges and had not appeared on the dates fixed when the enquiry was undergone, it was the bounden duty of the Enquiry Officer to have seen whether the charges were proved on the basis of the evidence which was led by it. The cook was a person affected. The police officer namely Vishwajeet Pratap Singh was only a person who had informed the Superintendent of Police, Jaunpur on 23.7.2014 about the incident of slapping etc. which took place on 21/22 July 2014. He was not an eye-witness. Further **no individual who had seen the incident was summoned as an eye-witness to prove the incident.** (Para 5)

B. Mere suspicion should not be allowed to take the place of proof even in domestic enquiries. The principle that in punishing the guilty scrupulous care must be taken to see that the innocent are not punished, applies as must to regular criminal trials as to disciplinary enquiries held under the statutory rules. (Para 2)

There was only a medical report based on suspicion of a smell coming of alcohol from the petitioner while there was no blood report or urine report of the petitioner which actually would have proved that the petitioner had actually consumed liquor/alcohol to an extent to be called in a state of drunkenness. (Para 5)

Writ petition allowed. (E-4)

Precedent followed:

1. Bachubhai Hassanalli Karyani Vs St. of Mah., (1971) 3 SCC 930 (Para 2)

2. Gurcharan Singh & anr. Vs St. of Punj., AIR 1956 SC 460 (Para 2)

3. R. Venkatakrishnan Vs C.B.I., AIR 2010 SC 1812 (Para 2)

4. U.O.I. Vs H.C. Goel, AIR 1964 SC 364 (Para 2)

Present petition assails order dated 27.08.2018, passed by Superintendent of Police, Jaunpur, order dated 17.10.2018, passed by Inspector General of Police, Varanasi Zone, Varanasi and order dated 25.01.2019, passed by the Additional Director General of Police, Varanasi Zone, Varanasi.

(Delivered by Hon'ble Siddhartha Varma, J.)

1. For an incident which occurred on 21/22.7.2014, information was given by the Station House Officer, Nevdhia, District

Jaunpur to the Superintendent of Police, Jaunpur that he had got a report through his mobile phone on 23.7.2014 that the petitioner under influence of alcohol has misbehaved with the private cook Shamshad Ahmad. The petitioner thereafter was suspended on 23.7.2014. A preliminary enquiry was undergone by a retired police officer by the name of Sagir Ahmad who submitted his report on 28.10.2014 finding a prima facie case against the petitioner. On the basis of the preliminary report, the enquiry was allotted on 20.6.2017 to Sri Sanjay Rai, Additional Superintendent of Police, Rural, Jaunpur by the Superintendent of Police, Jaunpur. A charge sheet was prepared on 28.7.2017 and was handed over to the petitioner on 1.8.2017. For the conducting of the enquiry dates were fixed on 1.8.2017, 16.8.2017, 3.9.2017, 5.10.2017, 13.10.2017, 27.11.2017, 4.12.2017, 20.12.2017, 21/23.12.2017, 6.1.2018, 17.1.2018, 18.2.2018 and 18/20.3.2018. Thereafter enquiry report was submitted on 24.4.2018 by the Enquiry Officer finding the petitioner guilty of the charges levied against him and a major punishment of removal was proposed under Rule 4(1) of the Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991. On 30.4.2018, a show-cause notice was issued to the petitioner for his reply. Upon receiving the show-cause notice, the petitioner submitted his reply on 7.7.2018. Thereafter the punishment order was passed against the petitioner and he was removed from service vide order dated 27.8.2018. The appeal filed by the petitioner was dismissed on 17.10.2018 and similarly the revision filed by him was also dismissed on 25.1.2019. Aggrieved thereof, the petitioner had filed the instant writ petition.

2. Contention of learned counsel for the petitioner is that the enquiry was a sham enquiry inasmuch as the enquiry was being undergone in Jaunpur and the petitioner was posted at Varanasi from where he was unable to get leave to attend the enquiry. What is more, it has been stated that no eye-witness of the incident had been examined by the Enquiry Officer. The only persons who were examined as witnesses by the Enquiry Officer were Vishwajeet Pratap Singh, the Station House Officer who had by his mobile phone informed the Superintendent of Police on 23.7.2014 about the incident which had taken place on 21/22.7.2014 and the private cook Shamshad Ahmad. It has been contended by learned counsel for the petitioner that no other witness was examined. Still further, it is the contention of the learned counsel for the petitioner that only a medical report which was based on smell coming from the petitioner of alcohol was relied upon. The blood test and the urine test of the petitioner were not undertaken and, therefore, it cannot with any certainty be said that the petitioner was guilty of having consumed alcohol. Still further, it is the contention of learned counsel for the petitioner that if the incident of slapping etc. had taken place when the petitioner was inebriated then a First Information Report ought to have been lodged which in fact was never lodged. Learned counsel for the petitioner submitted that the paragraph 31 of the writ petition, which had categorically stated that no medical officer was examined and also the sample of blood or urine was not used to prove the allegations, was not replied to in the counter affidavit. Learned counsel for the petitioner submits that as per the judgments reported in **(1971) 3 SCC 930 : Bachubhai Hassanalli Karyani vs. State of Maharashtra; AIR 1956 SC 460 : Gurcharan Singh & Anr. vs. State of Punjab and AIR 2010 SC 1812 : R. Venkatakrishnan vs. Central Bureau of**

Investigation, the law is certain that the prosecution must stand on its own legs basing its findings on the evidence that has been led by it. It matters little as to whether the accused has made out a plausible defence or not. Learned counsel for the petitioner relying upon a decision of the Constitution Bench of Supreme Court in **Union of India vs. H.C. Goel** reported in **AIR 1964 SC 364** submitted that suspicion cannot be allowed to take the place of proof even in domestic enquiries. Since, learned counsel for the petitioner cited a certain paragraph of the judgment reported in **AIR 1964 SC 364,** the same is being reproduced here as under :

".....mere suspicion should not be allowed to take the place of proof even in domestic enquiries. It may be that the technical rules which govern criminal trials in courts may not necessarily apply to disciplinary proceedings, but nevertheless, the principle that in punishing the guilty scrupulous care must be taken to see that the innocent are not punished, applies as must to regular criminal trials as to disciplinary enquiries held under the statutory rules."

3. Learned counsel for the petitioner, therefore, submitted that the charge was not proved to the hilt and, therefore, it cannot be presumed that the petitioner was guilty of the charges.

4. Learned Standing Counsel, however, in reply submitted that if the petitioner chooses not to appear and to reply to the charge sheet, then the Police Department had no other option but to presume that the charges were proved.

5. Having heard Sri Pawan Giri, Advocate holding brief of learned counsel for the petitioner and the learned Standing Counsel and after having gone through the written arguments, I am of the view that the impugned order dated 27.8.2018 passed by the Superintendent of Police, Jaunpur, the order dated 17.10.2018 passed by the Inspector General of Police, Varanasi Zone, Varanasi and the order dated 25.1.2019 passed by the Additional Director General of Police, Varanasi Zone, Varanasi cannot be sustained in the eyes of law. Even if the petitioner had not replied to the charges and had not appeared on the dates fixed when the enquiry was undergone, it was the bounden duty of the Enquiry Officer to have seen whether the charges were proved on the basis of the evidence which was led by it. The cook was a person affected. The police officer namely Vishwajeet Pratap Singh was only a person who had informed the Superintendent of Police, Jaunpur on 23.7.2014 about the incident of slapping etc. which took place on 21/22 July 2014. He was not an eye-witness. Further no individual who had seen the incident was summoned as an eye-witness to prove the incident. Also, there was only a medical report that there was a suspicion on account of the fact that there was a smell coming of alcohol from the petitioner while there was no blood report or urine report of the petitioner which actually would have proved that the petitioner had actually consumed liquor/alcohol to an extent that he was in a state of drunkenness.

6. For the reasons stated above, the order dated 27.8.2018 passed by the Superintendent of Police, Jaunpur, the order dated 17.10.2018 passed by the Inspector General of Police, Varanasi Zone, Varanasi and the order dated 25.1.2019 passed by the Additional Director General of Police, Varanasi Zone, Varanasi are quashed and are set-aside.

7. The writ petition is, accordingly, allowed.

(2022)07ILR A36
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ A No. 17452 of 2021

Aditya Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dharmendra Kumar Pandey

Counsel for the Respondents:
C.S.C., Sri Manish Goyal (Addl. A.G.)

A. Service Law - Petitioner to appear in preliminary exam for the post of Sub-Inspector in Uttar Pradesh Police/Plantoon Commander P.A.C./Fire Branch-schedule for taking examination was between 12.11.2021 to 02.12.2021-Petitioner fell ill due to typhoid-Petitioner moved an application to reschedule his examination between that period but nothing was done-respondents had acted in unjustified manner in rescheduling the exams of nearly 125 candidates whereas denying the request of the petitioner for the same and have acted in unreasonable manner against the brochure which does not permit rescheduled of the examination in any case-while in the notification the clauses as specified goes to show that in case of technicalities the exams will be held on 03.12.2021 and not due to any individual difficulty of candidates-Hence, the case of the petitioner does not stand on the ground of being discriminated. (Para 1 to 23)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Asha Vs Pt. B.D. Sharma University of Health Science & ors. (2012) 7 SCC 389

2. Pankaj Kumar Yadav Vs St. of U.P. & ors. (2020) 1 ADJ 187 DB

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

1. Learned counsel for the petitioner filed the amendment application to add prayer No. (ii-A) and (ii-B) in the prayer clause.

2. As no objection has been raised by learned counsel for the respondents, this amendment application is allowed.

3. Learned counsel for the petitioner is permitted to incorporate the necessary amendment in the body of the petition within three days.

Order on Petition

1. Heard Mr. Dharmendra Kumar Pandey, learned counsel for the petitioner, Mr. Manish Goel, learned Additional Advocate General assisted by Mr. Vikram Bahadur Yadav, learned Standing Counsel for the State-respondents.

2. Initially, the instant petition has been filed by the petitioner with the following prayer:-

"(i) a writ, order or direction, in the nature of mandamus commanding the respondents no.2 and 3 to permit the petitioner to appear in preliminary examination for the post of Sub-Inspector in Uttar Pradesh Police/Plantoon Commander P.A.C./Fire Branch (2020-21) between the dates 30.11.2021 to 03.11.2021

at any examination center of Prayagraj by making alternative arrangement for the same.

(ii) a writ, order or direction, in the nature of mandamus commanding the respondents no.2 and 3 to take necessary action for the post of Sub-Inspector in Uttar Pradesh Police/Plantoon Commander PAC/Fire Branch (2021-21) after issuance of admit card for the same by making alternative arrangement."

3. Subsequently, by means of an amendment application, which has been allowed by this Court today itself, petitioner has prayed for following relief:-

"(ii-A) A writ of certiorari to call for entire records of those candidates whose exam date has admittedly been rescheduled/shifted and quash their result of online written exam conducted by respondent no.2 in furtherance of their notification dated 25.02.2021 amended notification dated 15.06.2021 and notification dated 01.11.2021.

(ii-B) A writ, order or direction in the nature of mandamus commanding the respondent no.2 to pay compensation amount of Rs.10 Lacks to petitioner for violating his right of equality provided under Article 16 of Constitution of India (and equal treatment) to appear in online written exam (of U.P. Police Sub-Inspector/Plantoon Commander PAC/Fire Branch) after rescheduled the date like other candidates whose exams date has admittedly been rescheduled."

4. Brief facts of the case are that the petitioner applied for the post of Sub-Inspector in Uttar Pradesh Police/Plantoon Commander P.A.C./Fire Branch (2020-21), pursuant to the notification/amendment notification dated 25.02.2021/15.06.2021. The respondent no.2 issued the schedule for taking primary examination, vide letter dated 01.11.2021 which was to be held between 12.11.2021 to 02.12.2021.

5. As per the instructions given in the notification dated 01.11.2021, petitioner downloaded his admit card, in which the examination date was fixed on 22.11.2021.

6. Learned counsel for the petitioner submits that petitioner fell ill due to typhoid on 19.11.2021. The petitioner being under the impression that he would be in a position to attend the exams scheduled to be held on 22.11.2021 but after his treatment he was not in position to attend the exams on 22.11.2021, as also that the exams were scheduled to be held for a period from 12.11.2021 to 02.12.2021 in three shifts, thought that he would move an application, requesting to reschedule his examination between that period. The petitioner on the same date i.e. 22.11.2021 send online application on the website of respondent no.2 along with his medical papers with the request to reschedule his exam on any other date on or before 02.12.2021. The respondent no.2 did not pay any attention on the aforesaid application and when the petitioner did not get any response, he moved a representation dated 27.11.2021 through registered post, requesting that the respondents to conduct his online written examination but nothing was done, therefore, the present writ petition has been filed.

7. Learned counsel for the petitioner submits that Clause-3 of the notification dated 01.11.2021 provides that in case the examination so scheduled is not taken on the specified date due to technicalities in any of the centres, the examinations so

affected will be taken on 03.12.2021. Clause-3 of the aforesaid notification is extracted below:-

"यदि किसी तकनीक समस्या के कारण किसी परीक्षा तिथि / पाली में किसी केंद्र विशेष पर परीक्षा आयोजित नहीं हो सकी तो ऐसे केंद्र की परीक्षा दिनांक 03.12.2021 को आयोजित की जाएगी।"

8. He further submits that Clause-8 of the notification dated 01.011.2021 provides that in case the candidates have any problem/objection in the said online written examination, they could contact the help desk number as provided. Clause-8 of the aforesaid notification is extracted below:-

"ऑनलाइन लिखित परीक्षा के सम्बन्ध में अभ्यर्थियों को यदि कोई समस्या / आपत्ती हो तो हेल्पडेस्क न०. 022-62337900 पर संपर्क कर सकते हैं।"

9. When the matter was taken up on 02.12.2021, the learned counsel for the petitioner pointed out that he had acquired knowledge that the exams of certain candidates were rescheduled, therefore, he moved supplementary affidavit as well as amendment application for bringing on record the necessary facts for proper adjudication of the matter.

10. Learned counsel for the petitioner submits that the respondents have not acted according to the condition as mentioned in the notification and have rescheduled the examination of certain candidates who did not appear on the date specified in the admit card. He further submits that the respondents have adopted an arbitrary approach in re-scheduling the exams of some candidates who could not appear on the schedule date of exam for reasons beyond their control. The respondents have acted in unjustified manner in rescheduling the exams of nearly 125 candidates whereas denying the request of the petitioner for the same and have acted in unreasonable manner against the brochure which does not permit rescheduled of the examination in any case.

11. Learned counsel for the petitioner has relied upon the Clause-2, given in general instructions as provided in Appendix-1 of U.P. Sub-Inspector and Inspector (Civil Police) Service Rules in which Rule 125 provides:-

"(2) if a candidate fails to appear in the examination on the scheduled date and time, then he can give application to the committee formed for conducting the test in concerned district, giving reasons in details for absence and requesting to appear in the examination on some other date. The committee, after considering his application, can decide and may allow him to appear for test on some other date. The candidate will be given only one chance in this regard and if he fails to appear in the examination on rescheduled date and time, he shall be considered unsuccessful. The candidates may give application, before the last date fixed for this test, by the Board. No application will accepted after the last day. The committee shall inform the Board about all such cases where the date and time of the test has been rescheduled."

12. Placing reliance upon the aforesaid rules, it is the case of the petitioner that as he was ill, not being in a position to appear in the examination scheduled on 22.11.2021, he had moved an online application before the respondents on time i.e. on the same date making a request to reschedule his examination in between the dates provided in the

notification but no such opportunity of hearing was given.

13. The respondents have acted in an arbitrary manner while permitting 125 students to appear in the examinations on some other dates, therefore, the petitioner has to be compensated for the same. In support of his submission, the petitioner has placed reliance upon the judgement of Hon'ble Apex Court in case of **Asha Vs. Pt. B. D. Sharma University of Health Science and others** reported in **(2012) 7 SCC 389,** wherein it has been held as follows:-

"Wherever the court finds that action of the authorities has been arbitrary, contrary to the judgements of this Court and violative of the Rules, regulations and conditions of the prospectus, causing prejudice to the rights of the students, the Court shall award compensation to such students as well as....."

14. The learned counsel for the petitioner submits that in exceptional/peculiar circumstances when there is no fault of the candidate/petitioner and such a person has approached the Court within time, the Court can always interfere in such matters when the legal right of the petitioner is affected for which he has approached the Court within time and the respondents have committed fault in not following the rules, regulations as well principles to be followed in case of selection or admission. In support of his submission, he has also placed reliance upon the judgement of Division Bench of this Court in case of **Pankaj Kumar Yadav Vs. State of U.P. and others [2020 (1) ADJ 187 DB]** wherein it has been held as follows:-

"(i) That in a case where candidate/student has approached the Court at the earliest and without any delay and that the question is with respect to the admission in medical course all the efforts shall be made by the concerned Court to dispose of the proceedings by giving priority and at the earliest.

(ii) Under exceptional circumstances, if the Court finds that there is no fault attributable to the candidate and the candidate has pursued his/her legal right expeditiously without any delay and there is fauly only on the part of the authorities and/or there is apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right of equality and equal treatment to the competing candidates....."

15. Thus, on the aforesaid grounds the petitioner is entitled to be granted the relief as prayed.

16. Learned Counsel for the State submits that no candidate has been permitted to appear on some other date than the date as mentioned in the admit card on the ground of individual difficulty. There is no discrimination as submitted by the learned counsel for the petitioner because while the examination of 125 candidates were rescheduled on the ground that T.E.T. (Teacher Eligibility Test) examination date clashed with the date of exam of Sub-Inspector, therefore, the exam of separate class of candidates has been rescheduled on the ground of the examination of T.E.T. as the same clashed with the date of exam of Sub-Inspector.

17. Learned Counsel for the State further submits that reschedule of the examination is not permitted and if that is allowed, the Examination Regulatory Body will not be able to conclude the selection. In support of his submission, learned counsel for the petitioner has placed reliance of the order dated 18.11.2021, passed in Special Leave Petition

No. 6860 of 2021 (State of U.P. & others Vs. Pankaj Kumar) wherein following observations were made:-

"recruitment process undertaken by the competent authorities would be meaning less without a time line and the next recruitment process will also get effect since determination of the number of vacancies for the process will keep fluctuating."

18. With respect to the notification, the grounds raised by learned counsel for the petitioner regarding the conditions mentioned in the notification dated 01.11.2021, it has been submitted that the clauses have been misinterpreted.

19. A bare reading of the clauses as specified goes to show that in case of technicalities, the exams will be held on 03.12.2021 and not due to any individual difficulty of the candidates. It is also clear that for any of the problems while appearing in the examination, it was open to the candidates to approach the help desk number as provided and not for request for rescheduling the examination.

20. Lastly, counsel for the state submits that the examinations of such candidates whose date of examination clashed with the examinations of T.E.T. was rescheduled/changed only, that too, on the prior information given by them to the Board, so that the service agency could be able to make necessary arrangement for online written examination on said changed date. He has also brought on record the fact that the U.P.S.C. had also changed the date of provisional education (Teaching Service Examination) 2021 which was scheduled on 12.12.2021 taking into account the examination for the post of Samiksha Adhikari conducted by Allahabad High Court and the said examination was subsequently conducted on 22.12.2021. From the aforesaid, it is clear that the date of online examination was never changed on the ground of illness.

21. In the similar set of facts where candidate, namely, Arun Kumar could not appear in the examination pursuant to the same advertisement due to illness. He approached before Lucknow Bench of this Court by filing Writ No. 27264 (SS) of 2021 and the Court disposed of the writ petition with direction to the respondents to decide the representation of the petitioner.

22. This Court is of the opinion that there is no provision of rescheduling the examination on the ground of individual difficulty and certain candidates have been permitted to appear in the examination on another date as the date of the present examination clashed with some other examination, hence, the case of the petitioner does not stand on the ground of being discriminated.

23. In view of the aforesaid facts, the present petition lacks merits and is accordingly, **dismissed.**

(2022)07ILR A40
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ A No. 61226 of 2012

Hari Om Rastogi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri A.C. Pandey, Sri Kshitij Shailendra

Counsel for the Respondents:
C.S.C.

A. Service Law – Pension – Departmental Inquiry – Civil Service Regulations - Article 351-A - In the present case there is no irregularity in the process of departmental inquiry. The inquiry was initiated before the petitioner retired and it continued thereafter also and for that the sanction of the Governor was not required. However, when punishment was imposed for deduction of pension and gratuity, prior permission was taken from U.P. Public Service Commission as well as from the Governor and punishment order was passed under direction of the Governor. (Para 12 to 15)

B. Proportionality of punishment and scope of judicial review under Article 226 of the Constitution - The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof. (Para 24)

It is settled law that gratuity and pension are not bounties, as an employee earn these benefits of his long, continuous, faithful and unblemished service. (Para 17)

Article 351-A of CSR reserves right of the Governor to withheld of withdraw pension or part thereof, whether permanently or for specified period or to order recovery from pension of the whole or part for pecuniary loss caused to the Central or St. Government in eventualities that pensioner be guilty of grave misconduct in departmental or judicial proceedings or to have caused pecuniary loss to the government by misconduct or negligence. **The word "grave misconduct" is something more than a "misconduct".** The other eventuality is to have caused pecuniary loss to government by misconduct or negligence. (Para 18)

'Grave misconduct' - The petitioner was careless in passing orders and failed to follow requisite procedure to pass said orders. However, neither the Gaon Sabha concerned, who has apparently suffered pecuniary loss nor the St. Government had challenged the said orders and further the pecuniary loss, if caused, is not determined, even no rough calculation was made, therefore, **conduct of petitioner would not falls under "grave misconduct". The punishment awarded** (10% permanent deduction in pension, 50% deduction from pension as well as from gratuity) **to petitioner appears to be very harsh and it would not be wrong to say that punishment is shockingly disproportionate.** (Para 25)

Charges are proved against the petitioner are upheld to the extent discussed in the case. However, the order of punishment dated 03.08.2012 is set aside and matter is remanded back to respondents to pass a fresh order of punishment after considering the observations made in this judgment. (Para 26)

Writ petition partly allowed. (E-4)

Precedent followed:

1. Shivagopal & ors. Vs St. of U.P. & ors., 2019 (5) ADJ 441 (Para 14)

2. D.S. Nakara & ors. Vs U.O.I., (1983) 1 SCC 305 (Para 17)

3. U.O.I. & ors., Ram Karan, (2022) 1 SCC 373 (Para 24)

Precedent cited:

1. St. of U.P. & anr. Vs Rajesh Kumar Singh & anr., 2019 (11) ADJ 249 (DB) (LB) (Para 6)

2. Govt. of Andhra Pradesh & ors. Vs A. Venkata Raidu (2007) 1 SCC 338 (Para 8)

3. Subhash Chandra Sharma Vs Managing Director & anr., (2000) 1 UPLBEC 541 (Para 8)

4. Subhash Chandra Vs St. of U.P. & ors., 2017 (2) ADJ 630 (Para 8)

5. Lalta Prasad Vs St. of U.P. & ors., 2018 (9) ADJ 365 (Para 8)

6. St. Jharkhand & ors. Vs Jitendra Kumar Srivastava & ors., (2013) 12 SCC 210 (Para 9)

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

1. A charge sheet dated 09.11.2006 was served to petitioner, working as a Consolidation Officer, Agra, contains following two charges:

"आरोप संख्या-1

आपने ग्राम मौधा जनपद फर्रुखाबाद के वाद संख्या-592 (धारा 0अ) में पारित आदेश दिनांक 28.2.03 द्वारा ग्राम मौधा के गाटा संख्या 1285/0-60/1420/7-00 से ग्राम का नाम खारिज करके अनार सिंह पुत्र परशुराम का नाम दर्ज किया। तदोपरान्त नियत 109 के अन्तर्गत वाद संख्या 198 तारीख फैसला 18.10.03 में पारित आदेशानुसार उक्त आदेश का अमलदरामद करा दिया। जिससे ग्राम सभा सम्पत्ति को अपूर्णीय क्षति व श्री अनार सिंह पुत्र परशुराम को अनुचित लाभ पहुँचा, जिसके लिये आप दोषी है तथा इस कृत्य से आपकी सत्यनिष्ठा संदिग्ध होती है।

आरोप संख्या-2

ग्राम बिढ़ैल के वाद संख्या-1405 अन्तर्गत धारा-9 क ता0फै0 2.4.98 द्वारा ग्राम सभा के गाटा संख्या-374/070, 424/036, 426/0-67 कुल 1,73 एकड़ से नाम खारिज करके श्री देवेन्द्र कुमार मिश्रा, चकबन्दी अधिकारी द्वारा श्री फेरु सिंह पुत्र जौहरी नाम दर्ज करने का अनियमित आदेश पारित किया था। आपने वाद संख्या 191 अन्तर्गत धारा 109 में पारित आदेश दिनांक 28.10.03 द्वारा अमलदरामद करा दिया। जिससे ग्राम सभा को अपूर्णीय क्षति हुई तथा व्यक्ति विशेष को अनुचित लाभ पहुँचा। जिसके लिये आप दोषी है। तथा इस कृत्य से आपकी सत्यनिष्ठा संदिग्ध होती है।"

2. The petitioner filed applications dated 04.12.2006 and 13.02.2007 demanding the documents, contending that his signatures on the order referred in the charge sheet were forged and he had not put his signatures. He also seeks permission to examine the documents. However, neither documents were provided nor any oral evidence was recorded during inquiry. The Inquiry Officer conducted inquiry and submitted its report dated 09.08.2007 whereby the above referred both charges were found proved against petitioner.

3. Sri Kshitij Shailendra, learned counsel for petitioner submitted that Inquiry Officer has acted as an appellate authority and conducted inquiry as he was sitting in appeal against the orders passed by petitioner. The original records were not brought on record before Inquiry Officer and he erroneously came to conclusion that petitioner while passing certain orders as Consolidation Officer had committed procedure error which led to loss of revenue to Gaon Sabha concerned. Thereafter a copy of inquiry report was submitted to petitioner and a show cause notice dated 09.10.2007 was issued. Petitioner submitted reply to the show cause notice and again contended that orders were not passed by him and signatures were forged by a gang which was operating at the relevant time. It was also contended that there was no mala fide intention to pass such orders. The orders were passed on the basis of earlier orders and were in nature of execution.

4. Meanwhile, petitioner retired on 30.04.2008 after attaining age of superannuation. Thereafter a fresh show cause notice was issued on 09.07.2008 with proposed punishment of 50% deduction from pension as well as 50% deduction from gratuity. Petitioner replied the said show cause notice on 29.07.2008 again reiterating earlier stand that the orders

passed by petitioner were in the nature of execution of earlier orders and that relevant documents were not shown to petitioner as well as the entire inquiry was vitiated as it was conducted without complying the principle of nature justice. The Commissioner (Consolidation) granted permission under Article 351-A of Civil Service Regulations (hereinafter referred to as "CSR") to continue inquiry after retirement of petitioner and finally the Chief Secretary under the orders of Governor passed impugned order dated 03.08.2012 whereby petitioner was awarded punishment of 10% permanent deduction in pension and 50% deduction each from pension as well as gratuity.

5. Sri Kshitij Shailendra, learned counsel for petitioner, further submitted that in case any party was aggrieved by the orders passed by petitioner, it would have challenged the same before Appellate Forum, however, none of the party has approached the Appellate Forum, therefore, the concerned parties were satisfied with the orders passed by petitioner. Even, Gaon Sabha concerned (supposed to suffer loss), had also not filed any appeal against orders passed by the petitioner.

6. Learned counsel for petitioner further argued that mere negligence or omission in performance of duty or error of judgment does not amount of misconduct and for that he placed reliance on a Division Bench judgment of this Court in **State of U.P. and another vs. Rajesh Kumar Singh and another, 2019(11) ADJ 249 (DB)(LB),** relevant paras 8, 9 and 10, are reproduced as under:

"8. What flows from Rule 3 of Conduct Rules is that if a government servant conducts himself in a manner which is inconsistent with due and faithful discharge of his duty in service, the same will amount to misconduct. However, every act of omission would not constitute misconduct for the purposes of drawing disciplinary proceedings as has been held by Hon'ble Supreme Court in the case of J. Ahmad (supra). An act of omission which runs contrary to the expected conduct of an employee would certainly constitute misconduct, however some other act of omission or negligence in performance of duty and a lapse in performance of duty or error of judgment may amount to negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high.

(emphasis supplied)

9. These observations have been made in the case of J. Ahmad (supra), relevant extract of which is mentioned herein below:-

"A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P. H. Kalyani v. Air France, Calcutta (5), wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be

negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high."

10. Thus, for an act of omission to qualify 'misconduct', what is of primary importance is as to whether such act of omission or negligence would result in irreparable damage or damage caused by such an act would be so heavy that the degree of culpability would be very high. It is also clear that negligence or mistake may not ipso facto constitute misconduct when its consequences are serious."

7. Learned counsel also pointed out that Inquiry Officer has acted like Appellate Authority. He has scrutinized the orders passed by petitioner as he was sitting in appeal and pointed out the errors on law as well as deficiency in the procedure followed by petitioner while passing said orders.

8. Learned counsel also submitted that the procedure provided under Article 351-A of CSR whereby the Governor was empowered to institute or continue inquiry after retirement, was not followed in its letter and spirit as the order was passed by Commissioner (Consolidation) and under the order of Governor though punishment order was passed by Chief Secretary under direction of the Governor. The impugned punishment order is a non-speaking order as well as the punishment awarded is shockingly disproportionate to the charges levelled against petitioner. Lastly, learned counsel for petitioner submitted that the original records were never shown to petitioner rather it was mentioned in the inquiry report that original records were not brought before Inquiry Officer. He further relied on the judgments passed in **Government of Andhra Pradesh and others vs. A Venkata Raidu (2007) 1 SCC 338; Subhash Chandra Sharma vs. Managing Director and another, (2000) 1 UPLBEC 541; Subhash Chandra vs. State of U.P. and others, 2017(2) ADJ 630; and, Lalta Prasad vs. State of U.P. and others, 2018(9) ADJ 365.**

9. Learned counsel for petitioner placed heavy reliance on a judgment passed by Supreme Court in **State of Jharkhand and others vs. Jitendra Kumar Srivastava and others, (2013)12 SCC 210** and relied on paras 12, 13, 14 and 15 of the judgment, which are reproduced as under:

"12. There is also a Proviso to Rule 43(b), which provides that:

A. Such departmental proceedings, if not instituted while the Government Servant was on duty either before retirement or during re-employment.

i. Shall not be instituted save with the sanction of the State Government.

ii Shall be in respect of an event which took place not more than four years before the institution of such proceedings.

iii Shall be conducted by such authority and at such place or places as the State Government may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made:

B. Judicial proceedings, if not instituted while the Government Servant was on duty either before retirement or during re-employment shall have been instated in accordance with Sub-clause (ii) of Clause (a) and

C. The Bihar Public Service Commission, shall be consulted before final orders are passed.

It is apparent that the proviso speaks about the institution of proceedings. For initiating proceedings, Rule 43(b) puts some conditions, i.e., Department proceeding as indicated in Rule 43(b), if not instituted while the Government Servant was on duty, then it shall not be instituted except:

(a) With the sanction of the Government,

(b) It shall be in respect of an event which took place not more than four years before the institution of the proceedings.

(c) Such proceedings shall be conducted by the enquiry officer in accordance with the proceedings by which dismissal of the services can be made.

Thus, in so far as the proviso is concerned that deals with condition for initiation of proceedings and the period of limitation within which such proceedings can be initiated.

13. Reading of Rule 43(b) makes it abundantly clear that even after the conclusion of the departmental inquiry, it is permissible for the Government to withhold pension etc. ONLY when a finding is recorded either in departmental inquiry or judicial proceedings that the employee had committed grave misconduct in the discharge of his duty while in his office. There is no provision in the rules for withholding of the pension/gratuity when such departmental proceedings or judicial proceedings are still pending.

14. Right to receive pension was recognized as right to property by the Constitution Bench judgment of this Court in Deokinandan Prasad v. State of Bihar, (1971) 2 SCC 330, as is apparent from the following discussion:

29. The last question to be considered, is, whether the right to receive pension by a Government servant is property, so as to attract Articles 19(1)(f) and 31(1) of the Constitution. This question falls to be decided in order to consider whether the writ petition is maintainable under Article 32. To this aspect, we have already adverted to earlier and we now proceed to consider the same.

30. According to the Petitioner the right to receive pension is property and the Respondents by an executive order dated June 12, 1968 have wrongfully withheld his pension. That order affects his fundamental rights under Articles 19(1)(f) and 31(1) of the Constitution. The Respondents, as we have already indicated, do not dispute the right of the Petitioner to get pension, but for the order passed on August 5, 1966. There is only a bald averment in the counter-affidavit that no question of any fundamental right arises for consideration. Mr. Jha, learned Counsel for the Respondents, was not prepared to take up the position that the right to receive pension cannot be considered to be property under any circumstances. According to him, in this case, no order has been passed by the State granting pension. We understood the learned Counsel to urge that if the State had passed an order granting pension and later on resiles from that order, the latter order may be considered to affect the Petitioner's right regarding property so as to attract Articles 19(1)(f) and 31(1) of the Constitution.

31. We are not inclined to accept the contention of the learned Counsel for the Respondents. By a reference to the material provisions in the Pension Rules, we have already indicated that the grant of pension does not depend upon an order being passed by the authorities to that effect. It may be that for the purposes of

quantifying the amount having regard to the period of service and other allied matters, it may be necessary for the authorities to pass an order to that effect, but the right to receive pension flows to an officer not because of the said order but by virtue of the Rules. The Rules, we have already pointed out, clearly recognise the right of persons like the Petitioner to receive pension under the circumstances mentioned therein.

32. The question whether the pension granted to a public servant is property attracting Article 31(1) came up for consideration before the Punjab High Court in Bhagwant Singh v. Union of India A.I.R. 1962 Pun 503. It was held that such a right constitutes "property" and any interference will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension. This decision was given by a learned Single Judge. This decision was taken up in Letters Patent Appeal by the Union of India. The Letters Patent Bench in its decision in Union of India v. Bhagwant Singh I.L.R. 1965 Pun 1 approved the decision of the learned Single Judge. The Letters Patent Bench held that the pension granted to a public servant on his retirement is "property" within the meaning of Article 31(1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as "property" cannot possibly undergo such mutation at the whim of a particular person or authority.

33. The matter again came up before a Full Bench of the Punjab and Haryana High Court in K.R. Erry v. The State of Punjab I.L.R. 1967 P&H 278. The High Court had to consider the nature of the right of an officer to get pension. The majority quoted with approval the principles laid down in the two earlier decisions of the same High Court, referred to above, and held that the pension is not to be treated as a bounty payable on the sweet will and pleasure of the Government and that the right to superannuation pension including its amount is a valuable right vesting in a Government servant It was further held by the majority that even though an opportunity had already been afforded to the officer on an earlier occasion for showing cause against the imposition of penalty for lapse or misconduct on his part and he has been found guilty, nevertheless, when a cut is sought to be imposed in the quantum of pension payable to an officer on the basis of misconduct already proved against him, a further opportunity to show cause in that regard must be given to the officer. This view regarding the giving of further opportunity was expressed by the learned Judges on the basis of the relevant Punjab Civil Service Rules. But the learned Chief Justice in his dissenting judgment was not prepared to agree with the majority that under such circumstances a further opportunity should be given to an officer when a reduction in the amount of pension payable is made by the State. It is not necessary for us in the case on hand, to consider the question whether before taking action by way of reducing or denying the pension on the basis of disciplinary action already taken, a further notice to show cause should be given to an officer. That question does not arise for consideration before us. Nor are we concerned with the further question regarding the procedure, if any, to be adopted by the authorities before reducing or withholding the pension for the

first time after the retirement of an officer. Hence we express no opinion regarding the views expressed by the majority and the minority Judges in the above Punjab High Court decision, on this aspect. But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant.

34. This Court in State of Madhya Pradesh v. Ranojirao Shinde and Anr. (1968) 3 SCR 489 had to consider the question whether a "cash grant" is "property" within the meaning of that expression in Articles 19(1)(f) and 31(1) of the Constitution. This Court held that it was property, observing "it is obvious that a right to sum of money is property".

35. Having due regard to the above decisions, we are of the opinion that the right of the Petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by Sub-article (5) of Article 19. Therefore, it follows that the order dated June 12, 1968 denying the Petitioner right to receive pension affects the fundamental right of the Petitioner under Articles 19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Article 32 is maintainable. It may be that under the Pension Act (Act 23 of 1871) there is a bar against a civil court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of a Writ of Mandamus being issued to the State to properly consider the claim of the Petitioner for payment of pension according to law.

13. In State of West Bengal v. Haresh C. Banerjee and Ors. (2006) 7 SCC 651, this Court recognized that even when, after the repeal of Article 19(1)(f) and Article 31(1) of the Constitution vide Constitution (Forty-Fourth Amendment) Act, 1978 w.e.f. 20th June, 1979, the right to property was no longer remained a fundamental right, it was still a Constitutional right, as provided in Article 300A of the Constitution. Right to receive pension was treated as right to property. Otherwise, challenge in that case was to the vires of Rule 10(1) of the West Bengal Services (Death-cum--Retirement Benefit) Rules, 1971 which conferred the right upon the Governor to withhold or withdraw a pension or any part thereof under certain circumstances and the said challenge was repelled by this Court."

10. Sri Rajeshwar Tripathi, learned Standing Counsel appearing for State-Respondents, has opposed the above submissions and submitted that after the petitioner was retired, inquiry was continued after taking requisite permission under Article 351-A of CSR and punishment order was passed under direction of the Governor, therefore, in this regard there is not irregularity in the procedure followed by respondents. Petitioner has committed serious irregularities while passing orders, whereby concerned Gaon Sabha has suffered great loss. The explanation of petitioner that concerned orders were not signed by him and it was an act of a gang, are not only vague but petitioner has not submitted any documents in support of submission and also not brought on record any evidence that his signatures were forged. He further submits that judgments relied on by learned counsel for petitioner are distinguishable that in the present case petitioner has passed orders whereby loss was caused to Gaon Sabha concerned and thus he was not

diligent towards his duties and made a vague allegation that his signatures were forged without any proof.

11. I have heard learned counsel for parties and perused the material available on record.

12. In the present case there are two issues. The first issue is, "whether departmental inquiry was legally continued after retirement of petitioner?"

13. Article 351-A of CSR empowers the Governor to institute or continue inquiry after retirement. In the present case, said permission was granted by Commissioner (Consolidation) vide order dated 13.01.2010. Learned counsel for petitioner has contended that said permission cannot be termed to be a valid permission as required under the provisions of Article 351-A of CSR. In this regard it is relevant to note that permission was also sought from the Public Service Commission and an order was passed by Chief Secretary under the orders of Government to conclude inquiry continued under Article 351-A and punishment order, as referred above, was also passed.

14. In this regard paragraphs no. 40, 41, 42, 43, 44 and 45 of a Full Bench judgment in **Shivagopal and Ors. vs. State of U.P. and Ors., 2019(5) ADJ 441** are relevant and reproduced as under:

"40. Article 351-A empowers the Governor to withhold or withdraw pension or a part of it permanently or for specified period and order recovery from pension for pecuniary loss caused to the Government if the pensioner in departmental proceedings or in judicial proceedings, has been found: (i) guilty of grave misconduct or (ii) to have caused pecuniary loss to Government by misconduct or negligence during his service. The proviso to the Article spells out the circumstances/conditions in which the departmental proceedings/judicial proceedings is required to be instituted for the purposes of withholding/withdrawing pension. Article 351-A reads thus:

"351-A21. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement:

Provided that-

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during reemployment-

(i) shall not be instituted save with the sanction of the Governor.

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceeding; and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) Judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) the Public Service Commission, U.P. shall be consulted before final orders are passed.

Provided further that of the order passed by the Governor relates to a cash dealt with under the Uttar Pradesh Disciplinary Proceedings, (Administrative Tribunal) Rules, 1947, it shall not be necessary to consult Public Service Commission.

Explanation-For the purposes of this article-

(a) Departmental proceeding shall be deemed to have been instituted when the charges framed against the pensioner are issued to him or, if the officer has been placed under suspension from an earlier date, on such date ; and

(b) judicial proceedings shall be deemed to have been instituted:

(i) in the case of criminal proceedings, on the date on which complaint is made, or a charge-sheet is submitted, to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made to Civil court

Note- As soon as proceedings of the nature referred to in this article are instituted the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned."

41. Explanation to Article 351-A clarifies that departmental proceedings shall be deemed to have been instituted: (i) when charges are framed against the pensioner; or (ii) the officer has been placed under suspension from such date. Further, judicial proceedings is deemed to have been instituted against the pensioner: (i) in the case of criminal proceedings, on date on which complaint is made or charge-sheet is submitted to a criminal court; (ii) in case of civil proceedings on the date on which plaint is presented or as the case may be, an application is made to Civil Court.

42. Now we will refer to the proviso to Article 351-A. The proviso speaks about initiation of disciplinary proceedings or judicial proceedings against the government servant after retirement. For initiating proceedings the conditions specified therein must be satisfied, that is, departmental proceedings as indicated in proviso (a) if not instituted while the officer was on duty then it shall not be instituted except:

(i). with the sanction of the Governor;

(ii). it shall be initiated on an event which took place not more than 4 years before the institution of the proceedings;

(iii). such proceedings would be conducted by such authority and in such place as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

43. On perusal of Proviso and its Explanation, referred to above, deals only with the conditions for initiation for disciplinary proceedings/judicial proceedings and the limitation within which such initiation of the proceedings can be done has been made explicit.

44. ***In State of U.P. vs. Harihar Bhole Nath (Harihar Bhole Nath case), one of the issues involved therein was whether the sanction of the Governor was required to continue the proceedings after retirement. The Court held in negative as follows:***

"But the said Rules read with the Proviso and the Explanation appended thereto construed in their entirely clearly postulate that the proceedings initiated

before the delinquent officer reached his age of superannuation would be valid.....The question, however, is whether the sanction of the Governor was required even for the purpose of continuance of the proceedings which had already been initiated. Answer thereto must be rendered in the negative." (Refer: State of U.P. vs. R.C. Misra)

45. The issue before the Court in State of Orissa and others vs. Kalicharan Mohapatra and others was as to whether Rule 6 of All India Service (Death-cum-Retirement Benefits) Rules, 1958, could have been invoked during pendency of a criminal case against the government servant, inasmuch as, the charge against the government servant is not one of causing pecuniary loss to the State Government by misconduct or negligence within the meaning of the Rule. Relevant portion of Rule 6 for our purposes is extracted:

"6. Recovery from pension:- 6(1) The Central Government reserves to itself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from pension of the whole or part of any pecuniary loss caused to the Central or a State Government, if the pensioner is found in a departmental or judicial proceedings to have been guilty of grave misconduct or to have caused pecuniary loss to the Central or a State Government by misconduct or negligence, during his service, including service rendered or re-employment after retirement.

Provided that no such order shall be passed without consulting the Union Public Service Commission:-- Provided further that--

(a) such departmental proceeding, if instituted while the pensioner was in service, whether before his retirement or during his re-employment, shall, after the final retirement of the pensioner, be deemed to be a proceeding under this sub-rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the pensioner had continued in service;

(b) .....

(c) .....

Explanation.- For the purpose of this rule:-

(a) a departmental proceeding shall be deemed to be instituted which the charges framed against the pensioner are issued to his or, if he has been placed under suspension from an earlier date, on such date and

(b) a judicial proceeding shall be deemed to be instituted--

(i) in the case of criminal proceedings, on the date on which a complaint is made or a charge-sheet is submitted, to the criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court.

(2) Where any departmental or judicial proceeding is instituted under sub-rule (1), or where a departmental proceeding is continued under clause (a) of the proviso thereto against an officer who has retired on attaining the age of compulsory retirement or otherwise, he shall be sanctioned by the Government which instituted such proceedings, during the period commencing from the date of his retirement to the date on which, upon conclusion of such proceeding final orders are passed, a provisional pension not exceeding the maximum pension which would have been admissible on the basis of his qualifying service upto the date of retirement, or if he was under suspension

on the date of retirement, upto the date immediately preceding the date on which he was placed under suspension; but no gratuity or death- cum-retirement gratuity shall be paid to him until the conclusion of such proceedings and the issue of final orders thereon.

Provided that where disciplinary proceeding has been instituted against a member of the Service before his retirement service under rule 10 of the All India Service (Discipline and Appeal) Rules, 1969, for imposing any of the penalties specified in clause (i), (ii) and (iv) of sub-rule 1 of rule 6 of the said rules and continuing such proceeding under sub-rule (1) of this rule after his retirement from service, the payment of gratuity or Death-cum- Retirement gratuity shall not be withheld." (emphasis supplied)

15. As referred above, the inquiry was initiated before the petitioner retired and it continued thereafter also and for that the sanction of the Governor was not required. However, when punishment was imposed for deduction of pension and gratuity, prior permission was taken from U.P. Public Service Commission as well as from the Governor and punishment order was passed under direction of the Governor, therefore, in the present case there is no irregularity in the process of departmental inquiry.

16. Now, I proceed to consider the second issue that, "whether charges were proved against petitioner and punishment thereon is proportionate or not?"

17. It is settled law that gratuity and pension are not bounties, as an employee earn these benefits of his long, continuous, faithful and unblemished service. The Supreme Court in **D.S. Nakara and Ors. vs. Union of India, (1983) 1 SCC 305** held as under:

"31. From the discussion three things emerge : (i) that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to 1972 rules which are statutory in character because they are enacted in of exercise of powers conferred by the proviso to Article 309 and Clause (5) of Article 148 of the Constitution; (ii) that the pension is not an ex-gratia payment but it is a payment for the past service rendered ; and (iii) it is a social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch....."

18. Article 351-A of CSR reserves right of the Governor to withheld of withdraw pension or part thereof, whether permanently or for specified period or to order recovery from pension of the whole or part for pecuniary loss caused to the Central or State Government in eventualities that pensioner be guilty of grave misconduct in departmental or judicial proceedings or to have caused pecuniary loss to the government by misconduct or negligence. The word "grave misconduct" is something more than a "misconduct". The other eventuality is to have caused pecuniary loss to government by misconduct or negligence.

19. Now I proceed to consider, whether charges against petitioner, if considered to be proved, yet they would fall under "grave misconduct" or any pecuniary loss was caused to government by said misconduct or by negligence.

20. The contents of charges are that the petitioner had passed two orders whereby he entered name of private persons on land purportedly belonged to Gram Sabha, thus caused loss to Gram Sabha. Undisputedly, said orders were not challenged either by Gram Sabha or by the State. There was no allegation of illegal gratification or of granting any favour.

21. I have carefully perused the inquiry report. The inquiry officer has dealt in the inquiry as to how due procedure was not followed by the petitioner and that required precautions were not adhered to. I found merit in the argument of learned counsel for petitioner that Inquiry Officer has scrutinized the orders like an Appellate Authority and not like an Inquiry Officer. The finding of loss are not supported by any evidence or valuation of land. No witness was examined from Gram Sabha. It was also not noticed by Inquiry Officer that one order was passed only in compliance of an earlier order. The record was not verified in absence of original record which remained untraceable. The Inquiry Officer has proceeded with inquiry like an Appellate Authority and failed to decide whether any grave misconduct was committed or any pecuniary loss was caused to Gaon Sabha.

22. It is also relevant to consider the reply of petitioner to the charges. He has denied his signature on the record on a vague ground that a gang was operating at the relevant time which used to got order prepared with forged signatures, however petitioner had not made any complaint or lodged any FIR. It appears that petitioner has made vague and baseless grounds in reply. It was not warranted from a responsible government officer.

23. In first charge the petitioner has passed an order in pursuance of a true copy of an order passed 10-12 years ago, without appreciating that original record was not available as destroyed due to fire and passed a cryptic order without taking other precautions, such as to frame issue or to take other precautions as it was likely to effect right of a Gaon Sabha, therefore, petitioner was careless and he has not put any explanation for it except a vague and baseless explanation that his signatures were forged. Similarly with regard to second charge also, petitioner has passed order in haste and without complying due provisions, as such he was not careful. However, there is no evidence of any pecuniary loss caused due to above referred orders passed by petitioner. There is no evidence that orders were passed to give undue benefit to someone or integrity of petitioner was doubtful. In these circumstances, the act of petitioner would not fall under "grave misconduct". Pecuniary loss, if any, caused was not quantified, however, the petitioner was careless and had not followed due process while passing orders and his reply was not only vague but without any legal basis.

24. In these circumstances, the Court proceed to consider, whether punishment awarded (10% permanent deduction in pension, 50% deduction from pension as well as from gratuity) is shockingly disproportionate or not vis-a-vis limited scope of judicial review under Article 226 of the Constitution. In this regard reference of a recent judgment of Supreme Court in **Union of India and others vs. Ram Karan, (2022) 1 SCC 373** would be appropriate and paras 23, 24, 25 and 26 of the judgement are quoted hereunder:

"23. The well ingrained principle of law is that it is the disciplinary authority, or the appellate authority in appeal, which is to decide the nature of punishment to be given to the delinquent employee. Keeping in view the seriousness of the misconduct committed by such an employee, it is not open for the Courts to assume and usurp the function of the disciplinary authority.

24. Even in cases where the punishment imposed by the disciplinary authority is found to be shocking to the conscience of the Court, normally the disciplinary authority or the appellate authority should be directed to reconsider the question of imposition of penalty. The scope of judicial review on the quantum of punishment is available but with a limited scope. It is only when the penalty imposed appears to be shockingly disproportionate to the nature of misconduct that the Courts would frown upon. Even in such a case, after setting aside the penalty order, it is to be left to the disciplinary/appellate authority to take a call and it is not for the Court to substitute its decision by prescribing the quantum of punishment. However, it is only in rare and exceptional cases where the court might to shorten the litigation may think of substituting its own view as to the quantum of punishment in place of punishment awarded by the competent authority that too after assigning cogent reasons.

25. The principles have been culled out by a three-Judge Bench of this Court way back in B.C. Chaturvedi v. Union of India and Ors. 1995(6) SCC 749 wherein it was observed as under:

18. A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. ***The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.***

26. It has been further examined by this Court in Lucknow Kshetriya Gramin Bank (Now Allahabad, Uttar Pradesh Gramin Bank) and Anr. v. Rajendra Singh, (2013) 12 SCC 372 as under:

19. The principles discussed above can be summed up and summarised as follows:

19.1. When charge(s) of misconduct is proved in an enquiry the quantum of punishment to be imposed in a particular case is essentially the domain of the departmental authorities.

19.2. The courts cannot assume the function of disciplinary/departmental authorities and to decide the quantum of punishment and nature of penalty to be awarded, as this function is exclusively within the jurisdiction of the competent authority.

19.3. Limited judicial review is available to interfere with the punishment imposed by the disciplinary authority, only in cases where such penalty is found to be shocking to the conscience of the court.

19.4. Even in such a case when the punishment is set aside as shockingly disproportionate to the nature of charges framed against the delinquent employee, the appropriate course of action is to remit the matter back to the disciplinary authority or the appellate authority with direction to pass appropriate order of penalty. The court by itself cannot mandate as to what should be the penalty in such a case.

19.5. The only exception to the principle stated in para 19.4 above, would be in those cases where the co-delinquent is awarded lesser punishment by the disciplinary authority even when the charges of misconduct were identical or the co-delinquent was foisted with more serious charges. This would be on the doctrine of equality when it is found that the employee concerned and the co-delinquent are equally placed. However, there has to be a complete parity between the two, not only in respect of nature of charge but subsequent conduct as well after the service of charge-sheet in the two cases. If the co-delinquent accepts the charges, indicating remorse with unqualified apology, lesser punishment to him would be justifiable." (emphasis supplied)

25. As discussed in earlier paragraphs, the petitioner was careless in passing orders and failed to follow requisite procedure to pass said orders. However, neither the Gaon Sabha concerned, who has apparently suffered pecuniary loss nor the State Government had challenged the said orders and further the pecuniary loss, if caused, is not determined, even no rough calculation was made, therefore, conduct of petitioner would not falls under "grave misconduct". The punishment awarded to petitioner appears to be very harsh and it would not be wrong to say that punishment is shockingly disproportionate.

26. Taking note of **Ram Karan (supra),** the findings that charges are proved against the petitioner are upheld to the extent discussed above. However, the order of punishment dated 03.08.2012 is set aside and matter is remanded back to respondents to pass a fresh order of punishment after considering the observations made in this judgment.

27. The writ petition is partly allowed with aforesaid observations and directions.

(2022)07ILR A54
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.07.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

RERA Appeal No. 26 of 2022
&
RERA Appeal No. 27 of 2022
&
RERA Appeal No. 8 of 2022

U.P. Awas Evam Vikas Parishad, Lucknow ...Appellant

Versus

Nishta Bhatnagar ...Respondent

Counsel for the Appellant:
Shikhar Srivastava, Satya Prakash

Counsel for the Respondent:

A. RERA Appeal- Real Estate (Regulation and Development) Act, 2016 - Section 58- possession of the flat was to be given within 30 months from the date of allotment-the possession has only been given on 12.12.2017 after substantial delay and after the sale deed executed on 18.08.2017-taking into consideration the said default on the part of the appellant and the categoric provision of Section

18(3) of the Act, 2016, the Authority has awarded compensation in the shape of interest- Mere fact that the respondent accepted terms of conveyance deed and took possession of the flat cannot deprive the respondent from claiming compensation for the failure on the part of the promoter/appellant herein to discharge the obligations-The authority as well as the Tribunal have proceeded to grant compensation in terms of provisions contained in Section 71 r/w 72 of the Act 2016-The Court finds no substantial question of law involved. (Para 1 to 29)

The appeal is dismissed.(E-6)

List of Cases cited:

1. Sir Chunilal Vs Mehta & Sons Ltd. Vs Century Spg. & Mfg. Co. Ltd. (1962) SC 1314

2. Hero Vinoth Vs Seshammal (2006) 5 SCC 545

3. Santosh Hazari Vs Purushottam Tiwari (2001) 3 SCC 179

4. Ramchandra Vs Ramalingam (1963) AIR SC 302

5. Nazir Mohamed Vs J. Kamala & ors. (2020) AIR SC 4321

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

1. This is an application for condonation of delay in filing the appeal supported with affidavit.

2. Heard Shri Sikhar Srivastava, learned counsel for the appellant.

3. The reasons indicated in the affidavit filed in support of the application are sufficient.

4. Accordingly, the application is allowed and delay in filing the appeal is hereby condoned.

Order on memo of main appeal

1. Heard Shri Shikhar Srivastava, learned counsel for the appellant.

2. Learned counsel for the appellant contends that the issue involved in RERA APPEAL No. - 26 of 2022, RERA APPEAL No. - 27 of 2022 and RERA APPEAL No. - 8 of 2022 are the same. As such, the Court proceeds to hear all the appeals together. For convenience, facts of RERA APPEAL No. - 26 of 2022 are being taken.

3. The instant appeal has been filed under Section 58 of Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as 'Act 2016') against the order dated 09.03.2022 passed by the Uttar Pradesh Real Estate Appellate Tribunal, Lucknow (hereinafter referred as 'Tribunal') in Appeal No. 85 of 2020 in re: U.P. Awas Vikas Evam Parishad vs Nishtha Bhatnagar.

4. The appeal has been filed by framing the following substantial questions of law which for the sake of convenience are reproduced below:

"(i) Whether a complaint by an allottee can be entertained under the provisions of Section 71 of Real Estate (Regulation and Development) Act, 2016 after the execution of a sale deed and handing over of possession by the Promoter including the appellant as defined under Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016, to the allottee?

(ii) Whether delay interest on the deposited amount can be given to allottees, once they have accepted the terms of the

conveyance deed and taken possession of the flat/residential unit without any protest?

(iii) Whether the allottee is entitled to interest, if he has been handed over possession of the flat with delay, but on the agreed commercial price?

(iv) Whether the allottee would be entitled to interest w.e.f. the date of enforcement of Act or from the proposed date of completion of project?"

5. Section 58 of the Act 2016 restricts the right of second appeal on the grounds specified in Section 100 of Code of Civil Procedure, 1908. Section 100 of the Code of Civil Procedure, 1908 reads as follows:

"100. Second Appeal.-

(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this Section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the Respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this Sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

6. Thus, it is apparent that keeping in view Section 100 of the CPC read with Section 58 of the Act 2016 the second appeal can only be filed where a substantial question of law is involved meaning thereby that the existence of substantial question of law is the sine qua non for the exercise of jurisdiction under Section 58 of the Act 2016.

7. The principles for deciding when a question of law becomes a substantial question of law, have been enunciated by a Constitution Bench of Hon'ble the Apex Court Court in the case of **Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. reported in AIR 1962 SC 1314,** where the Apex Court held as under:

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

8. In the case of **Hero Vinoth v. Seshammal** reported in **(2006) 5 SCC 545,**

Hon'ble the Apex Court referred to and relied upon **Chunilal v. Mehta and Sons (supra)** and other judgments and summarised the tests to find out whether a given set of questions of law were mere questions of law or substantial questions of law. The relevant paragraphs of the judgment of the Apex Court in **Hero Vinoth (supra)** are set out hereinbelow:

21. The phrase "substantial question of law", as occurring in the amended Section 100 Code of Civil Procedure is not defined in the Code. The word substantial, as qualifying "question of law", means of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with-technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. Ram Ditta AIR 1928 PC 172 the phrase substantial question of law as it was employed in the last Clause of the then existing Section 100 Code of Civil Procedure (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In Sir Chunilal case AIR 1962 SC 1314 the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju AIR 1951 Mad 969 (Sir Chunilal case AIR 1962 SC 1314).

When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law.

9. To be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way.

10. To be a question of law "involved in the case", there must be first, a foundation for it laid in the pleadings, and the question should emerge from the sustainable findings of fact, arrived at by Courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case.

11. Whether a question of law is a substantial one and whether such question is involved in the case or not, would depend on the facts and circumstances of each case. The paramount overall consideration is the need for striking a judicious balance between the indispensable obligation to do justice at all stages and the impelling necessity of

avoiding prolongation in the life of any lis. This proposition finds support from **Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179.**

12. In a Second Appeal, the jurisdiction of the High Court being confined to substantial question of law, a finding of fact is not open to challenge in second appeal, even if the appreciation of evidence is palpably erroneous and the finding of fact incorrect as held in **Ramchandra v. Ramalingam AIR 1963 SC 302**. An entirely new point, raised for the first time, before the High Court, is not a question involved in the case, unless it goes to the root of the matter.

13. The principles culled out from the aforesaid judgements of Hon'ble the Apex Court relevant for this case may be summarised as follows:

(i) An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

(iii) A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iv) The general Rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

14. The aforesaid principles of law have already been considered by Hon'ble the Apex Court in the case of **Nazir Mohamed vs J. Kamala and others** reported in **AIR 2020 SC 4321.**

15. Now the Court proceeds to see whether the four "substantial' questions of law, as have been framed by the appellants, are invoked "substantially' or not so as to invoke the jurisdiction of this Court. For this purpose facts of the case may also have to be indicated which are as follows.

16. From perusal of the appeal it comes out that the respondent had booked a "2BHK + STUDY" type of flat with the U.P. Awas Evam Vikas Parishad (hereinafter referred as 'Parishad') and paid a booking amount of Rs 1.81 lakhs in terms of scheme floated by the Parishad in the year 2012.

17. It is claimed that the respondent was allotted a flat in Mandakini Enclave vide a letter dated 27.09.2013. The Parishad thereafter demanded certain amount towards allotted flat and fixed the price of the flat at Rs. 37.50 lakhs. The respondent claims to have submitted the aforesaid amount. It is admitted that the possession of the flat was supposed to be given within 30 months from the date of allotment as per clause 9.1 of the brochure. It is only by means of letter dated 12.04.2017, a copy of which is at page 152 of the appeal, that the respondent has been asked to deposit an amount of Rs 5.87 lakhs so that the registration of the apartment can be done. Admittedly, the amount has been deposited in July 2017, the registration was done on 18.08.2017 and the possession has been given on 12.12.2017.

18. It is submitted that after having received the possession and after registration was done the respondent has filed a Complaint Case before the U.P. Real Estate Regulatory Authority (hereinafter referred to as "Authority') claiming refund of certain excess amount, refund of interest, compensation for delayed possession alongwith advocate fee and court fee. The complaint was registered as complaint no. 9201817572 in re: Smt Nishtha Bhatnagar vs U.P. Awas Evam Vikas Parishad and the Authority concerned vide order dated 31.01.2019, a copy of which is annexure 1 to the appeal, allowed the complaint and has directed the Parishad to pay interest on the total amount of Rs 37.50 lakh till the date of possession of the apartment. The interest has been directed to be paid at the rate of MCLR + 1%.

19. Being aggrieved the Parishad filed an Appeal no. 85 of 2020 in re: U.P. Awas Evam Vikas Parishad vs Nishtha Bhatnagar before the Tribunal. The Tribunal vide the impugned order dated 09.03.2022 has upheld the order of the Authority and hence the present second appeal.

20. The Court has gone through the appeal filed by the Parishad with assistance of Shri Sikhar Srivastava, learned counsel appearing for the appellant and the alleged substantial questions of law.

21. Following the principles of law laid down by Hon'ble the Apex Court in the judgments referred above, it is apparent that none of the "substantial' questions of law as have been framed by the appellant, fall within the ambit of being "substantial' questions of law. The reason for the same is that the "substantial' questions of law as have been framed in the instant Second Appeal are specifically covered by the specific provisions of law as per the interpretation given by Hon'ble the Apex Court and do not involve any debatable legal issue. Even otherwise the learned Tribunal has not ignored or acted contrary to the legal principles or has violated the provisions of the Act 2016 rather the same have been followed scrupulously. Learned Tribunal has also not ignored any material evidence or has drawn wrong inference or cast the burden of proof on the appellants herein as would be apparent from the perusal of the impugned judgment.

22. However, as the appeal has been filed and learned counsel for the appellant has vehemently argued on the aforesaid questions, as such the Court proceeds to answer the said questions as formulated by the appellant.

23. As regards the question of law no. 1 which is:

"(i) Whether a complaint by an allottee can be entertained under the provisions of Section 71 of Real Estate (Regulation and Development) Act, 2016 after the execution of a sale deed and handing over of possession by the Promoter including the appellant as defined under Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016, to the allottee?"

24. Learned counsel for the appellant is unable to indicate anywhere from the Act 2016 that there is a bar per which a complaint cannot be filed after the possession has been taken. No case law to the said effect has been produced by learned counsel for the appellant and hence considering that there is no bar under the Act 2016 either restraining or refraining the allottee from filing of complaint after taking possession, the Court does not find any question of law involved in this regard.

25. As regards question no. 2 which is:

"Whether delay interest on the deposited amount can be given to allottees, once they have accepted the terms of the conveyance deed and taken possession of the flat/residential unit without any protest?"

and question no. 3 which is:

"Whether the allottee is entitled to interest, if he has been handed over possession of the flat with delay, but on the agreed commercial price?"

the same are linked to each other and as such are being dealt together.

26. A perusal of the order passed by the Authority as well as the Tribunal would indicate that the authority as well as the Tribunal have proceeded to grant compensation in terms of provisions contained in Section 71 read with Section 72 of the Act 2016. Even otherwise Section 18(3) of the Act 2016 categorically provides that if the promoters fail to discharge any other obligation imposed on him under this Act or the rules or regulations thereunder or in accordance with the terms and conditions of the agreement for sale, **he shall be liable to pay such compensation to the allottees, in the manner as provided in the Act.**

27. Admittedly, as per the brochure, the possession of the flat was to be given within 30 months from the date of allotment. Admittedly, the possession has only been given on 12.12.2017 after substantial delay and after the sale deed executed on 18.08.2017. Taking into consideration the said default on the part of the appellant and the categoric provision of Section 18(3) of the Act 2016, the Authority has awarded compensation in the shape of interest. Mere fact that the respondent accepted terms of conveyance deed and took possession of the flat cannot deprive the respondent from claiming compensation for the failure on the part of the promoter/appellant herein to discharge the obligations. As such, this Court does not find any question of law involved with regard to questions no. (2) and (3).

28. As regards question no. 4 which is:

"Whether the allottee would be entitled to interest w.e.f. the date of enforcement of Act or from the proposed date of completion of project?"

no substantial argument has been raised by learned counsel for the appellant. Even otherwise the learned Authority as well as learned Tribunal has categorically indicated that the amount of interest which is to be paid would be from the date of deposit of the aforesaid amount. Thus the Court does not find any question of law involved with regard to question no. 4 also.

29. Considering the aforesaid, the Court does not find any merit in the appeal. Accordingly the appeal is **dismissed.**

(2022)07ILR A61
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.07.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ B No. 247 of 2022

Udayvir & Ors. ...Petitioners
Versus
Board of Revenue, U.P. at Prayagraj & Ors. ...Respondents

Counsel for the Petitioners:
Dharm Raj Mishra, Ratnesh Singh

Counsel for the Respondents:
C.S.C., Ashok Kumar Singh, Pankaj Gupta, Rahul Kumar Singh, Vijai Bahadur Verma

A. Land Law - U.P. Zamindari Abolition & Land Reforms Act, 1950-Section 229-B-suit for title declaration-Petitioner filed and appeal u/s 331(3) of the Act against the dismissal of suit u/s 229-B of the Act which was dismissed-again petitioner filed a revision u/s 333 of the Act before the Board of Revenue which was also dismissed-Once the statute, in its wisdom has specifically mandated under Section 331(4) of the Act, 1950 for filing of second appeal by use of the word "shall", as such in case the petitioners were aggrieved against the order passed u/s 331(3) of the Act they could only have filed a second appeal and no revision u/s 333 of the Act was maintainable-The order of the Board of revenue is set aside.(Para 1 to 30)

B. Section 333 of the Act, 1950 does not quantify or define "Appeal". the statutory scope and purpose of Section 333 is to be availed only in those situations or legal circumstances where against an order or judgment rendered by the Subordinate Court either no appeal lies or where an appeal lies but it has not been preferred. However, those cases in which the statute provides the forum of second appeal, the power of revision can never be treated to be synonymous to power of appeal as it would defeat the very purpose of creation of the different forum.(Para 22)

The writ petition is partly allowed. (E-6)

List of Cases cited:

1. Lachman Das Vs Santosh Singh (1996) All Civil Journal 324

2. Mirza Kishwar Beg Vs Board of Revenue & ors. (1975) RD 373

3. Prema Devi Vs Mathura Dutt Pandey (2019) AIR Online Utr 564

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

1. Heard Mohd. Arif Khan, learned Senior Advocate assisted by Sri Dharm Raj Mishra, learned counsel appearing for the petitioner, Sri Abhinav Narain Trivedi, learned Chief Standing counsel assisted by Sri Hemant Kumar Pandey, learned counsel

appearing for the State-respondents, Sri Vijay Bahadur Verma, learned counsel appearing for the respondents no. 4 to 12 and Sri Pankaj Gupta, learned counsel appearing for the respondent no. 14.

2. Instant petition has been filed praying for the following main reliefs:-

(i) Issue a writ, order or direction in the nature of certiorari quashing the judgment and order dated 21.04.2022, contained in Annexure No. 1, passed by the Opposite Party No. 1, judgment and order dated 05.07.2018/31.08.2020, contained in Annexure No. 2, passed by the Opposite Party no. 2 and judgment and order dated 25.05.1988, contained in Annexure No. 3, passed by the Opposite Party No. 3 with all consequential benefits.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the Opposite Parties to restrain the private respondents from creating any third party right or changing the nature of land in dispute without reference to the judgments and orders, contained in Annexure Nos. 1 to 3 impugned in the petition, with all consequential benefits and allow the relief claimed in the suit in favour of the petitioner.

3. The case set forth by the petitioner is that a suit under Section 229-B of the Uttar Pradesh Zamindari Abolition and Reforms Act, 1950 (hereinafter referred to as "Act, 1950") was filed by the father of the petitioners no. 1 & 2 and father-in-law of the petitioner no. 3. The said suit was dismissed vide order dated 25.05.1988. Being aggrieved, the petitioners filed a first appeal under the provisions of Section 331 (3) of the Act, 1950 which was dismissed vide order dated 05.07.2018 as corrected on 31.08.2020. Still being aggrieved, the petitioners filed a Revision No. 119 of 2021 under Section 333 of the Act, 1950 which has been dismissed vide impugned order dated 21.04.2022, a copy of which is annexure 1 to the writ petition and hence the writ petition.

4. A preliminary objection was raised by Sri Hemant Kumar Pandey, learned Standing counsel as well as Sri Vijay Bahadur Verma, learned counsel appearing for the respondents no. 4 to 12 that taking into consideration the specific provision of Section 331 (4) of the Act, 1950, the petitioners ought to have filed a second appeal and the revision itself was not maintainable under Section 333 of the Act, 1950. The same was opposed by the learned Senior Advocate by contending that there is no specific bar under Section 333 of the Act, 1950 per which the revision would not be maintainable.

5. Considering the same, this Court vide order dated 05.07.2022 had passed an order framing a question which for the sake of convenience is reproduced below:-

"Supplementary affidavit filed today be kept on record.

Heard Mohd. Arif Khan, learned Senior Advocate assisted by Mohd. Aslam and Sri Dharam Raj Mishra, learned counsel appearing for the petitioners, Sri Hemant Kumar Pandey, learned counsel appearing for the State, Sri Pankaj Gupta, learned counsel appearing for the Gaon Sabha and Sri Vijay Bahadur Verma, Advocate who files his Vakalatnama on behalf of respondents no. 5 to 12.

The question which needs to be gone into at the first instance is as to whether after dismissal of the appeal by the Commissioner vide order dated

05.07.2018/31.08.2020 which was filed by the petitioners under the provisions of Section 331 (3) of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as "Act, 1950"), the petitioner correctly filed a revision before the Board of Revenue under the provisions of Section 333 of the Act, 1950 or he should have filed a second appeal under the provisions of Act, 1950.

All the learned counsels would come prepared with this question tomorrow i.e 06.07.2022.

Put up this case tomorrow i.e 06.07.2022 for further hearing at 0215 P.M.

Till tomorrow, status quo as of today shall be maintained by all the parties pertaining to land in dispute."

6. All the learned counsels have been heard on the question as to whether the revision filed by the petitioners was correctly filed under the provisions of Section 333 of the Act, 1950 or whether the petitioners ought to have filed a second appeal under the provisions of Section 331 (4) of the Act, 1950.

7. Learned Senior Advocate while supporting the filing of the revision petition by the petitioners under Section 333 of the Act, 1950 argues that (a) it is the choice of the petitioners regarding the forum i.e to file a second appeal under the provisions of Section 331 (4) of the Act, 1950 or to file a revision under Section 333 of the Act, 1950. He contends that as both the forums are available to the petitioners, consequently they chose to avail the remedy of revision under Section 333 of the Act, 1950 and as such, there is no infirmity in having chosen to file a revision & (b) bare reading of Section 333 of the Act, 1950 would indicate that there is no bar in filing of a revision even after the appeal has been decided inasmuch as and once the legislature in its wisdom has not used a word "Second Appeal" under Section 333 of the Act, 1950, as such the said provision cannot be read in a restrictive manner so as to restrain or restrict filing of the revision under the provisions of Section 333 of the Act, 1950 after having filed an appeal under Section 331 (3) of the Act, 1950.

8. In support of his arguments, learned Senior Advocate has placed reliance on a judgment of the Apex Court in the case of **Lachman Das Vs. Santosh Singh** reported in **1996 All Civil Journal 324.** No other ground has been urged by the learned Senior Advocate.

9. On the other hand, Sri Vijay Bahadur Verma, learned counsel appearing for the respondents no. 4 to 12 has placed reliance on a judgment of this Court in the case of **Mirza Kishwar Beg Vs. Board of Revenue and Ors** reported in **RD (1975) 373** to contend that this Court has categorically held that once an appeal has been filed then the revisional jurisdiction cannot be invoked either at the instance of a party or by the Board itself suo moto.

10. Elaborating the same, Sri Verma argues that Section 333 of the Act, 1950 itself stipulates that the power of revision can be invoked either where no appeal lies or where an appeal lies but has not been preferred meaning thereby that the power of revision under Section 333 of the Act, 1950 could only be invoked by the petitioners in case they had not filed an appeal under the provisions of Section 331 (3) of the Act, 1950 and once the petitioners had filed an appeal, they could not subsequent thereto be permitted to

invoke the power of revision of the Board under Section 333 of the Act, 1950.

11. Sri Hemant Kumar Pandey, learned Standing counsel has adopted the arguments of Sri Vijay Bahadur Verma, Advocate and further argues that once the petitioners having themselves chosen to invoke Section 331 (3) of the Act, 1950 while challenging the order passed under Section 229-B of the Act, 1950, consequently in case of being aggrieved by the order passed in the first appeal dated 05.07.2018/31.08.2020, the only remedy available to them was to have filed the second appeal under the provisions of Section 331 (4) of the Act, 1950. He argues that keeping in view the provisions of Section 333 of the Act, 1950 and the petitioners having themselves filed a first appeal as such, the power of revision was not available to them and they could only have filed a second appeal.

12. Heard learned counsel appearing for the contesting parties and perused the records on the question which has been framed by this Court vide order dated 05.07.2022.

13. From a perusal of the records it is apparent that against the dismissal of the suit filed under Section 229-B of the Act, 1950, an appeal was filed under Section 331 (3) of the Act, 1950 which was dismissed vide order dated 05.07.2018 as corrected on 31.08.2020. The petitioners thereafter filed a revision under Section 333 of the Act, 1950 before the Board of Revenue which has been dismissed vide impugned order dated 21.04.2022 against which the instant petition has been filed.

14. The question is as to whether the petitioners had a remedy of filing of a revision under Section 333 of the Act, 1950 more particularly when their first appeal had already been dismissed and it was the petitioners who were aggrieved against the order of the dismissal of the first appeal.

15. For this purpose, the Court would have to consider the provisions of Section 331 read with Schedule II & Section 333 of the Act, 1950 which for the sake of convenience are reproduced below:-

*"**331. Cognizance of suits, etc. under this Act. -** (1) Except as provided by or under this Act no court other than a court mentioned in Column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (V of 1908), take cognizance of any suit, application, or proceedings mentioned in Column 3 thereof [,] [or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application :]*

[Provided that where a declaration has been made under Section 143 in respect or any holding or part thereof, the provisions of Schedule II insofar as they relate to suits, applications or proceedings under Chapter VIII shall not apply to such holding or part thereof.]

[Explanation. - If the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical to that which the revenue court would have granted.]

[(1-A) Notwithstanding anything in sub-section (i), an objection, that a court mentioned in Column 4 of Schedule II, or, as the case may be, a civil court, which had no jurisdiction with respect to the suit, application or, proceeding, exercised

jurisdiction with respect thereto shall not be entertained by any appellate or revisional court unless the objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.]

(2) Except as hereinafter provided no appeal shall lie from an order or [decree] passed under any of the proceedings mentioned in Column 3 of the Schedule aforesaid:

[(3) An appeal shall lie from any decree or from an order passed under Section 47 or an order of the nature mentioned in Section 104 of the Code of Civil Procedure, 1908 (V of 1908) or in Order 43, Rule 1 of the First Schedule to that Code passed by a court mentioned in Column No. 4 of Schedule II to this Act in proceedings mentioned in Column 3 thereof to the court or authority mentioned in Column No. 5 thereof.

(4) A second appeal shall lie on any of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (V of 1908) from the final order or decree, passed in an appeal under sub- section (3), to the authority, if any, mentioned against it in Column 6 of the Schedule aforesaid.]

***333. Power to call for cases** (1) The Board or the Commissioner or the Additional Commissioner may call for the record of any suit or proceeding [other than proceeding under sub-section (4-A) of Section 198] decided by any court subordinate to him in which no appeal lies or where an appeal lies but has not been preferred, for the purpose of satisfying himself as to the legality or propriety of any order passed in such suit or proceeding and if such subordinate court appears to have;*

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested, or

(c) acted in the exercise of jurisdiction illegally or with material irregularity;

the Board or the Commissioner or the Additional Commissioner, as the case may be, may pass such order in the case as he thinks fit.

(2) If an application under this section has been moved by any person either to the Board or to the Commissioner or to the Additional Commissioner, no further application by the same person shall be entertained by any other of them.]

[Schedule II]
(Section 331)

16. A perusal of Section 331 of the Act, 1950 would indicate that except as provided under the Act, 1950 no Court other than a Court mentioned in Column 4 of Schedule II shall take cognizance of any suit, application or proceedings mentioned in Column 3 thereof or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any suit or application.

17. Sub Section (3) of Section 331 of the Act, 1950 provides that an appeal shall lie from any decree or from an order passed under Section 47 or an order of the nature mentioned in Section 104 of the Code of Civil Procedure or in Order 43, Rule 1 of the First Schedule to that Code passed by a Court mentioned in Column 4 of Schedule II to the Act in proceedings mentioned in Column 3 thereof.

18. Sub Section (4) of Section 331 of the Act, 331 provides that a second appeal shall lie on any of the grounds mentioned in Section 100 of the Code of Civil

Procedure, 1908 from the final order or decree passed in an appeal under Sub Section (3) to the authority, if any, mentioned against it in Column 6 of the Schedule.

19. Schedule II, so far as it pertains to Section 331 of the Act, 1950 specifically provides at Serial No. 34 that under Section 229, 229-B and 229-C i.e suit for declaration of rights, the Court of original jurisdiction would be Assistant Collector Ist Class while a first appeal would lie to the Commissioner and a second appeal shall lie to the Board of Revenue. Thus, when Section 331 (4) is read along with Schedule II it is apparent that a second appeal against an order passed in first appeal shall lie to the Board of Revenue.

20. Section 333 of the Act, 1950, so far as it is relevant for the facts of the instant case, provides that the Board may call for the record of any suit or proceedings decided by any Court subordinate to him in which no appeal lies or where an appeal lies but has not been preferred. Thus, it is apparent that a revision under Section 333 of the Act, 1950 would be available only in those cases either in which no appeal lies or though an appeal lies but had not been preferred.

21. In the instant case, it is admitted that an appeal against the order passed under Section 229-B of the Act, 1950 was filed by the petitioners under Section 331 (3) of the Act, 1950 and thereafter they have filed a revision under Section 333 of the Act, 1950. However, keeping in view the specific provisions of Section 331 (4) of the Act, 1950 which uses the word "shall", it was mandatory for the petitioners, if aggrieved against the order passed under Section 331 (3) of the Act, 1950, to have filed a second appeal. It is settled proposition of law that an appeal is creation of statue. Once the statue, in its wisdom has specifically mandated under Section 331 (4) of the Act, 1950 for filing of second appeal by use of the word "shall", as such, in case the petitioners were aggrieved against the order passed under Section 331 (3) of the Act, 1950 they could only have filed a second appeal and no revision under Section 333 of the Act, 1950 was maintainable. This would also be clear from the words used in Section 333 of the Act, 1950 wherein it has been provided that the Board may call for the records of any suit or proceedings decided by any Court subordinate in which either no appeal lies or where an appeal lies but has not been preferred. Thus, the revision under Section 333 of the Act, 1950 can only be filed either where the petitioners had no remedy of filing an appeal (which is not the case) or where they had not filed the appeal which is also not the case inasmuch as the petitioner admittedly filed an appeal under Section 331 (3) of the Act, 1950. Thus, the revision under Section 333 of the Act, 1950 was clearly not maintainable and was wrongly preferred by the petitioners.

22. The arguments of learned Senior Advocate that as Section 333 of the Act, 1950 does not quantify or define "Appeal" as first appeal or and second appeal, as such he would be empowered to file a revision under Section 333 of the Act, 1950 as per litigants choice of choosing the forum, is clearly misconceived inasmuch as there cannot be two forums open to a litigant at his choice to either file a second appeal or a revision for in case the said argument of the learned Senior Advocate is accepted then Section 333 of the Act, 1950 would be treated as an alternative forum to Section 331 (4) of the Act, 1950, which

would be absolutely a wrong interpretion of law. The reason is that the statutory scope and purpose of Section 333 is to be availed only in those situations or legal circumstances where against an order or judgment rendered by the subordinate Court either no appeal lies or where an appeal lies but it has not been preferred. However, those cases in which the statute provides the forum of second appeal, the power of revision can never be treated to be synonymous to power of appeal as it would defeat the very purpose of creation of the different forum.

23. The matter can also be looked from another perspective inasmuch as obviously the intention of legislature cannot be to make two forums available to a litigant and that too, at his own choice and thus merely because Section 333 of the Act, 1950 has only used the word "Appeal" and not second appeal, the same has to be reasonably interpreted to mean that where an appeal has been preferred under Section 331 (3) of the Act, 1950, the forum of filing of a revision under Section 333 of the Act, 1950 would not be available.

24. In this regard, the Court may refer to a judgment of this Court in the case of **Mirza Kishwar Beg (supra)** wherein this aspect of the matter has been considered and it was categorically held that once an appeal has been preferred then in such a case the revisional power could not be invoked by the Board either at the instance of a party or by the Board itself suo moto.

25. This aspect of the matter has also been considered by Uttrakhand High Court in the case of **Prema Devi Vs. Mathura Dutt Pandey** reported in **AIROnline 2019 Utr 564** wherein the Court has held as under:-

6. The learned counsel for the petitioners submits that being aggrieved against the Appellate Court's order passed in an statutory appeal, no revision will lie under the Act, because once a special statute provides a Forum of Second Appeal under Section 331(4) to be read under II Schedule of U.P.Z.A. & L.R. Act, 1950, in that eventuality, the person, who is aggrieved by the First Appellate Court's order, is bound to invoke the Forum, which has been statutorily created of preferring a Second Appeal under sub Section (4) of Section 333 of U.P.Z.A. & L.R. Act, 1950, which has to be decided in the light of the provisions contained under Section 100 of the Code of Civil Procedure, which has been made applicable over the second appellate proceedings under the Act, by reference. Even otherwise, this Court is of the view that once the statutory appeal has been decided, any judgement rendered by the appellate Court would not be revisable as appellate judgements are not revisable.

7. While on the other hand, the argument which has been extended by the learned counsel for the plaintiffs/respondents is that the provisions contained under Section 333 of the U.P.Z.A. & L.R. Act, though it apparently seems to be a revisional power given under the Act, which has been vested with the Board or the Commissioner, as the case may be, hence, it would be amounting to exercise the same powers as contemplated under Section 331(4) of the Act could be treated as to be para materia provision and a forum to challenge the First Appellate Court's order. This Court is not in agreement with the argument as extended by the learned counsel for the plaintiffs/respondents the reason being that if his argument as extended is accepted then the provisions contained under Section 333 as to be treated as an alternative

Forum to Section 331(4), it would be absolutely a wrong interpretation of law for the reason being that the statutory scope and purpose of Section 333, is to be availed in those situations or legal circumstances where any order or a judgement rendered by any subordinate Court could be subject to revision at the behest of the party aggrieved or even the revisional Court can suo moto take its call and initiate the proceedings of a revision. But in these cases where the Statute is providing a forum of second appeal, the powers of revision can never be treated to synonyms to powers of appeal, as it would defeat the very purpose of creation of the different forum.

8. But, if we compare the powers conferred to the second appellate Court under Section 331(4) of the Act, it does not provide that the Second Appellate Court can ever suo moto exercise the powers and take cognizance of an order passed under Section 331(1) of the Act until and unless the aggrieved party files a second appeal, like that provided in Revisional Power under Section 333.

9. Secondly, if the scope of revisional power, which is vested under Section 333 of the Act, would be confined in its application within the scope as provided therein the 3 clauses of the provisions under Section 333 of the Act, which is para materia to the provisions contained under Section 115 of the Code of Civil Procedure. It happens to be absolutely distinct to the appellate power where the provision of Section 100 of the Code of Civil Procedure has been made applicable by reference, under Section 331(4)

10. If the argument as extended by the counsel for the plaintiffs/respondents is accepted, it will run contrary to the intention of the legislation itself the reason being that if Section 333 is to be read as a substitute or a synonymous to the provisions contained under Section 331(4) of the Act, it would rather limit the jurisdiction of interference by the Revisional Court as against the First Appellate Court's order within the scope of its interference provided under Section 3 clauses contained therein under Section 333, whereas on the other hand, the provisions contained under Section 331(4) is wide enough to enable the parties to place there case both on facts and law and thus the argument, which has been extended by the learned counsel for the plaintiffs/respondents is not accepted.

11. There is another logic as to why the argument of the learned counsel for the revisionist to treat the proceedings under Section 333 as to be the proceedings of the same parlance as that provided under Section 331(4) is not acceptable from the viewpoint that if this logic is accepted, then there was no need for the legislature to provide for a specific Forum for redressal of the grievance by a party, who is aggrieved by a First Appellate Court's judgement by preferring a second appeal that too within the ambit of Section 100 of the C.P.C. Hence, there was no necessity for the legislature to contemplate different provisions under the Act itself for redressal of the grievance as against the First Appellate Court's order because if the argument as extended is accepted then it will have an adverse effect as it would be leaving the forum to be chosen by the choice of the party, which is aggrieved by first appellate Court's order, selection of a forum cannot be made available by choice of a litigant to invoke a forum which suits to his convenience which is not the intention of the legislature.

26. As regards the judgment cited by learned Senior Advocate in the case of

Lachman Das (supra) the same pertains to the distinction between appeal and revision. There cannot be any quarrel to the settled proposition of law inasmuch the scope of appeal and revision are clearly different. As such, the said judgment would have no applicability in the facts of the instant case.

27. Keeping in view the aforesaid discussion as well as the judgment of this Court in the case of **Mirza Kishwar Beg (supra)** and the judgment of Uttrakhand High Court in the case of **Prema Devi (supra)** the Court holds that the revision which was filed by the petitioners was wrongly filed and the Board patently erred in entertaining the same.

28. Considering the aforesaid, the writ petition is partly allowed. The impugned order dated 21.04.2022 passed by the Board of Revenue, a copy of which is annexure 1 to the writ petition is set aside. It is provided that it would be open for the petitioners to file a second appeal within a period of two weeks from today.

29. Sri Vijay Bahadur Verma, learned counsel appearing for the respondents no. 4 to 12 fairly submits that in case the appeal is filed within the aforesaid time then he would not be raising the plea of limitation before the Board of Revenue. It is thus provided that in case the second appeal is filed within the aforesaid time period then the Board of Revenue shall proceed to decide the same on merits.

30. It would be open for the petitioners to file an application for stay which will be considered by the Board of Revenue expeditiously.

31. The Court records the valuable assistance given by Sri Abhinav Narain Trivedi, learned Chief Standing counsel and Ms. Vaishnavi Bansal, Law Clerk Trainee of this Court.

(2022)07ILR A69
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 1520 of 2022

Bhagwan Das @ Ram Das ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Krishna Kumar Chaurasia

Counsel for the Respondents:
C.S.C., Sri Ashutosh Tripathi, Sri Hariom Upadhyay, Sri Pradeep Singh

A. Land Law - U.P. Consolidation of Holdings Act, -Section 9A(2)-challenge to-DDC order-objection u/s 9A(2) of the Act has been decided on the basis of compromise by which the name of recorded tenure holder was expunged from whom respondent no. 6 was claiming right-Restoration application filed by the respondent no. 6 was allowed by the Consolidation Officer for deciding the case on merit but no condition had been imposed upon respondent no.6 for filing the application with inordinate delay-The impugned orders are modified to the extent that the respondent no. 6 will pay cost for allowing the restoration application to the sum of Rs. 10,000/- to the petitioner.(Para 1 to 10)

The writ petition is disposed of. (E-6)

List of Cases cited:

1. Hari Ram Vs DDC, Azamgarh (1989) RD Pg 281

2. Sharda Prasad Tiwari Vs St. of U.P. & ors. (2015) 127 RD 702

3. Smt. Thaker Vs DDC & ors. (1975) RD 271

4. Ram Chand & anr. Vs DDC & ors. (1984) RD 258

5. Gurucharan Singh Baldev Singh Vs Yashwant Singh (1992) 1 SCC 428

6. Glaxo Smith Kline PLC Vs Controller of Patents & Designs (2009) AIR SC 1147

7. Gopi Singh Vs DDC & ors. (1967) RD 214

8. Ram Bahadur Vs DDC & ors. (1974) RD 627

9. Siddh Narain Vs DDC & ors. (2007) 103 RD 627

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Krishna Kumar Chaurasia, learned counsel for the petitioner, learned Standing Counsel for respondent nos.1 to 4, Sri Pradeep Singh, learned counsel for respondent no.5 and Sri Ashutosh Tripathi, learned counsel for respondent nos.6 and 7.

2. The instant petition has been filed for quashing the impugned order dated 9.5.2022 passed by the Deputy Director of Consolidation / A.D.M., Namamigange, Mirzapur as well as the order dated 27.12.2019 passed by the Settlement Officer of Consolidation, Mirzapur and order dated 4.7.2019 passed by the Consolidation Officer in the proceeding arising out of Section 9A (2) of the U.P. Consolidation of Holdings Act.

3. Brief facts of the case are that in the basic year of the consolidation operation, one Somaroo was recorded over Gata No.73/2 and 411/2 of Khata No.255. A time barred objection under Section 9A (2) of U.P.C.H. Act was filed on 3.12.1998 by Basedeo (petitioner's father) and Laldeo (respondent no.7) impleading Laldeo and others for co-tenancy right, the case was registered as Case No.1698. Somaroo had died during pendency of the objection before Consolidation Officer. A compromise was entered into in the aforementioned Case No.1698 between petitioner and respondent no.7 (natural father and guardian of respondent no.6) by compromise deed dated 25.11.1999, which was verified by their counsel. Accordingly, Consolidation Officer by order dated 4.4.2001 allowed the objection on the basis of compromise after condoning the delay in filing the objection by separate order and ordered to record the name of petitioner's father Basedeo over Plot Nos.73/2 and 411/2. Notification under Section 52 of U.P.C.H. Act took place on 16.9.2006 in the village in question. Respondent no.6, Panna Lal filed an application before Consolidation Officer on 18.8.2017 against the order dated 4.4.2001 passed by Consolidation Officer stating that he (Panna Lal) was minor during the period of consolidation and came to know about the order dated 4.4.2001 on 6.8.2017 when the interference was made with possession of the petitioner. The basis of claim of respondent no.6 is registered adoption deed alleged to be executed on 20.11.1998 by Somaroo in favour of respondent no.6 (Panna Lal). Petitioner filed an objection to the restoration application and delay condonation application filed by respondent no.6. Consolidation Officer by order dated 4.7.2009 allowed the restoration application giving benefit of Section 5 of Limitation Act and set aside the earlier order dated 4.4.2001 fixing a date 18.7.2019 for further proceedings. Against the order dated 4.7.2019 petitioner filed an appeal under Section 11 of the

U.P.C.H. Act before the Settlement Officer of Consolidation which was dismissed by the Settlement Officer of Consolidation vide order dated 27.12.2019. The revision under Section 48 of U.P.C.H. Act filed by the petitioner against the order of the Consolidation Officer as well as the Settlement Officer of Consolidation was dismissed by the impugned order dated 9.5.2022, hence this writ petition.

4. Learned counsel for the petitioner submitted that objection under Section 9A-2 of the U.P.C.H. Act filed by the parties were decided on the basis of compromise. The result of which, petitioner's father was ordered to be recorded expunging the name of Somaroo but respondent no.6 on the basis of manipulated gift deed, has setup his claim through belated restoration application after 16 years and the Consolidation Officer without giving cogent reason has allowed the restoration application. He further submitted that application for recall filed by respondent no.6 on 18.8.2017 was not maintainable as notification under Section 52 of the U.P.C.H. Act had already taken place on 16.9.2006. He placed reliance upon ***1989 R.D. Page 281, Hari Ram Vs. D.D.C. Azamgarh*** on the point of Section 52 of the U.P.C.H. Act. He next submitted that even no condition has been imposed for allowing the restoration application which was belated by 16 years. He also submitted that the petitioner is in possession of the disputed plots and respondents have initiated the proceeding by way of restoration/recall in order to harass the petitioner, hence writ petition be allowed and the impugned orders are liable to be set aside.

5. On the other hand, learned counsel for respondent no.6 and 7 submitted that fraud has taken place before the Consolidation Officer in obtaining the order on the basis of compromise. He further submitted that respondent no.6 was minor at the time when the proceeding were pending and compromise has taken place, as such, the order passed on the basis of compromise was rightly set aside by the Consolidation Officer while allowing the restoration application. He next submitted that appeal and revision etc. can be filed against the order of consolidation authorities even after notification under Section 52 of U.P.C.H. Act. He placed reliance upon ***2015 (127) R.D. 702 Sharda Prasad Tiwari Vs. State of U.P. and Others***. He also submitted that the case has been restored on its original number by the Consolidation Officer so petitioner can take whatever objection he want before the Consolidation Officer, hence he prays for dismissal of the writ petition.

6. I have considered the submissions advanced on behalf of the learned counsel for the parties and perused the record. There is no dispute about the fact that objection under Section 9A (2) of the U.P.C.H. Act has been decided on the basis of compromise by which the name recorded tenure holder was expunged from whom respondent no.6 is claiming right, accordingly, restoration application filed by respondent no.6 was allowed by the Consolidation Officer for deciding the case on merit but no condition has been imposed upon respondent no.6 for filing the application with inordinate delay.

7. In ***Smt. Thaker Vs. Deputy Director of Consolidation And Others 1975 R.D. 271,*** it has been held that the High Court should not interfere under Article 226 of the Constitution of India, in exercise of discretion in condoning the

delay by consolidation authorities. In ***Ram Chand and Another Vs. Deputy Director of Consolidation and Others, 1984 R.D. 258***, it has been held that order of condonation of delay raises no question of jurisdiction so as to call for interference by the Court in exercise of powers under Article 226 of the Constitution of India.

8. On the point of Section 52 of the U.P.C.H. Act, Para No.11 in the case of ***Sharda Prasad Tiwari (supra)*** will be relevant which is as follows:

"11. The other argument that the consolidation operation was closed in the village by notification under Section 52 of the Act, on 30.4.1990 and the appeal was filed on 13.4.2002, as such, it was not maintainable has also no force. Section 6 of the General Clauses Act authorizes for filing of the appeal after repeal of the Act. Supreme Court in ***Gurucharan Singh Baldev Singh Vs. Yashwant Singh (1992) 1 SCC 428 and Glaxo Smith Kline PLC Vs. Controller of Patents and Designs AIR 2009 SC 1147*** *held that pre-existing right of appeal under the old law continues to exist and not destroyed by necessary implications after repeal of the law, in the absence of contrary intention in the repealing law. Division Benches of this Court in* ***Gopi Singh Vs. D.D.C. and Others 1967 R.D. 214, Ram Bahadur Vs. D.D.C. and Others 1974 R.D. 627, and in Siddh Narain Vs. D.D.C. and Others 2007 (103) R.D. 627*** *have held that appeal and revision etc. can be filed against the orders passed by consolidation authorities even after the notification under Section 52 of the Act."*

9. Considering the entire facts and circumstances as well as the ratio of law laid down by the Court on the point in issue no interference is required against the impugned orders except that since no condition has been imposed by the Consolidation Officer while allowing the restoration application of respondent no.6, as such, the impugned orders are modified to the extent that respondent no.6 will pay cost for allowing the restoration application to the sum of Rs.10,000/- to the petitioner on the date fixed before the Consolidation Officer.

10. The writ petition is finally ***disposed of*** with the following directions:

(i) The parties will appear before the Consolidation Officer on 22nd August, 2022.

(ii) The respondent no. 6 will pay cost of Rs. 10,000/- to the petitioner on the date fixed i.e. 22.8.2022 before the Consolidation Officer and the Consolidation Officer shall mention the same in the order sheet.

11. Since, the case is very old, as such, the Consolidation Officer is directed to decide the case expeditiously preferably within a period of six months after affording opportunity of hearing to the parties from the date of production of certified copy of this order before him.

(2022)07ILR A72
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.07.2022

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ C No. 873 of 2022

Mohd. Maqsood Khan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ram Dheeraj, Vinod Kumar Singh, Vivek Mishra

Counsel for the Opposite Parties:
C.S.C.

A. Civil Law – Registration Act, 1908 – Sections 34 & 35(1)(c) – Registration of document – Non-appearance of the executor or representatives before the registering officer within four months after presentation of document for registration – Wife of executor did not admit the execution of deed – Effect – Application for registration was rejected – Validity challenged – Held, the representative of the executor i.e. her wife has not admitted the execution of the deed, hence the provision of Section 35(1)(c) of the Act is not applicable in this case – Further held, a document cannot be registered in absence of executor before the Registering Authority or his authorized representative, assignee or any other person as permissible under the Act, admitting the execution of the document. (Para 9 and 11)

Writ petition dismissed. (E-1)

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

1. In compliance of order of this Court dated 13.04.2022, the affidavit of service has been filed by the learned counsel for the petitioner enclosing therewith the notices published in two newspapers i.e. Amar Ujala and Times of India as well as the notice pasted on the door of the Respondent No. 4. Despite the notice published in the new papers, no one has put in appearance on behalf of the Respondent no. 4.

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

3. The present petition has been preferred for quashing of the appellate order dated 15.12.2021 passed by Additional District Magistrate (F&R), Sultanpur and the order dated 12.11.2018 passed by Sub-Registrar, Tehsil- Sadar, District - Sultanpur refusing to register the document namely the sale deed said to be executed in favour of the petitioner.

4. The brief facts of the case as per the petitioner are that on 11.07.2018 the instrument was presented in the office of Sub-Registrar for the purpose of registration of the sale deed executed by one Tufail Ahmad - Respondent No.4 in favour of the petitioner. After the enquiry as provided under Section 34 of the Registration Act, 1908, when the document was to be registered, Tufail Ahmad went away from the office of the Sub-Registrar. The Sub-Registrar vide its order dated 12.11.2018 had rejected the application for registration of the instrument as time barred with the finding that despite notice/ summon to the Tufail Ahmad, he had not appeared. Against the said order, the petitioner preferred an appeal before the Additional District Magistrate (F&R), District Sultanpur and in the appeal vide order dated 15.12.2021 an order has been passed staying the proceedings of Appeal and file was consigned to record, feeling aggrieved by these orders, the present writ petition has been filed.

5. Learned counsel for the petitioner has submitted that the registering authority has wrongly refused to register the instrument as the same was presented by executor and the signature had been made on the same in the office of Sub Registrar. It is further submitted that after the signature made and accepting the consideration amount, the presence of the

seller is not required for the purpose of registration of the documents as the formalities had already been completed. It is further submitted that the authorities had not registered the instrument till the period of limitation and after that rejected the same as time barred. It is further submitted that the authorities are bound to register the document as per section 35(1)(c) of the Registration Act, 1908. It is further submitted that the appellate authority had passed the order without application of mind and, hence it is liable to be quashed.

6. On the other hand, learned State counsel has submitted that there is no illegality in the orders impugned as passed by the Respondent No.2 and 3 respectively.

7. After hearing learned counsel for the parties and going through the record and the provisions of Registration Act, 1908, where it has been provided that no document shall be registered under this Act, unless the persons executing such document, or their representatives, assigns or agents authorized as aforesaid, appear before the registering officer within the time allowed for presentation.

8. The reliance placed by learned counsel for the petitioner that his case is squarely covered under Section 35(1)(c) of the Registration Act, 1908 and hence the Sub-Registrar is under obligation to register the instrument. For convenience Section 35(1)(c) is quoted hereinbelow:

"if the person executing the document is dead, and his representative or assign appears before the registering officer and admits the execution, the registering officer shall register the document as directed in sections 58 to 61 inclusive."

9. In the present case, it is still not confirmed that Respondent No.4 is dead or alive, and his representative i.e. wife appeared and moved an application for recall of an earlier order where she has stated that her husband has been kidnapped and an F.I.R. has been lodged after the order passed by the Court. It is further stated that she is not aware that her husband is dead or alive. The representative of Respondent No.4 i.e. her wife has not admitted the execution of the deed, hence the provision of Section 35(1) (c) of the Act is not applicable in this case.

10. Section 34 of the Registration Act, 1908, provides that the presence of the person, who has to execute the sale deed, his representative or his agent is necessary within four months from the date of presenting the documents for the purpose of registration For convenience, Section 34 of the Act is quoted hereinbelow;

"34. Enquiry before registration by registering officer.?(l) Subject to the provisions contained in this Part and in sections 41, 43, 45, 69, 75, 77, 88 and 89, no document shall be registered under this Act, unless the persons executing such document, or their representatives, assigns or agents authorized as aforesaid, appear before the registering officer within the time allowed for presentation under sections 23, 24, 25 and 26: Provided that, if owing to urgent necessity or unavoidable accident all such persons do not so appear, the Registrar, in cases where the delay in appearing does not exceed four months, may direct that on payment of a fine not exceeding ten times the amount of the proper registration fee, in addition to the fine, if any, payable under section 25, the document may be registered.

(2) Appearances under sub-section (1) may be simultaneous or at different times.

(3) The registering officer shall thereupon?

(a) enquire whether or not such document was executed by the persons by whom it purports to have been executed;

(b) satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document; and

(c) in the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such person so to appear.

(4) Any application for a direction under the proviso to sub-section (1) may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.

(5) Nothing in this section applies to copies of decrees or orders."

11. It is an undisputed fact in the present case that the orders passed by the Sub Registrar is after the expiry of four months after presentation of document for registration and that the Respondent No. 4 had not appeared despite summons/notices, hence, there is no illegality in the order passed by the Sub-Registrar. A document cannot be registered in absence of executor before the Registering Authority or his authorized representative, assignee or any other person as permissible under the Act, admitting the execution of the document.

12. The appellate authority has rightly passed the order consigning the appeal to the record.

13. The appellate authority neither rejected the appeal nor closed the rights of the petitioner. Later on in case the executor is traced and may appear before the Sub-Registrar or if any of its respondent in case he is found to be dead, the petitioner may still move any appropriate application for registration of the instrument, if and as it may permissible under the law.

14. As discussion made hereinabove, there is no illegality in the orders impugned, hence the petition is devoid of merit and is accordingly **dismissed.**

(2022)07ILR A75
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2022

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ C No. 4519 of 2022

Om Prakash @ Pappu ...Petitioner
Versus
Sub Divisional Officer/ Prescribed Authority Sandila Hardoi & Ors. ...Respondents

Counsel for the Petitioner:
A.Z. Siddiqui

Counsel for the Respondents:
C.S.C., Vikrant Prakash

A. Election Law – UP Panchayat Raj Act, 1947 – Section 12-C – Civil Procedure Code – O. XIV R. 1 an R. 2 – Issue of law, how long need to be decided first – The issue of law as mentioned in the application of the petitioner did not contain issues relating to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force – Held, the contentions raised to direct the prescribed authority to decide the issue of law first is not tenable in law. (Para 13)

Writ petition dismissed. (E-1)

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

1. Heard Shri A.Z. Siddiqui, learned counsel appearing for the petitioner, learned Standing Counsel and Shri Vikrant Prakash, learned counsel for the respondent no. 2.

2. Present petition has been preferred to quash the impugned orders dated 04.07.2022 and 12.01.2022. It has further been sought to direct the Election Tribunal to first decide the preliminary issue before the further proceedings in the Election Petition and direct the Prescribed Authority to get the aforesaid original ballot paper be investigated by the Police after registering the FIR at the concerned Police Station.

3. The brief facts of the present case as per the petitioner are that the petitioner was declared elected as Gram Pradhan of Village Atwa, Kshetra Panchayat Kothwan, Tehsil Sandila, District Hardoi by the Election authorities on 03.05.2021. Later, some persons who were not elected had preferred an application under Section 12 C of the Uttar Pradesh Panchayat Raj Act, 1947 (henceforth be referred as, the Act, 1947) challenging the election of the petitioner. In the said proceedings, the notice was issued to the petitioner and in reply thereto, a written statement was submitted denying the facts narrated in the application preferred under Section 12 C of the Act, 1947.

4. The petitioner had moved applications for framing of issues in pursuance of which issues were framed pertaining questions of facts and law both.

5. The application of the petitioner to decide the issues of law first, as per Order XIV Rule 1 of the Civil Procedure Code, 1908 (hereinafter for the sake of brevity referred as, the Code, 1908), was rejected by the prescribed authority vide its order dated 04.07.2022 and feeling aggrieved by the same, the present writ petition has been preferred.

6. Learned counsel for the petitioner has relied on Order XIV Rule 1 (4) which provides that issues are of two kinds, which are mentioned as follows:-

(a) issue of fact,
(b) issues of law.

7. Learned counsel for the petitioner has further relied on Order XIV Rule 2 (2) of the Code, 1908 where the Court has been mandated to decide the issue of law first.

8. On the other hand, learned Standing Counsel has submitted that the proceedings pending before the prescribed authority is covered by the provisions of Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994 (hereinafter referred to as, the Rule, 1994) framed under Section 110, read with Section 12 C and Section 12 D of the United Provinces Panchayat Raj Act, 1947. It is further submitted that as per Section 12 C (5), proceedings before the prescribed authority under Section 12 C of the Act, 1947 was for questioning the election and are summary in nature and thus, the submissions raised for deciding the issues of law first, is not acceptable as per Order XIV 2 (2) of Code, 1908.

9. It is further submitted that evidence is going on and the petitioner is trying to linger the proceedings by moving applications time and again.

10. Shri Vikrant Prakash, learned counsel appearing for the respondent no. 2 has submitted that the petitioner is moving several applications time and again just to linger the proceedings. It is further submitted that earlier also, a petition bearing Writ C No. 2665 of 2022 was preferred by the wife of the petitioner, who had also contested the election and got only 10 votes, which was disposed of by this Court vide its order dated 11.05.2022 giving liberty to the petitioner of that petition to submit her reply/objection in the suit.

11. After hearing learned counsel for the parties and going through the records, the position which emerges out is that the submissions raised by the learned counsel for the petitioner that prescribed authority has to decide the issues of law first is not tenable. As per the petitioner, the issue of law is as under as pointed out from the annexure no. 7 to the present petition:-

"क्या प्रस्तुतु याचिका में आदेश 6 नियम 15 (4) व्यवहार प्रकृति संहिता का अनुपालन नहीं किया गया है, याद है तो प्रभाव?

12. Order XIV 2 (2) provides that if the issues of law as well as fact arise in a suit only the issues of law relates to the jurisdiction of the Court, or a bar to the suit created by any law for the time being in force is to be decided first. For convenience, the Order XIV 2 (2) of the Code, 1908 is quoted hereinbelow:-

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

13. Undisputedly, the petitioner has failed to show the issue of law as framed on the application of the petitioner (annexed at annexure no. 7 to the present petition) is covered by any of the conditions contained in Order XIV Rule 2 (2). The issue of law framed on Order VI Rule 15 (4), the Order VI deals with pleadings generally and Rule 15 (4) of Order VI is with regard to the person verifying the pleadings shall also furnish an affidavit in respect of pleadings. The issue of law as mentioned in the application of the petitioner did not contain issues relating to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force and hence, the contentions raised to direct the prescribed authority to decide the issue of law first is not tenable in law.

14. The proceedings, as per Section 12 C (5) are summary in nature and the evidence is going on.

15. For the facts and circumstances mentioned hereinabove, this court does not find any good reason to interfere with the proceedings which are going on before the prescribed authority.

16. Petition is devoid of merit and is ***dismissed,*** accordingly.

(2022)07ILR A78
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.07.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 5098 of 2017

Ajay Pratap Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Manoj Kumar Dwivedi

Counsel for the Respondents:
C.S.C.

A. Civil Law – The United Provinces Excise Act, 1910 – Section 34 – UP Excise (Settlement of Licenses for Retail Sale of Country Liquor) Rules, 2002 – R. 21 – Suspension and cancellation of the licence – Unauthorized liquor was found in rice mill owned by the petitioner – Condition required for suspension to the effect that any other kind of liquor or intoxicating drugs are found in the 'licensed premises' or in 'possession of licensee', was not fulfilled – Effect – Held, in the absence of any allegation of any recovery from any place in the 'licensed premises' or in the 'possession of the licensee', the powers to suspend and cancel cannot be resorted to under the Act or the Rules. (Para 15)

B. Civil Law – UP Excise (Settlement of Licenses for Retail Sale of Country Liquor) Rules, 2002 – R. 21 – Time limit of 7 days, prescribed for calling explanation, was not adhered to – Effect – Held, the orders cancelling the licence were against the substantive provisions and also violated the procedural provisions. (Para 17 and 18)

Writ petition disposed off. (E-1)

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

1. Heard learned Counsel for the petitioner and learned Additional Chief Standing Counsel.

2. The present writ petition has been filed challenging the order dated 24.02.2016 whereby 06 country liquor and 02 Indian Made Foreign Liquor (IMFL) licenses of the petitioner were cancelled and the security as well as the licence fee was forfeited in exercise of powers under Section 34 of The United Provinces Excise Act, 1910 as well as the appellate order dated 22.03.2016 whereby the appeal preferred by the appellant was dismissed and the order dated 17.02.2017 whereby the revision preferred by the petitioner before the State Government was rejected.

3. The facts in brief leading to the filing of the present writ petition are that the petitioner was granted six licences of country liquor shop in District Amethi in exercise of the powers conferred under the Uttar Pradesh Excise (Settlement of Licenses for Retail Sale of Country Liquor) Rules, 2002 (in short 'the Rules 2002') and was also granted two licences for selling foreign liquor in District Amethi in terms of the provisions of Uttar Pradesh Excise [Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer and Wine Rules)] Rules, 2001 (in short 'the Rules 2001'). On 28.01.2016, an FIR came to be lodged in Case Crime No.103 of 2016, under Section 60 of the Excise Act read with Sections 419 and 420 IPC at Police Station Musafirkhana, District Amethi against one Guddu Singh and Babblu Singh. The said two accused took the name of the petitioner and in pursuant to the said statement, the petitioner was arrested under the said FIR. The allegations as contained

in the FIR referred to violation of Section 60 of the Excise Act read with Sections 419 and 420 IPC and it was also stated that unauthorized liquor was found in a rice mill owned by the petitioner.

4. Subsequently, the proceedings were initiated for suspending the licences (six in number) in exercise of the powers conferred under the Rules 2002 and the Rules, 2001. A notice was served to the petitioner on 04.02.2016 referring to the FIR and alleging therein that there appeared to be a violation of Section 34 of the Excise Act and the Rules of 2002. The petitioner put in appearance and denied the allegations levelled against him, however, orders were passed suspending the six licences granted to the petitioner in respect of the six shops vide order dated 21.02.2016. Thereafter on 22.02.2016, the petitioner was called upon for personal hearing in terms of Rule 21(2) of the 2002 Rules. The petitioner filed a reply denying his involvement with the offence in question, he also filed his written submissions, however, an order dated 24.02.2016 was passed cancelling the six licences and through the same order, the basic license fee, the license fee and the security deposit were forfeited in favour of the State Government. Aggrieved against the said order cancelling the license, the petitioner preferred an appeal before the Excise Commissioner, which came to be dismissed on 22.03.2016.

5. Subsequent to the dismissal of the appeal, a final report was filed in favour of the petitioner in the Case Crime No.103 of 2016 wherein nothing incriminating was found against the petitioner and only the other two accused were charge-sheeted. It is also relevant that challenging the appellate order, the petitioner has preferred a revision before the State Government and during the pendency of the revision, the petitioner by means of an affidavit brought the subsequent development as took place in Case Crime No.103 of 2016 before the Revisional Authority and pleaded that as the sole ground for cancellation of the licenses and the action of forfeiture of security and licence fee was based upon the lodging of the FIR, in which ultimately a final report was filed in favour of the petitioner, the revision deserves to be allowed. The Revisional Authority, by the impugned order proceeded to dismiss the revision. On perusal of the said order, there appears to be no discussion with regard to the subsequent development that happened in Case Crime No.103 of 2016.

6. In the above referred three orders, which are under challenge, the main submission of the Counsel for the petitioner is that the entire action initiated and concluded by means of the above three orders, which are impugned herein, there is a serious error committed by the authority concerned in not following the mandate of law. He draws my attention to the Rules 2002 as well as the Rules 2001 which governs the grant of licenses in respect of country liquor and foreign liquor respectively. He also argues that even the time limit prescribed under the rules for filing replies was not adhered to.

7. Rule 21 of the Rules 2002 provides for the manner in which steps can be taken for suspension and cancellation of the license as well as provides for penalty. Rule 21 reads as under:

"21. Suspension and cancellation of the licence and penalties *- (1) Licensing Authority may suspend or cancel the license -*

*(a) if any bottle or container of country liquor is **found in the licensed premises** on which duty has not been paid and which does not carry security hologram duly approved by the Excise Commissioner as a proof of payment of duty;*

*(b) if any bottle or container of any other kind of liquor or intoxicating drug (for which licence is not granted) is **found in the licensed premises;***

*(c) if any liquor or intoxicating drug is **found in the possession of the licensee** against the provisions of the Act or rules;*

(d) if the affidavit submitted by the licensee at the time of application is found incorrect and assertions made therein are found to be false;

(e) if it is found that the licence has been obtained in a false name or the licensee is holding the licence on behalf of some other person.

(f) if the licensee fails to deposit monthly instalment of licence fee or replenish the deficit in security amount within prescribed period;

(g) if the licensee is convicted of an offence punishable under the Act or of any cognizable and nonbailable offence, or any offence punishable under Narcotics Drugs and Psychotropic Substances Act, 1985 or of any offence punishable under Sections 482 to 489 of the Indian Penal Code.

*(2) The Licensing Authority shall immediately suspend the licence and issue a show cause notice for cancellation of licence and forfeiture of security. The licensee shall submit his explanation **within 7 days of the receipt of notice.** There after the Licensing Authority shall pass suitable orders after giving due opportunity of hearing to the licensee.*

(3) In case the licence is cancelled the basic licence fee, licence fee deposited by him shall stand forfeited in favour of the Government and licensee shall not be entitled to claim any compensation or refund. Such licensee may also be blacklisted and debarred from holding any other exercise licence."

8. Similarly Rule 18 of the Rules 2001 provides for the manner of suspension and cancellation of the licence in respect of Foreign Liquor Shops, which is quoted hereinbelow:

*"**18. (1) Licensing authority may suspend or cancel the licnce. -** (a) If any bottle is **found in licensed premises** on which duty has not been paid and which does not carry security hologram duly approved by the Excise Commissioner as a proof of payment of duty.*

*(b) if any other kind of liquor or intoxicating drug (for which licence is not granted) is **found in the licensed premises.***

*(c) if any liquor or intoxicating drug is **found in the possession of the licensee** against the provisions of the Act or rules;*

(d) if the affidavit submitted by the licensee at the time of application is found incorrect and assertions made therein are found to be false.

(e) if the licensee is convicted of any offence punishable under the Act or of any cognizable and non-bailable offence, or any offence punishable under Narcotics Drugs And Psychotropic Substances Act, 1985 or of any offence punishable under sections 482 to 489 of the Indian Penal Code,

(f) if any bottle/container is found in the licensed premises on which maximum retail price is not printed and

(g) if it is found that the licence has been obtained in a false name and the licensee is holding the licence on behalf of some other person.

(2) The licensing authority shall immediately suspend the licence and also serve a show cause notice for cancellation of licence and for forfeiture of security deposit, the licensee shall submit his ***explanation within 7 days of the receipt of notice.*** *Thereafter the licensing authority shall pass suitable orders after giving due opportunity of hearing to the licensee, if he so desires.*

(3) The licensee shall not be entitled to claim any compensation or refund for suspension or cancellation of licence under this rule.

(4) In case the licence is cancelled the licensee may also be blacklisted and debarred from holding any excise licence."

9. In the light of the mandate of said Rules, the Counsel for the petitioner argues that the steps for suspending and cancelling of the licence can take place only in the event of 'any other kind of liquor or intoxicating drugs are found in the "licensed premises"'. He argues that similar provisions exist in the Rules 2002 also, thus to exercise the power under the said Rules, it is incumbent that there should be an allegation and conclusion to the effect that any liquor or intoxicating drugs is found in the "licensed premises" or in "possession of the licensee". He submits that in the allegations contained in the FIR as well as in the notices issued to the petitioner, there is no averment to the effect that any liquor or intoxicating drugs was found in the "licensed premises" or in the "possession of the licensee" and without there being any finding to that effect, the powers could not have been exercised for suspension and cancellation of the license as has been done in the present case.

10. The Counsel for the petitioner further argues that in a similar case, where no liquor was found in the licensed premises and subsequently a final report had been filed in favour of the licensee, the appellate authority in exercise of appellate powers had quashed the cancellation order passed in respect of the said licensee vide order dated 22.03.2016 which is contained in Annexure-20 to the writ petition.

11. In the light of the aforesaid, the counsel for the petitioner argues that although the term of the licences have come to an end and the same cannot be renewed/ granted to the petitioner, the forfeiting of the basic licence fee, licence fee and the security, which was against the law, should be directed to be refunded to the petitioner.

12. Learned Standing Counsel, on the other hand, argues that the orders have been passed in exercise of powers under Section 60 read with Section 34 and Section 7 of The United Provinces Excise Act, as such, no fault can be found with the orders. He further argues that the offending liquor was found in the premises owned by the petitioner and thus no fault can be found in exercise of powers as has been done by means of the impugned order. He lastly prays that the writ petition is liable to be dismissed.

13. Considering the submissions made at the bar, the first question to be determined is whether the condition existed for suspension and cancellation of the licence in terms of the powers conferred

under the statutory enactment being The United Provinces Excise Act and the 2002 or the 2001 Rules.

14. It is common ground in between the parties that the Rules 2002 and 2001 as extracted above would be applicable to the grant of licence in respect of country liquor shop as well as the foreign liquor shop respectively.

15. The action as taken against the petitioner under the orders impugned herein was clearly an 'expropriatory action' and the provision in the Rules are also 'expropriatory'. It is well settled that expropriatory powers conferred on State through statutes are required to be interpreted strictly and the orders passed have to pass the 'strict scrutiny test'. On a plain reading of the provisions of the Rules 18 and 21 in the 2001 and 2002 Rules respectively, it is clear that the steps for suspension and cancellation of the licence can be taken only in the event that (i) any liquor is found in the licensed premises or (ii) it is found in the *possession of the licensee.* The other conditions specified in Rule 21 and Rule 18 need not detain this Court as the same do not arise in the present case. The words *"licensed premises"* has not been defined under the Act and the Rules referred above, however while granting of licence, the premises for which the licence has been granted is clearly delineated and specified in the licence itself and thus for the purposes of interpreting the word "licensed premises", reference has to be drawn to the premises referred to in the licence. Any infraction or possession of liquor or intoxicating drugs other than authorized in the 'licensed premises' would certainly empower the authority concerned to take action under Rules 18 or Rule 21 of the aforesaid Rules as the case may be. Similarly the possession of any liquor or intoxicating drugs other than the authorized in the possession of the licensee would also trigger the powers to be exercised under Rules 18 and 21 of the aforesaid Rules. In the absence of any allegation of any recovery from any place in the 'licensed premises' or in the 'possession of the licensee', the powers to suspend and cancel cannot be resorted to under the Act or the Rules referred above.

17. In the present case even the time limit of 07 days provided under Rule 18 and Rule 21 of the Rules was not adhered to for the reasons best known to the State.

18. The orders passed and impugned herein, thus were against the substantive provisions and also violated the procedural provisions.

19. In the present case, the allegations in the FIR were that the unauthorized liquor was found in a rice mill owned by the petitioner. Clearly the rice mill not being covered within the definition of "licensed premise" would not attract the rigor of Rules 18 and 21 of the aforesaid Rules. In any event subsequently even the said allegations of recovery of goods from the rice mill could not be substantiated and the police authority proceeded to file a final report in favour of the petitioner and which facts even demolishes the allegation in the FIR that any unauthorized liquor was found in possession of the licensee.

20. Thus for all the reasoning recorded above, the order passed against the petitioner are clearly unsustainable and are liable to be set aside.

21. Accordingly, the order dated 24.02.2016, the order dated 22.03.2016 and the order dated 17.02.2017 are set aside.

22. As no direction for renewal of the licences can be issued in view of the change in the policy of the State Government, the writ petition is ***disposed off*** with a direction to refund the proportionate basic license fee, the proportionate license fee and the security deposit as forfeited by means of the order dated 24.02.2016 within a period of two months from the date of the petitioner moving an appropriate application before the District Magistrate, District Amethi.

23. There shall be no order as to costs.

(2022)07ILR A83
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.04.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ C No. 10572 of 2022

Dinesh Singh Sarathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Narendra Kumar Chaturvedi, Sri Ashok Khare (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Balwant Singh, Sri Amit Saxena (Senior Adv.)

A. Civil Law - Societies Registration Act, 1860 – Section 4-B & 25(2) – Membership dispute – Electoral college – Earlier, the order of Assistant Registrar, Societies holding membership of 54 members genuine, was upheld by the High Court in writ petition and Special Appeal – Controversy of the same membership again raised – Exercise of power by Assistant Registrar u/s 4-B to change it, how long permissible – Remedy available discussed – While exercising power under Section 4-B of the Act, 1860, the Assistant Registrar, Societies cannot reopen the controversy to return a finding *qua* membership contrary to what has already been held by such an authority previously and affirmed by the High Court – Controversy with regard to the 54 members did not remain open to challenge any further except in proceedings to be drawn either under Section 25(1) of the Act, 1860 or through a common law remedy of instituting the suit. (Para 16 and 17)

B. Interpretation of Statute – *de facto* doctrine – Meaning and Scope – The doctrine of *de facto* is based on sound principle of public policy and is aimed at removing any kind of insecurity and confusion amongst the people whose rights would get prejudiced in the event the orders passed or actions taken by a person who in fact occupied the office, is held to be *void* on account of his occupation of office subsequently being held to be illegal. (Para 26)

C. Committee of management – Elected office bearer continuing in office and working – Challenge to the validity of the office, how far effect their proceeding and resolution – Application of *de facto* doctrine – Held, mere challenge to an office in absence of any order of interim stay or rider making continuance subject by express words, would not mean that such persons, board of Management or Committee illegally continued and so exercise of power would stand served by the *de facto* doctrine – Committee of Management that had validly continued until the elections were set aside, its conduct of proceeding including resolution adopted by it, shall stand

saved by virtue of *de facto* doctrine. (Para 32 and 35)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. C/M Gangadin Ram Kumar Inter College Vs Deputy Director of Education, Vth Region & ors.; 2006 (4) AWC 3731 All

2. Gokaraju Rangaraju Vs St. of Andra Pradesh

3. Achanti Sreenivasa Rao & ors. Vs St. of Andhra Pradesh; (1981) 3 SCC 132

4. C/M Dayanand Arya Kanya Degree College, Moradabad & ors. Vs Director of Higher Education, Allahabad & ors.; (1998) 4 SCC 104

5. Mehandi Hasan & ors. Vs St. of U.P. & ors.; (2014) 2 UPLBEC 1338

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

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Narendra Kumar Chaturvedi, learned counsel for the petitioner and Sri Amit Sexena, learned Senior Advocate assisted by Sri Balwant Singh, learned counsel for the respondents.

2. The petitioner, who claims to be a member of general body of the society is aggrieved against the order of the Assistant Registrar, Society dated 10th March, 2022, whereby he has rejected the objection of the present petitioner against the list of members of general body and finalized 251 members electoral college for the purposes to hold election of the Committee of Management of the society nominating District Inspector of Sanskrit Schools of Gorakhpur Division, Gorakhpur as an Election Officer.

3. It transpires from the record that earlier petitioner had approached this Court vide Writ - C No.- 29150 of 2019 against the order dated 1st July, 2015 passed under Section 25(2) of the Societies Registration Act, 1860 (hereinafter referred to as "Act, 1860') directing District Inspector of Schools, Gorakhpur to hold elections of the society.

4. The main argument advanced in the said case was that District Inspector of Schools wholly illegally further delegated the power to the associate District Inspector of Schools to conduct elections inasmuch as the elections that were held, were not in consonance with the scheme of the bye-laws.

5. The Contesting respondents in the said writ petition agreed for a fresh election to be held and, accordingly, direction was issued to the Assistant Registrar, Societies, Gorakhpur to ensure that fresh elections of the Committee of Management of the Societies were held under Section 25(2) of the Act, 1860 in accordance with bye-laws of the society. The operative portion of the order of this Court dated 18th September, 2019 is reproduced hereunder:-

"With consent of parties, the orders dated. 06.07.2019 passed by the Assistant Registrar, Firms, Societies and Chits, Gorakhpur, the elections proceedings dated 11.06.2017 and 20.06.2019 are quashed and the matter is remitted to the Assistant Registrar, Firms, Societies and Chits, Gorakhpur to execute the following directions:

1. The respondent no.2, Assistant Registrar, Firms, Societies and Chits, Gorakhpur shall ensure that the fresh elections to the society are conducted under Section 25(2) of the Societies Registration Act as per the Bye-laws of the society.

2. The elections shall be conducted within a period of two months

from the date of receipt of a certified copy of this order.

The writ petition is allowed to the extent indicated above."

6. It appears that after the aforesaid order was passed, the Deputy Registrar, Societies proceeded to issue notice dated 8th February, 2021 to both the petitioner and respondent No.- 2 to deposit requisite expenses to be incurred in holding elections. The list of general body members was forwarded by the respondent No.- 3 to the Assistant Registrar, Societies on 22nd January, 2021 for necessary approval and follow up action to hold election under Section 25(2) of the Act, 1860. This gave an opportunity this time to the petitioner to file his objections which he did file on 25th April, 2021 and claimed 108 members to be only the valid members and, therefore, prayed that rest of the members be held to be illegally enrolled. This is how the matter under Section 4-B of the Act, 1860 came to be adjudicated upon by the Assistant Registrar, Societies by the order impugned.

7. The main argument advanced herein this petition by learned Senior Advocate is that those members who had participated in the election held in the year 2004 should be taken to be only the valid members to form the electoral college because 52 members who were subsequently enrolled and were not the members in the year 2004 were wholly illegally inducted as members.

8. It is argued that the Committee of Management that was elected on 11th June, 2017 was ultimately held to be invalid and cancelled by this Court under its order dated 18th September, 2019, therefore, the list that was got registered for the year 2019-20 on 6th July, 2019 would be taken to be invalid and therefore, meeting convened by such Committee of Management on 28th July, 2019 would stand void. It is argued that depositing enrollment fee on 1st August, 2019 shows that the 86 members were got fraudulently enrolled.

9. It is in the above background, therefore, it is argued that Assistant Registrar, Societies was not justified in applying *de facto* doctrine in upholding memberships of 86 members on the ground that their membership fee was accepted as per the scheme of bye-laws prior as the election of the Committee of Management then in power having been quashed.

10. *Per contra*, it is argued by Sri Amit Saxena, learned Senior Advocate appearing for the petitioner that the petitioner could have grievance to the extent of his membership and he being not the Committee of Management, could not have set up grievance regarding others inasmuch as he argued that the order passed by the Assistant Registrar, Societies is a reasoned and speaking order in which he has dealt with various aspects of the matter of determination of the membership and is, therefore, fully justified in upholding the membership of 251 members submitted by the contesting respondents. He further submits that *de facto* doctrine has been correctly applied and thus prayed that the petition deserves to be dismissed.

11. Learned Standing Counsel would defend the order for the reasons assigned therein.

12. Rival submissions fall for consideration:-

13. The elections that were earlier held by the associate District Inspector of Schools dated 11th June, 2017 and so the

consequential order dated 26th February, 2019 were basically questioned on the ground that the District Inspector of Schools could not have sub-delegated the power once he was directed by the Assistant Registrar, Societies to hold the elections and this is how the writ petition came to be allowed on 18th February, 2019 with a direction to the Assistant Registrar, Societies, Gorakhpur to conduct the elections as per the scheme of bye-laws under Section 25(2) of the Act, 1860. It, therefore, clearly transpires that insofar as the previous election is concerned there was no dispute of the membership, it only cropped up when a list of 251 members was forwarded by the contesting respondent No.- 3 in response to the notice of Assistant Registrar, Societies on 8th November, 2019 in which only expenditure to be incurred was required to be deposited. The Assistant Registrar, Societies proceeded to issue fresh notice on 8th January, 2021 directing the parties to produce their original documents so as to determine electoral college under Section 4-B of the Act, 1860. The objection taken before the Deputy Registrar, Societies by the present petitioner was that after verifying from the original records membership of 54 old members and 86 new members be held invalid and only the living members of 108 list of members that was there in 2004 election, be taken to be as consisting a valid electoral college. He has raised objection to the membership of 54 members on the ground that there was forged meeting held on 1st October, 2006 as there was nothing available on records to demonstrate as to whether any receipt was issued against the membership fee taken from each such member nor, membership fee was deposited in the account. Regarding 86 members the plea taken is that their membership was accepted on 1st August, 2019 only by a Committee of Management which was there in office and since very election pursuant to which the Committee continued in office came to be set aside by this Court on 18th September, 2019 it will be taken that those 86 members were enrolled by an illegally elected Committee of Management and so their membership was also liable to be cancelled.

14. I find that Assistant Registrar, Societies has discussed the issue of 54 members whose membership was finalized by the Assistant Registrar, Societies vide order dated 1st September, 2015 which came to be challenged before this Court vide Writ- C No.- 43837 of 2015 and the Court had repelled the argument questioning the membership of those 54 members earlier enrolled by erstwhile Committee of Management in the year 2006 and, therefore, the Court held that *"the induction of 54 members cannot be faulted especially as it has not been shown anywhere nor argued that in past the members of both the committees acted separately or distinctly"*.

15. Thus, the Court declined to interfere with the order of Assistant Registrar, Societies and the petition was dismissed. The said judgement was unsuccessfully appealed against and it found favour with the findings of learned Single Judge by observing thus:-

"The issue as to whether the 54 members were validly inducted and whether the second appellant presided over or did not participate in the meeting in which they are said to have been enrolled are clearly disputed questions of fact. The Assistant Registrar, it may be noted while finalizing the composition of the general body of a society, is exercising only a

summary jurisdiction and it is always open to a person aggrieved to question the same in appropriate proceedings instituted either before the Civil Court or by invocation of the provisions of Section 25 of the 1860 Act. The Assistant Registrar while proceeding to negative the claim of the subsequent elections has in our opinion correctly proceeded to direct the holding of fresh elections, the results of which shall be open to question by the rival factions by either invoking the jurisdiction of the civil court or by challenging the same in appropriate proceedings under the 1860 Act."

16. Having gone through the judgment of learned Single Judge and that of the Special Appellate Bench, in my considered view the controversy with regard to the 54 members enrolled in the year 2006 did not remain open to challenge any further except in proceedings to be drawn either under Section 25(1) of the Act, 1860 or through a common law remedy of instituting the suit.

17. The order of Assistant Registrar, Societies on the question of membership of those very 54 members having been held to be genuine members once stood upheld by a Coordinate Bench and then by Division Bench of this Court even while exercising power under Section 4-B of the Act, 1860, the Assistant Registrar, Societies cannot reopen the controversy to return a finding qua membership contrary to what has already been held by such an authority previously and affirmed by this Court. Section 25 as referred to in the order of Division Bench (supra) would be referable to Section 25(1) of the Act, 1860, where the question of membership can be raised while reference is being adjudicated upon.

18. Under the circumstances, therefore, I do not find any fault in the findings returned by the Assistant Registrar, Societies relating to 54 members.

19. Now I come to the second argument that Assistant Registrar, Societies wrongly applied *de facto* doctrine in upholding membership of 86 new members whose fee was deposited on 1st August, 2019 prior to the order of this Court dated 18th September, 2019, whereby the elections were set aside.

20. In support of his argument learned Senior Advocate appearing for the petitioner has relied upon the judgment of Division Bench of this Court in the case of **Committee of Management Gangadin Ram Kumar Inter College v. Deputy Director of Education, Vth Region and others** reported in **2006 (4) AWC 3731 All.** Learned counsel for the petitioner has relied upon paragraphs 22 and 23 of the judgment that run as under:

*"22. learned Counsel for the appellant has further placed reliance on Division Bench judgment of this Court reported in **Mohd. Iqbal v. State of Uttar Pradesh and Ors.,**(1992) 2 UPLBEC 1558. In the aforesaid case two members were nominated by the State Government in the Board exercising power under proviso to Section 9 of the U.P. Municipality Act, 1916 by notification dated 2.8.1991. These two nominated members participated in the proceedings of no-confidence held on 12.8.1991 which was brought against the President of the Municipal Board Mohd. Iqbal. The President filed writ petition challenging the proceedings dated 12.8.1991 and participation of aforesaid two nominated members. Two nominated members who were earlier nominated vide*

notification dated 19.4.1990 also challenged the notification dated 12.8.1991. The Division Bench relying on an earlier judgment of the Division Bench held that the power of nomination given to the State Government was without providing any definite guide lines, thus the nomination dated 12.8.1991 was of no legal consequence. Thus, the notification nominating the two members was held to be illegal. It was contended before the Division Bench that their participation in the proceedings dated 12.8.1991 is saved by de facto doctrine because on the date when they participated in the proceedings the nomination was subsisting. The writ petition was filed even before the proceedings dated 12.8.1991 could take place seeking the interim relief restraining the nominated members to participate in the election. The Court did not grant any interim order staying the participation but only directed that their participation shall be subject to result of the writ petition. The Division Bench in the aforesaid case repelled the argument of saving the said proceedings dated 12.8.1991 on de facto doctrine. Following was observed in paragraphs 7 and 8:

7... If the result of no- confidence motion proceeding is subjected to the decision of a writ petition and if the right to hold office is directly questioned as it has been done in the cases on hand, then de facto doctrine could not protect the illegal participation of respondent Nos. 4 and 5 and voting right exercised by them in the ab-initio void no- confidence motion proceeding.

8... The Supreme Court lint the case of Gokaraju Rangaraju (supra) clearly enunciated that a judgment delivered by a Judge cannot be questioned in a collateral proceeding like appeal or revision but his right to hold office of a Judge can be questioned directly. The right to hold office of a member by respondents No. 4 and 5 under the notification dated 2.8.1991 has not been challenged by the petitioner in the instant cases in a collateral proceeding but directly. Therefore, reliance placed by Sri Ravi Kiran Jain on the case of Gokaraju Rangaraju (supra) is misplaced.

23. In the above case the Division Bench did not accept the submission based on *de facto* doctrine for saving of actions of illegally nominated members principally on the ground that the nomination of two members was directly under challenge in the writ petition. The Division Bench applied the judgment of the apex Court in Gokaraju Rangaraju (supra). The above case does not help the appellant in any manner rather support the view which we have taken in the present case. No benefit can be taken by the appellant of *de facto* doctrine."

21. Upon a bare reading of aforesaid paragraphs I find that there was already writ petition filed before the Court in which the nomination of 2 members was already under challenge and their participation in the voting was directed to be subject to the result of the writ petition.

22. This is a case quite distinguishable on facts. Here in this case there was no such rider operating in the writ petition being Writ - C No.- 29150 of 2019 which ultimately came to be allowed on 18th September, 2019. It is on the score of their being already a rider provided in the said case that Division Bench held that *de facto* doctrine would not be attracted to save the participation and consequential casting of votes by two nominated members.

23. It is a settled law that when the occupation of an office is under challenge and the interim order is passed by the Court that the no policy decision would be taken by such party in office nor, would its conduct resulting in finality to any proceeding then this doctrine would not apply. Even otherwise the Court is of the view that if the officer whose title is ultimately held to be defective then any act by him by which he would build up a personal right or claim or privilege or emolument by reason of his being in office, the doctrine would not be attracted (Cooley' Constitutional Limitations 8th Edition (2) 1355).

24. Here is a case where certain members have come to be enrolled and so no individual rights by any office bearer of Committee in office is sought to be invoked or built up for any personal gain rather it is the members who have the right to participate in an election and cast their respective votes so it is more prejudicing their right than the office bearers who by adopting resolution enrolled members to the general body of the society. By no stretch of imagination if Committee of Management is functioning and adopting resolution, it can be attributable to any personal gain of a particular office bearer individually or collectively by the Committee of Management.

25. It is one who applies for membership his application is taken into consideration and then the Committee or Society adopts the resolution as the case may be. For any Committee of Management that is in office, this is a routine and general exercise of power which cannot be questioned only on this score that subsequently such Committee of Management got ousted by virtue of its election being held to be invalid.

26. Coming to the *de facto* doctrine, the literal meaning of this would be "in fact'. The doctrine of *de facto* is based on sound principle of public policy and is aimed at removing any kind of insecurity and confusion amongst the people whose rights would get prejudiced in the event the orders passed or actions taken by a person who in fact occupied the office, is held to be void on account of his occupation of office subsequently being held to be illegal.

27. It is rightly said that doctrine is borne of necessity and to arrest mischief if there exists office in law and an authority occupies it by virtue of its appointment or election or nomination. Such a person or body is clothed with insignia of the office and exercises powers and functions as such and the authority to exercise such power is upheld by virtue of *de facto* doctrine.

28. Public policy is a matter of faith and trust that individual's repose in a system which has been created for their benefits. In case of **Gokaraju Rangaraju v. State of Andra Pradesh and Achanti Sreenivasa Rao and others v. State of Andhra Pradesh** reported in (1981) 3 SCC 132, it was held vide paragraphs 7, 8, 9, 10 and 17 thus:

*"7. In **Scadding v. Lorant [1851] 3 HLC 418,** the question arose whether a rate for the relief of the poor was rendered invalid by the circumstance that some of the vestry men who made it were vestry men de facto and not de jure. The Lord Chancellor observed as follows :*

With regard to the competency of the vestry men, who were vestry men de facto, but not vestry men de jure, to make the rate, your Lordships will see at once the importance of that objection, when you consider how many public officers and

persons there are who were charged with very important duties, and whose title to the office on the part of the public cannot be ascertained at the time. You will at once see to what it would lead if the validity of their acts, when in such office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers and it might also lead to persons, instead of resorting to ordinary legal remedies to set right anything done by the officers, taking the law into their own hands.

8. Some interesting observations were made by the Court of Appeal in England in Re James (An Insolvent) [1977] 2 W.L.R. 1. Though the learned Judges constituting the Court of Appeal differed on the principal question that arose before them namely whether "the High Court of Rhodesia" was a British Court, there did not appear to be any difference of opinion on the question of the effect of the invalidity of the appointment of a judge on the judgments pronounced by him. Lord Denning M. R., characteristically, said :

He sits in the seat of a judge. He wears the robes of a judge. He holds the office of a judge. May be he was not validly appointed. But, still, he holds the office. It is the office that matters, not the incumbent... So long as the man holds the office and exercises it duly and in accordance with law, his orders are not a nullity. If they are erroneous they may be upset on appeal. But, if not, erroneous they should be upheld".

Lord Denning then proceeded to refer to the State of Connecticut v. Carroll decided by the Supreme Court of Connecticut, Re Aldridge decided by the Court of Appeal in New Zealand and Norton v. Shelby County decided by the United States Supreme Court. Observations made in the last case were extracted and they were :

Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions.... The official acts of such persons are recognised as valid on grounds of public policy, and for the protection of those having official business to transact.

Scarman, L.J., who differed from Lord Denning on the question whether the High Court of Rhodesia was a British Court appeared to approve the view of Lord Denning, M. R. in regard to the de facto doctrine. He said :

He (Lord Denning) invokes the doctrine of recognition of the de facto judge, and the doctrine of implied mandate or necessity. I agree with much of the thinking that lies behind his judgment. I do think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government. But it is a fallacy to conclude that, because in certain circumstances our Courts would recognise as valid the judicial acts of an unlawful court or a de facto judge, therefore, the Court thus recognised is a British Court.

10. The de facto doctrine has received judicial recognition in the United States of America also. In State v. Gardner (Cases on Constitutional Law by Mc. Gonvey and Howard Third Edition 102) the question arose whether the offer of a bribe to a City Commissioner whose appointment was unconstitutional was an offence. Bradbury, J. said :

We think that principle of public policy, declared by the English Courts three

centuries ago, which gave validity to the official acts of persons who intruded themselves into an office to which they had not been legally appointed, is as applicable to the conditions now presented as they were to the conditions that then confronted the English Judiciary. We are not required to find a name by which officers are to be known, who have acted under a statute that has subsequently been declared unconstitutional, though we think such officers might aptly be called de facto officers.

17. A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a Judge de jure. Such is the de facto doctrine, born of necessity and public a policy, to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise so soon as a judge pronounces a judgment a litigation may be commenced for a declaration that the judgment is void because the judge is no judge. A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. To question a judge's appointment in an appeal against his judgment is, of course, such a collateral attack."

29. In the case of **Committee of Management Dayanand Arya Kanya Degree College, Moradabad and others v. Director of Higher Education, Allahabad and others** reported in **(1998) 4 SCC 104,** the Court upheld the acceptance of voluntarily resignation of a teacher by the Committee of Management which was *de facto* in office. Vide paragraph 3 of the judgment the Court held that the Committee of Management that was continuing in office by virtue of interim order of the High Court, it would be taken to be a *de facto* and *de jure* as well.

30. Following the above judgment, a Division Bench of this Court in the case of **Mehandi Hasan and others v. State of U.P. and others** reported in **(2014) 2 UPLBEC 1338,** had an occasion to deal with the situation where Committee of Management continued to enjoy office by virtue of stay order passed by this Court even though subsequently the election was held to be invalid. In that case the Committee of Management which was continued by virtue of an interim order it issued an advertisement. The petitioners, who had applied against the advertisement and their selection was held but the same was questioned on the ground that their appointment was void ab initio as at that time the Committee was only on the strength of interim order. Vide paragraphs 15 and 16 of the judgment, the Court held thus:

"15. The principles of de facto and de jure have been explained by the

Supreme Court in the case of Committee of Management, Dayanand Arya Kanya Degree College, Moradabad and others v. Director of Higher Education, Allahabad and others, MANU/SC/0050/1998MANU/ SC/0050/1998 : (1998) 4 SCC 104. In the said case one Dr. Manju Saraswat was a Principal of Dayanand Arya Kanya Degree College. She tendered her resignation from the post, which was accepted by the managing committee. The dispute arose whether the committee of management had power to accept the resignation as on the date when the committee of management had accepted the resignation, it was in the office by virtue of interim order passed by the High Court in a writ proceeding in favour of the committee of management. The resignation was not accepted by the Vice Chancellor on the ground that the authorized controller was appointed in the Institution and he had not accepted the resignation but it was accepted by the committee of management, which was continuing on the strength of the interim order. The High Court had also taken the same view. The Supreme Court took the view that as the committee of management was working in the Institution on the strength of interim order, its decision is saved by de facto and de jure both. The similar view was taken by a Division Bench of this Court in the case of Committee of Management Gangadin Ram Kumar Inter College, Ramgarh Barwan, District Jaunpur v. Deputy Director of Education, Vth Region, Varanasi and others, MANU/UP/0622/ 2006 : 2006(4) ADJ 381 (DB).

16. After careful consideration of the matter, we are of the view that the appointment of writ petitioners are saved by the de facto doctrine. Accordingly, the impugned order of the learned Single Judge so far as it relates to the petitioners in Dr. Mehandi Hasan and another v. The State of U.P. and others, MANU/UP/0529/2007 : 2007(4) ADJ 664, is set aside and a direction is issued upon the respondents for the payment of salary of the writ petitioners. Accordingly, special appeal is disposed of."

31. Applying the above principle of *de facto* doctrine in the present case, I find that the present case stands on a much better footing than those cases discussed above. Here is a case where Committee of Management had stood elected and was continuing in office.

32. In my considered view unless and until election to any office or post is held bad, such elected office bearer or board of Management or Committee, to whatever name it is called, enjoy the office both *de jure* and *de facto*. A mere challenge to an office in absence of any order of interim stay or rider making continuance subject by express words, would not mean that such persons, board of Management or Committee illegally continued and so exercise of power would stand served by the *de facto* doctrine. No one would be entitled to any personal benefit for having occupied his office as such if such occupation is held bad.

33. In this case writ petition was filed challenging the election and no interim order was passed. While it is true that the elections were ultimately set aside but neither any plea was taken in the writ petition nor, any direction was issued that whatever the powers had been exercised by the Committee of Management in office by virtue of its election, would get rendered *void* or cancelled on account of election being set aside.

34. As a matter of fact from the bare reading of the aforesaid order of the High Court, I do not find that any plea regarding membership was ever raised.

35. Thus, Committee of Management that had validly continued until the elections were set aside, its conduct of proceeding including resolution adopted by it, shall stand saved by virtue of *de facto* doctrine.

36. In view of the above, therefore, I do not find any good ground to interfere with the order passed by the Assistant Registrar, Societies. Liberty rests with the petitioner to apply for common law remedy.

37. This petition lacks merit and is, accordingly, dismissed with no order as to cost.

38. Consigned to records.

(2022)07ILR A93
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DINESH PATHAK, J.

Writ C No. 11266 of 2022

C/M Kaasampur Gadhi Kisan Sewa Sahkari Samiti Ltd., Bijnor & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Uday Pratap Singh, Sri Rakesh Pande (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Sujeet Kumar Rai

A. Civil Law – UP Cooperative Society Act, 1965 – Sections 35 & 65 – Suspension of Committee of Management – Power, when can be exercised by the Registrar – Section 35 (1) contemplates two overt acts by the Registrar indicating that proceeding for suspension has commenced, namely (i) issuance of show cause notice calling for explanation of the Committee of Management and (ii) obtaining the opinion of general body of the society in a general meeting called for the purpose – Non compliance of provision of S. 35(1) – Effect – Held, the Registrar though has formed an opinion that suspension of the petitioner Committee of Management is necessary, but has not taken any steps towards supersession of the Committee of Management – The impugned order of suspension has been passed at a premature stage before the proceeding for supersession has actually commenced. (Para 7 and 8)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Veerpal Singh Vs The Registrar, Co-operative Societies, U.P. & ors.; A.I.R. 1973, SC 1249

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Dinesh Pathak, J.)

1. The petitioners have called in question an order dated 9.3.2022 passed by respondent no.2, Joint Commissioner and Joint Registrar, Cooperative, U.P. Moradabad Mandal, Moradabad suspending the first petitioner, which is Committee of Management of a primary agricultural Cooperative Society, in exercise of power under Section 35 (2) of the U.P. Cooperative Societies Act, 1965 (hereinafter referred to as 'the Act'). Respondent no.2, while passing the above

order, has placed reliance on an interim enquiry report submitted under Section 65 of the Act and has concluded that financial irregularities seem to have been committed by the petitioner Committee of Management. He has also held that there are repeated defaults on part of the petitioner Committee in observing its duties imposed upon it under law and in future there is likelihood of an adverse report coming against the petitioner Committee in enquiry that is pending under Section 65 of the Act. Consequently, it is desirable to keep the petitioner Committee of Management under suspension. By the same order, he has proceeded to appoint an interim Committee comprising of Additional District Cooperative Officer (Banking), Bijnor, Additional District Cooperative Officer, Tehsil Nagina and Additional Development Officer (Cooperative), Vikas Khand, Dhampur.

2. Sri Rakesh Pande, learned senior counsel appearing on behalf of the petitioners submitted that the impugned order suspending the petitioner Committee of Management is erroneous in law inasmuch as no proceeding for super-session of the Committee of Management has yet been initiated. In support of his contention, he has placed reliance on the language used in sub-section (2) of Section 35 of the Act and the judgement of the Supreme Court in **Veerpal Singh Vs. The Registrar, Co-operative Societies, U.P. and others, A.I.R. 1973, SC 1249.**

3. Learned counsel for the petitioners further submitted that even otherwise, the impugned order is manifestly illegal inasmuch as the formation of opinion to keep the petitioner Committee of Management under suspension is based on conjecture that in future there is likelihood of an adverse report being submitted against the petitioner Committee in enquiry pending under Section 65 of the Act. He further submitted that certain other irregularities alleged relate to the period when the petitioner Committee of Management was not in power, therefore, it cannot be held accountable for the same.

4. Learned standing counsel appearing on behalf of State respondents and Sri Sujeet Kumar Rai, who has been heard as an intervenor, submitted that the stage of calling general body meeting as contemplated under sub-section (1) of Section 35 of the Act has yet not arrived. They submitted that in view of serious irregularities coming to knowledge of respondent no.2, he was justified in suspending the petitioner Committee of Management.

5. Section 35 (1) and (2), which are relevant for the present controversy, are reproduced below:-

"35. Supersession or suspension of Committee of Management.- [(1) Where, in the opinion, of the Registrar the Committee of Management of any Cooperative Society persistently makes default or is negligent in the performance of the duties imposed on it by this Act or the rules or the bye-laws of the society or commits any act which is prejudicial to the interest of the society or its members, or is otherwise not functioning properly, the Registrar after affording the Committee of Management a reasonable opportunity of being heard and obtaining the opinion of the General Body of the society in a general meeting called for the purpose in the manner prescribed may, by order in writing, supersede the Committee of Management:

Provided that where under the prescribed circumstances it is not feasible to convene a general meeting of the General Body of the society, the Registrar may dispense with the requirement of obtaining the opinion of the General Body of the society:

Provided further that in the case of Central Co-operative Bank or the Uttar Pradesh Co-operative bank, the suspension or supersession of the Committee of Management shall not be made by the Registrar unless the Reserve Bank of India has been consulted:

Provided also that the Committee of Management of the Primary Agriculture Co-operative Credit Society can be superseded by the Registrar only on the following grounds-

(i) if a society incurs losses for three consecutive years, or

(ii) if serious financial irregularities or fraud have been committed,

(iii) if there are judicial directives to this effect or there is perpetual lack of quorum.

(2) Where the Registrar, while proceeding to take action under sub-section (1) is of opinion that suspension of the Committee of Management during the period of proceeding is necessary in the interest of the society, he may suspend the Committee of Management which shall thereupon cease to function and make such arrangement as he thinks proper for the management of the affairs of the society till the proceedings are completed:

Provided that if the Committee of Management so suspended is not superseded it shall be reinstated and the period during which it has remained suspended shall count towards its term."

6. The power of Registrar to place Committee of Management of a Cooperative Society under suspension has been dealt with by the Supreme Court in Veerpal Singh (supra) in paragraphs 12, 13 and 14 as follows:-

"12. The Registrar has power under Section 35 (1) of the Act to, supersede the committee of management. The circumstances. under which he can exercise his powers are when in the opinion of the Registrar the society makes default or is negligent in the performance of duties imposed on it by the Act or the rules or the bye-laws of the society or commits any act which is prejudicial to the interest of the society or its members, or, is otherwise not functioning properly, the Registrar after affording the committee of management a reasonable opportunity of being heard and obtaining the opinion of the general body of the society in a general meeting called for the purpose in the manner prescribed may, by order in writing, supersede the committee of management.

13. These provisions indicate the circumstances under which the Registrar has power to supersede or suspend the committee of management and, to appoint an administrator. Sect-ion 35(2) of the Act confers power on the Registrar to suspend the committee of management during the period of proceedings for supersession. The Registrar has also power under Section 35 (2) of the Act to make arrangement, as he thinks proper for the management of the society till the proceedings are completed. The power to suspend the committee of management during the period of proceedings is exercisable when proceedings for supersession have commenced. Section 35 (1) of the Act shows that when the Registrar is of opinion that the committee of a cooperative society makes default or is negligent in the performance of duties or is otherwise not

functioning properly the Registrar may supersede the committee of management and has to give an opportunity to the society to be heard in that behalf. The Registrar has also to obtain the opinion of the ,general body of the society. Therefore, the opinion of the Registrar is to be followed by some definite act which will commence the proceedings for supersession. The provisions in the Act indicate that some definite step like the issue of, a notice must be taken under the provisions of Section 35 (1) of the Act with a view to show that proceedings for supersession of the committee are set in motion.

14. It is therefore manifest that power exercisable under Section 35 (2) of the Act is confined to the time during the period of supersession proceedings. Unless the proceedings have started as indicated earlier the Registrar cannot call in aid the power exercisable under Section 35 (2) of the Act."

7. It is clear from the enunciation of law as made by the Supreme Court in the above judgement that the power to suspend the Committee of Management has to be preceded by an act which reflects that the proceeding for supersession has commenced. Sub-section (1) of Section 35 contemplates two overt acts by the Registrar indicating that proceeding for suspension has commenced, namely (i) issuance of show cause notice calling for explanation of the Committee of Management and (ii) obtaining the opinion of general body of the society in a general meeting called for the purpose. A perusal of the impugned order reveals that none of the above two steps have been taken so far. The Registrar though has formed an opinion that suspension of the petitioner Committee of Management is necessary, but has not taken any steps towards supersession of the Committee of Management.

8. Consequently, we are of the opinion that the impugned order of suspension has been passed at a premature stage before the proceeding for supersession has actually commenced.

9. Learned standing counsel appearing on behalf of State respondents and Sri Sujeet Kumar Rai appearing for the intervenor submitted that the Registrar be granted liberty to pass a fresh order instead of keeping the matter pending, as it will delay the matter and there are charges of financial irregularities against the petitioner Committee of Management.

10. Having regard to the above submissions, we quash the impugned order leaving it open to respondent no.2 to pass a fresh order in the light of the observations made above.

11. In the result, the writ petition succeeds in part and is allowed.

(2022)07ILR A96
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE RAJNISH KUMAR, J.

Writ C No. 15034 of 2018

Rishipal Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Nirankar Singh, Km. Gitanjali Shukla, Prashant

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra, Rajendra Pratap Singh, Sanjay Bhasin, Surendra Pratap Singh

A. Election Law – Constitution of India – Article 243 ZK – UP Cooperative Society Act, 1965 – Section 29(3) – Postponement of election process, even after issuance of notification – Power of Election Commission, how far can be exercised – Held, the words, 'Superintendence', 'Direction' and 'Control' not only in respect of preparation of electoral rolls but also for conduct of elections vest very wide powers in the Election Commission – The Election Commission by virtue of Article 243ZK (2) of the Constitution of India and Subsection 3 of Section 29 of the Act of 1965 is vested with almost plenary powers, which will include the authority/ power/ jurisdiction to postpone the election or even to cancel the election – However, the condition precedent for exercising of such power or authority is that the purpose of postponement or cancellation of an election should be to ensure free and fair polls. (Para 10)

B. Constitution of India – Article 226 – Judicial review – Scope of interference – Free and fair election – Revision of electoral roll – Power exercised by the Election Commission – Interference in election process, how far can be made – Report of Additional District Magistrate relating to the illegal electoral roll was alleged to be prepared in derogation of the writ order, passed earlier by High Court – Held, be that as it may, based on some material, sufficiency of which cannot be gone into under Article 226 of the Constitution of India, if the Election Commissioner or Chief Election Commissioner comes to a conclusion that permitting the elections on the basis of illegal or incorrect electoral roll will not be in the interest of free and fair elections. (Para 13)

Writ petition dismissed. (E-1)

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Rajnish Kumar, J.)

1. Heard Sri Nirankar Singh, learned counsel for the petitioner, learned State Counsel, Sri Gaurav Mehrotra assisted by Sri Devrishi Kumar, learned counsel representing U.P. State Cooperative Societies Election Commission(hereinafter referred to as the Election Commission), Sri Kuldeep Pati Tripathi, learned counsel representing the respondent no.4-District Cooperative Federation Limited, Bulandshahar and Sri S.P. Singh, learned counsel for the respondent no.6.

2. By instituting these proceedings, the petitioner has laid challenge to an order dated 17.04.2018 passed by the Chief Election Commissioner(Cooperative Societies), whereby the elections of District Cooperative Federation Limited, Bulandshahar(hereinafter referred to as the society), which were notified on 16.02.2018, were postponed.

3. Submission of learned counsel for the petitioner, impeaching the impugned order, is that once the election process had commenced by way of issuing the notification dated 16.02.2018, the Election Commission or for that matter any other authority of the State Government does not have any jurisdiction to postpone the election process. It has also been argued by learned counsel appearing for the petitioner that as per the notification issued on 16.02.2018 by the Chief Election Commissioner himself, the entire time bound programme was notified wherein deadlines were given for various purposes

including for the purpose of publication of provisional electoral college, filing objection to such provisional electoral college and publication of final electoral college. He has further stated that as per the said schedule, the date on which the final electoral college was to be published was 16.04.2018 whereas the impugned order has been passed a day thereafter, i.e., on 17.04.2018 and hence once the final electoral college was published in terms of the Election Notification on 16.02.2018 itself, the impugned order could not have been passed by the Chief Election Commissioner for the reason that the same amounts to interference in the election process which had already set in. It has also been argued by learned counsel for the petitioner that it was beyond the jurisdiction of the Chief Election Commissioner to have acted upon the complaint which was allegedly enquired into by the Additional District Magistrate(Finance and Revenue), Bulandshahar and was forwarded by the District Magistrate, Bulandshahar to the Chief Election Commissioner. Submission in this regard is that District Magistrate or Additional District Magistrate(Finance and Revenue) or for that matter any other authority of the State Government did not have any locus to interfere in the election process once it had been notified and process of the election had been set in motion.

4. On the other hand, it has been argued by Sri Gaurav Mehrotra, learned counsel for Election Commission and Sri S.P. Singh, learned counsel for the respondent no.6, learned State Counsel and Sri Kuldeep Pati Tripathi, learned counsel representing the respondent no.4, in unison that in terms of the provisions contained in Section 29 (3) of the U.P. Cooperative Societies Act, 1965(hereinafter referred to as the Act of 1965), the Election Commission has all the authority and jurisdiction to postpone the election process or to cancel the same for the reason that it is a duty cast upon the Election Commission to ensure that free and fair poll takes place for constituting Committee of Management of every cooperative society throughout the state of Uttar Pradesh.

5. We have considered the rival submissions made on behalf of the respective parties and have also perused the records available before us. The issue/ question which falls for our consideration and decision is as to whether once election process commences and a notification for the said process is issued by the Chief Election Commissioner, whether any interference is legally permissible either by way of postponing the elections or cancelling the same by the Chief Election Commissioner on the ground that certain irregularities have been found in the electoral list.

6. It is not in dispute that by means of the notification dated 16.02.2018 issued by the Chief Election Commissioner, the election of the cooperative society concerned, which is a central cooperative society in terms of Section 2(d)(3) of the Act of 1965, was notified and as per the said notification various dates were fixed for completing the process of election including the date and time for publication of tentative electoral list, for filing objections against tentative electoral list and for publication of final electoral list, on the basis of which in terms of the said notification the election was to be held. As per the said schedule, the last date for publication of the final electoral list was

16.04.2018 which was to be published between 2.00 p.m. to 4.00 p.m. However, the Chief Election Commissioner on the next date, i.e., 17.04.2018 postponed the elections on the basis of certain letter received from the District Magistrate which was based on the report submitted by the Additional District Magistrate(Finance and Revenue), Bulandshahar.

7. So far as the submission of learned counsel for the petitioner that once election process is set in motion, the district authorities or for that matter or any other authority of the State Government did not have any jurisdiction to interfere in the same is concerned, we may point out that some enquiry report has been submitted based on which the letter has been written by the District Magistrate, Bulandshahar to the Chief Election Commissioner. The same in our considered opinion would not amount to any interference in the election process rather the report and the letter of the Additional District Magistrate and the District Magistrate concerned will only be a material on the basis of which the Chief Election Commissioner is empowered to take appropriate decision to ensure free and fair polls.

8. So far as the submission of learned counsel for the petitioner that even the Chief Election Commissioner does not have any authority or jurisdiction or power to interfere in the process of election once it has been set in motion, is concerned, we may indicate that in tune with the constitutional provisions available in part IX-B of the Constitution of India which was added by way of Amendment Act 2011 w.e.f. 15.02.2012, provisions contained in Section 243ZK of the Constitution of India provides that the election of a board shall be conducted before the expiry of the term of the board so as to ensure that the newly elected members of the board assume office immediately on the expiry of the term of the office of members of the outgoing board. Sub-section 2 of Article 243ZK clearly mandates the state legislatures to enact a law for the purposes of creating an authority or body for the superintendence, control, direction and preparation of the electoral rolls for and the conduct of all elections to a cooperative society.The Election Commission, thus, owes its existence not only to the State Legislation but also to Article 243K of the Constitution of India.

9. The Election Commission in the State of U.P. for the purpose of superintendence and other ancilliary functions including revision of electoral rolls can be found defined in Section 2(j) of the Act of 1965. Section 29(3) of the Act of 1965 provides that election to re-constitute a committee of management of every cooperative society shall be completed in the manner prescribed, under the superintendence, control and direction of the Election Commission. It further provides that such election is to be conducted at least 15 days before the expiry of the term of the committee of management and that of the members. Thus, provisions of part IX-B of Constitution of India read with the provisions contained in the Act of 1965 clearly mandate that election of member of the society ought to take place before the term of the outgoing member of the committee of management expires.

10. We may also notice that Article 243ZK (2) of the Constitution of India clearly mandates that by providing a law superintendence, direction and control of the preparation of electoral rolls and

conduct of all elections to the cooperative society is to be vested in a body, which in the State of Uttar Pradesh, has been constituted as Election Commission for the Cooperative Societies. The words, 'Superintendence', 'Direction' and 'Control' not only in respect of preparation of electoral rolls but also for conduct of elections vest very wide powers in the Election Commission. We have no hesitation to observe that in so far as ensuring free and fair elections of the cooperative society for the state of Uttar Pradesh is concerned, the Election Commission by virtue of article 243ZK (2) of the Constitution of India and subsection 3 of section 29 of the Act of 1965 is vested with almost plenary powers, which in our considered opinion will include the authority/ power/ jurisdiction to postpone the election or even to cancel the election. However the condition precedent for exercising of such power or authority is that the purpose of postponement or cancellation of an election should be to ensure free and fair polls. Such authority is since all encompassing hence is to be exercised by the Election Commission/ Chief Election Commissioner very sparingly and only to achieve the object of conducting free and fair elections. Exercise of such powers cannot be permitted to be resorted to in a routine manner. The Election Commission and the Chief Election Commissioner has to bear in mind that though the Election Commission is an authority created by the statute and entrusted with very important function, however it has to act only for the purpose for which it has been created, namely, for superintendence,direction and control of preparation of electoral roll and also conduct of elections. Conduct of elections of a democratic institution in a free and fair manner is one of the most significant and important facet of a democratic polity.

11. We have already noticed that the statutory mandate as available in Article 243ZK as also under section 29 of Act of 1965 is that Committee of Management needs to be constituted before expiry of the term of the out-going committee of management.

12. In the instant case, the Chief Election Commissioner has exercised powers vested in him under Section 29(3) read with Article 243 ZK(2) of the Constitution of India while passing the impugned order dated 17.04.2018. It has been stated by learned counsel appearing for the Election Commission that the report of the Additional District Magistrate which was sent by the District magistrate to the Chief Election Commissioner related to illegal electoral roll, which is said to have been prepared in derogation of the order passed by this court on 09.04.2018 in Writ Petition No.10053 of 2018.

13. Be that as it may, based on some material, sufficiency of which cannot be gone into under Article 226 of the Constitution of India, if the Election Commissioner or Chief Election Commissioner comes to a conclusion that permitting the elections on the basis of illegal or incorrect electoral roll will not be in the interest of free and fair elections, in our considered opinion in such a situation the Election Commission/ Chief Election Commissioner exercising his ancillary powers is empowered and has jurisdiction to postpone or even to cancel such election. At this juncture, we may also notice that District Magistrate is not an alien to the election process for the reason that in terms

of Rule 2(j) of U.P. State Co-operative Societies Election Rules 2014, he is the District Cooperative Election Officer. Thus, District Magistrate in his capacity as District/ Election Officer is part of the election commission itself and hence if he makes any complaint or submits any cogent material on the basis of which Chief election commissioner forms an opinion that permitting elections to go on would not be in the interest of free and fair polls,as observed above, the Chief Election Commissioner has the authority to take decision either to postpone or even to cancel the election process.

14. For the reasons as aforesaid, we are satisfied that the impugned order dated 17.04.2018 passed by the Chief Election Commissioner does not suffer from any illegality, much less any jurisdictional error as such it does not call for any interference by us in this writ petition.

15. At this juncture learned counsel for the petitioner insists that the petitioner was elected unopposed pursuant to the election programme declared by notification dated 16.02.2018 as such even if the elections are to be held now, the same should commence from the stage it was postponed by means of the impugned order.

16. The aforesaid submission of learned counsel for the petitioner in our considered opinion is not tenable for the reason that, the proviso appended to Section 29 of Act of 1965 provides that where Election Commission is satisfied that circumstances exists which render it difficult to hold the election on the date fixed, it may postpone the election and all proceedings pertaining to the election shall commence afresh in all respects. It is this power vested in the Election Commission under the said proviso appended to section 29(3) of the Act that vests jurisdiction in the chief election commissioner/ Election Commission to postpone the election and hence in our considered opinion the impugned order dated 17.04.2018 is referable to the said provision apart from the provision contained in Article 243-Z-K of the Constitution of India. The proviso clearly says that if for some reason elections were postponed then subsequent election is to commence afresh in all respects. The occurrence of the word in "all respects" would clearly mean that entire process of election is to be commenced de novo.

17. Rule 432 of U.P. Cooperative Societies Rules 1968 provides that if for any reason election of any cooperative society gets disrupted by the district magistrate or by the election officer, the process of election shall commence from the stage at which it was disrupted or from the stage prior to that or denovo as the Registrar may decide. The aforesaid provision of Rule 432 vests the discretion in the Registrar to decide the stage from which the elections are to be held. However, we may only note that the provision contained in the proviso appended to section 29(3) of the Act of 1965 will prevail over the said provision as the rules are only subordinate to the Principle Legislation which cannot override the provision of the Act under which the Rules have been framed. It is also to be noted that Rule 432 was inserted in U.P. Cooperative Societies Rules 1968 on 15.07.1994 i.e. prior to the provisions which have been inserted in the 1965 Act on the enactment of Part IX-B of the Constitution of India. It is also to be noticed that in tune with part IX-B of the Constitution of India, the state legislature

has also amended the provision of 1965 Act on 28.03.2013 by Act No.13 of 13.

18. In view of the aforesaid, submission of learned counsel for the petitioner that election of the society should be held from the stage it was disrupted by issuing the impugned order, is highly misconceived.

19. The writ petition is, thus, hereby **dismissed.**

(2022)07ILR A102
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DINESH PATHAK, J.

Writ C No. 15363 of 2022

M/s BCITS Pvt. Ltd., Bangalore ...Petitioner

Versus

Purvanchal Vidhyut Vitaran Nigarm Ltd., Varanasi & Anr. ...Respondents

Counsel for the Petitioner:
Sri Prashant Chandra (Senior Adv.), Sri Kartikeya Dubey, Sri Ujjwal Satsangi

Counsel for the Respondents:
Sri Udit Chandra

A. Civil Law – Blacklisting of Door to Door Meter Reading Contract –Issuance of show cause notice – Opportunity of hearing – Fairness – Earlier two time notice were issued and after filing of explanation the notices were dropped – IIIrd notice was issued with the observation that the explanation of the company was found unsatisfactory – Validity challenged – Held, the respondent-Corporation in the impugned show cause notice has already expressed its mind that the explanation offered is unsatisfactory – Even if the petitioner offers its explanation, it would be an empty formality and a futile exercise – Fairness demanded that the respondent should have taken care to keep their mind open to the issues while seeking the explanation. The respondent-Corporation having already held that the explanation is not worthy of acceptance, it could not be treated to be a show cause notice but a decision already taken. (Para 7 and 8)

Writ petition allowed. (E-1)

List of Cases cited :-

1. Siemens Ltd. Vs St. of Mah. & ors.; 2006 (13) SCALE 297

2. ORYX Fisheries Pvt. Ltd. Vs U.O.I. & ors.; 2010 (13) SCC 427

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Dinesh Pathak, J.)

1. The short issue that arises for consideration in the instant writ petition is whether show cause notice issued to the petitioner seeking explanation as to why it should not be black listed and debarred from entering into contracts for next two years is a valid notice or not.

2. The petitioner-Company was given contract of "Door to Door Meter Reading, Bill Generation and Serving through SBM/Mobile App/Other Suitable Means with Downloading" by the respondent-Corporation on 23.7.2018 for a period of three years. Subsequently it was extended for two months more. On 6.06.2020, the petitioner was issued a notice threatening to blacklist it on account of alleged irregularities on its part. It was replied by the petitioner on 19.6.2020 and according

to the case of the petitioner, the notice was dropped, as no action was taken in pursuance thereof. After about a year and a half, another notice dated 13.8.2021 was issued with the same/similar allegations. It was replied by the petitioner company on 23.8.2021 but thereafter no further action was taken. Yet another notice dated 18.8.2021 with the same allegations was issued, again threatening the petitioner to blacklist it. It was replied to by the petitioner company on 30.10.2021. The respondent-Corporation after considering the explanation arrived at a definite finding that the explanation offered is unsatisfactory and the alleged irregularities and breaches committed by the Company has resulted in tarnishing the image of the respondent-Corporation. Accordingly, the petitioner company has been called upon to show cause as to why it should not be black listed/debarred for a period of two years.

3. On 25.5.2022, we passed the following order:

"It is urged by Sri Prashant Chandra, learned Senior Advocate, assisted by Sri Kartikeya Dubey and Sri Ujjawal Satsangi, that the impugned show cause notice is illegal as it has been issued with premeditation to debar and blacklist the petitioner-firm for a period of two years, inasmuch as, the respondents have already disclosed their mind by recording finding to the effect that the explanation submitted by the petitioner-firm in response to earlier notice, has not been found to be satisfactory. In support of the said contention, learned counsel for the petitioner has placed reliance upon the judgment of Supreme Court in Siemens Ltd. vs. State of Maharashtra and Others, 2006 (13) SCALE 297 and ORYX Fisheries Private Ltd. vs. Union of India and Others, 2010 (13) SCC 427.

Sri Udit Chandra, learned counsel for the respondent corporation, seeks time to obtain instructions by tomorrow.

Accordingly, the matter is adjourned.

Put up as fresh tomorrow."

4. Sri Udit Chandra, learned counsel for the respondent-Corporation, after seeking instructions, states that he does not wish to file any counter affidavit. He submitted that the notice is strictly valid inasmuch as the respondent-Corporation has only examined the explanation offered by the petitioner-Company and having found the same to be unsatisfactory, issued fresh notice for black listing the petitioner firm.

5. In **Siemens Ltd. vs. State of Maharashtra and Others, 2006 (13) SCALE 297** a challenge was made to a show cause notice on the ground that if it has been issued with pre-meditation then issuing notice and seeking explanation would not serve any purpose as the person issuing notice had already made up its mind. The contention was upheld. The relevant observations made in this behalf in Paragraphs No. 8, 9 and 10 are reproduced below:

"8. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of Uttar Pradesh v. Brahm Datt Sharma and Anr. MANU/SC/0711/1987: [1987] 2SCR444, Special Director and Anr. v. Mohd. Ghulam Ghouse and Anr, MANU/SC/0025/2004: 2004(164) ELT141 (SC) and Union of India and another v. Kunisetty Satyanarayana

MANU/SC/5137/2006: AIR2007SC906 but the question herein has to be considered from a different angle, viz, when a notice is issued with pre-meditation, a writ petition would be maintainable. In such an event, even if the courts directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose [See K.I. Shephard and Ors. v. Union of India and Ors. MANU/SC/0643/1987: (1988) ILLJ162SC]. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter affidavit as also in its purported show cause.

9. The said principle has been followed by this Court in V.C. Banaras Hindu University and Ors. v. Shrikant MANU/SC/8170/2006: AIR2006SC2304, stating:

The Vice Chancellor appears to have made up his mind to impose the punishment of dismissal on the Respondent herein. A post decisional hearing given by the High Court was illusory in this case.

In K.I. Shephard and Ors. etc. etc. v. Union of India and Ors, MANU/SC/0643/1987 (1988): ILLJ162SC, this Court held:

...It is common experience that once a decision has been taken, there is tendency to uphold it and a representation may not really yield any fruitful purpose.

[See also Shri Shekhar Ghosh v. Union of India and Anr. MANU/SC/8616/2006 : (2007)1SCC331 and Rajesh Kumar and Ors. v. D.C.I.T. and Ors. MANU/SC/4779/2006 :]2871TR91(SC)]

10. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show cause notice. The writ petition, in our opinion, was maintainable."

6. Again in **ORYX Fisheries Private Ltd. vs. Union of India and Others, 2010 (13) SCC 427,** the Supreme Court held as follows:

"28. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding become an idle ceremony."

"32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show cause notice."

7. In the case at hand, the situation is similar as the respondent-Corporation in the impugned show cause notice has already expressed its mind that the explanation offered is unsatisfactory and

the petitioner-Company is guilty of the charges levelled against it.

8. In the above backdrop, even if the petitioner offers its explanation, it would be an empty formality and a futile exercise. Fairness demanded that the respondent should have taken care to keep their mind open to the issues while seeking the explanation. The respondent-Corporation having already held that the explanation is not worthy of acceptance, it could not be treated to be a show cause notice but a decision already taken. We accordingly quash the impugned notice leaving it open to the respondent-Corporation to issue fresh notice in accordance with law, if so advised.

9. The petition stands allowed to the extent indicated above.

(2022)07ILR A105
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2017

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 16026 of 2015

Awadhesh Narayan Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri J.P.N. Singh

Counsel for the Respondents:
C.S.C., S. Tiwari

A. Constitution of India – Article 226 – Writ of mandamus – Contract by a statutory body – Scope of interference – Non-payment of amount due in respect of civil work performed by a contractor – Maintainability of writ petition – Public law and private law, how far relevance – Held, the fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied – The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act – Statutory bodies have power to contract or deal with property like private parties. Such activities may not raise any issue of public law. When it is not shown that contract is statutory and parties are within the realm of their authority, contract between the parties is in the realm of private law – The disputes relating to interpretation of terms and conditions of such contract cannot be agitated in a petition under Article 226 of the Constitution. (Para 6)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. F.C.I. & anr. Vs M/s Seil Ltd. & ors.; AIR 2008 SC 1101

2. M/s Chitra Gupta Trading Vs U.P. Public Works Department & ors.; 2010(5) ADJ 299 (DB)

3. Writ Petition No. 41238 of 2013; M/s Pratiksha Constructions Vs St. of U.P. & ors. decided on 11.02.2015

4. Hindustan Petroleum Corp. Ltd. & anr. Vs Dolly Das; 1999 (4) SCC 450

5. Kerala State Electricity Board & anr. Vs Kurien E. Kalathil & ors.; 2000 (6) SCC 293

6. Writ C No. 25075 of 2014; M/S Prabhu Construction Comp.through its Proprietor Vs St. of U.P. & anr. decided on 05.05.2014

7. Writ C No. 11544 of 2014; M/s R.S. Assc. Vs St. of U.P. & ors. decided on 24.02.2014

8. Alaska Tech Vs St. of U.P.; 2014 (6) ADJ 591

9. Misc. Bench No. 10971 of 2015; M/S Goyal Stationary Mart through its Proprietor State of U.P. decided on 27.11.2015

10. Budh Gramin Sansthan Vs St. of U.P.; 2014 (7) ADJ 29

11. Kaka Advertising Agency Vs U.P. Technical University & ors.; 2014 (11) ADJ 227

12. Misc. Bench No. 1909 of 2014; M/s A.K. Constructions Vs St. of U.P. & ors. decided on 07.03.2014

13. Misc. Bench No. 3472 of 2014; Major Travels through Proprietor Vs St. of U.P. & ors. decided on 25.04.2014

14. Misc. Bench No. 3898 of 2015; Uttaranchal Paper Converters & Publishers through Proprietor Vs St. of U.P. & ors. decided on 13.05.2014

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Ajit Kumar, J.)

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

2. Petitioner is a Contractor and claimed to have executed some civil work in respect whereto payment has not been made. It is stated that amount is not disputed, therefore, writ petition is maintainable and reliance is placed on **Food Corporation of India and another Vs. M/s Seil Ltd. and others, AIR 2008 SC 1101; M/s Chitra Gupta Trading vs. U.P. Public Works Department and others, 2010(5) ADJ 299 (DB); and, M/s Pratiksha Constructions Vs. State of U.P. and others (Writ Petition No. 41238 of 2013), decided on 11.02.2015.**

3. However, we do not find that aforesaid authorities help petitioner in the present matter. In **Food Corporation of India (supra)** dispute relates to supply of levy sugar pursuant to Government orders which was governed by Essential Commodities Act, 1955 (*hereinafter referred to as the "Act, 1955"*). Under Section 3(2)(f) of Act, 1955 Central Government is empowered to direct any manufacturer of sugar to sell sugar to Central Government or State Government or a body owned or controlled by them for the purpose of making it available to public at fair price. This sugar is known commonly as levy sugar. Price of such levy sugar was fixed by Central Government in exercise of statutory power conferred under Section 3(3C) of Act, 1955 on yearly basis. Price of levy sugar although is required to be notified when sugar year commences but their exist a practice to notify previous year's price as a levy sugar on an ad hoc basis in October and final price used to be notified later on. Pursuant to such directions and notifications issued by Central Government under the provisions of Act, 1955 respondents Sugar Company supplied levy sugar to agencies of Central Government, i.e., Food Corporation of India as also UPPCF. The sugar mill demanded price of levy sugar from both, Food Corporation of India as also Directorate of Sugar, Ministry of Food. It is this non payment of price of levy sugar which caused sugar mill to approach Delhi High Court by filing writ petition. In respect of supply made to Central Government, Delhi High Court held that direction for making payment should be made but in respect of supply of levy sugar made to other agencies it was held that such direction is impermissible and remedy lies in common law. When matter came to Supreme Court it was held that supply of sugar was made in terms of statutory order as also on the directions made by Central Government and there is no factual dispute. Court held that contractual disputes involving public law elements are amenable to writ jurisdiction.

4. In other two judgments of this Court, i.e., **M/s Chitra Gupta Trading (supra) and M/s Pratiksha Constructions (supra)** directions for payment were issued

but question as to whether writ petition is maintainable or not as such was not an issue raised, argued and decided.

5. This question has been considered specifically in **Hindustan Petroleum Corporation Limited and another Vs. Dolly Das 1999 (4) SCC 450** wherein Court said that in absence of any constitutional or statutory rights being involved, a writ proceeding would not lie to enforce contractual obligations even if it is sought to be enforced against State or to avoid contractual liability arising thereto. In the absence of any statutory right, Article 226 cannot be availed to claim any money in respect of breach of contract or tort or otherwise.

6. In **Kerala State Electricity Board and another Vs. Kurien E. Kalathil and others 2000 (6) SCC 293**, Court said that interpretation and implementation of a clause in a contract cannot be subject-matter of a writ petition. Whether a contract envisages actual payment or not is a question of construction of contract. If a term of contract is violated, ordinarily remedy is not the writ petition under Article 226. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Disputes arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies have power to contract or deal with property like private parties. Such activities may not raise any issue of public law. When it is not shown that contract is statutory and parties are within the realm of their authority, contract between the parties is in the realm of private law. The disputes relating to interpretation of terms and conditions of such contract cannot be agitated in a petition under Article 226 of the Constitution. The Court further said:

"That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition."

7. Following the above authorities, a Division Bench of this Court in **M/S Prabhu Construction Company through its Proprietor Vs. State of U.P. and another (Writ C No. 25075 of 2014)** decided on 05.05.2014 said as under:

"In the present case, there is nothing on the record which may persuade us to hold that the contract is a statutory contract. The remedy of the contractor, if he is aggrieved by non-payment, would be to either file an ordinary civil suit or if there is an arbitration agreement between the parties, to invoke the terms of the agreement."

8. The Court also relied on its earlier decision in **M/s R.S. Associate Vs. State of U.P. and others (Writ-C No. 11544 of 2014)** decided on 24.02.2014.

9. Again in **Alaska Tech Vs. State of U.P. 2014 (6) ADJ 591**, a Division Bench of this Court observed as under:

"2. We are of the view that, in a matter of this nature which pertains to alleged non-payment of dues under a contract for supply of goods, it would neither be prudent nor judicious for this Court, in exercise of its jurisdiction under Article 226 of the Constitution, to grant relief, which is in substance, is a prayer for a money decree. These matters, it must be emphasized, are not those relating to statutory contracts but are purely non-statutory contracts. Whether work has been satisfactorily performed, whether the rates which had been quoted are in accordance with the terms of the contract, whether the goods were of a quality as mandated, and above all, whether the claim is within limitation or otherwise, are issues which cannot appropriately be adjudicated upon under Article 226 of the Constitution."

10. The same view has been reiterated in **M/S Goyal Stationary Mart through its Proprietor State of U.P. (Misc. Bench No. 10971 of 2015)** decided on 27.11.2015; **Budh Gramin Sansthan Vs. State of U.P. 2014 (7) ADJ 29; Kaka Advertising Agency Vs. U.P. Technical University and others 2014 (11) ADJ 227; M/s A.K. Constructions Vs. State of U.P. and others (Misc. Bench No. 1909 of 2014)** decided on 07.03.2014; **Major Travels through Proprietor Vs. State of U.P. and others (Misc. Bench No. 3472 of 2014)** decided on 25.04.2014; and **Uttaranchal Paper Converters and Publishers through Proprietor Vs. State of U.P. and others (Misc. Bench No. 3898 of 2015)** decided on 13.05.2014.

11. In view thereof, we are clearly of the view that mandamus sought by petitioner cannot be granted in extraordinary equitable jurisdiction under Article 226 of the Constitution.

12. Dismissed. Interim order, if any, stands vacated.

(2022)07ILR A108
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.07.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 16056 of 2021

Rashmi Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amrendra Nath Tripathi, Yogeshwar Sharan Srivasta

Counsel for the Respondents:
C.S.C., Akhilesh Kumar Srivastava, Gyanendra Kr. Srivastava, Prashant Kumar Tripathi

A. Constitution of India – Article 19(1)(a) – Fundamental right to change the name – Intent to change the name was declared by making publication – Name was changed in Aadhar Card as well as in PAN also, however, the application for changing the name in Education certificate was rejected on the ground that it was made beyond the prescribed limitation provided under Regulation 7 of the Regulations framed under the Intermediate Education Act 1921 – Validity challenged – Held, right to change the name is a facet of fundamental right as guaranteed under Article 19(1) (a) of the Constitution of India – *Kabir Jaiswal's case* and *Jigya Yadav's case* relied upon – The foundation based upon which the impugned orders have been passed namely that the request was made beyond

the limitation prescribed under Regulation 7 is wholly untenable and the same militates against the law laid down in the case of *Anand Singh Vs U.P. Board of Secondary Education* – Stand taken by the respondents denying the petitioner's right to change her name clearly violates her rights guaranteed under Article 19(1)(a) of the Constitution of India. (Para 9, 10 and 11)

Writ petition disposed off. (E-1)

List of Cases cited :-

1. Anand Singh Vs U.P. Board of Secondary Education & ors.; (2014) 3 ADJ 443 (DB)

2. Kabir Jaiswal Vs U.O.I. & ors.; AIR 2021 All 96

3. Civil Appeal No.3905 of 2011; Jigya Yadav (Minor) Vs CBSE & ors. decided on 03.06.2021

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

1. Heard Sri Yogeshwar Sharan Srivastava, the counsel for the petitioner, Sri Saharsh Srivastava, the counsel for the respondents 1 and 2, Sri Akhilesh Kumar Srivastava the counsel fro the respondent no.3 and Sri Gyanendra Kumar Srivastava, the counsel for the respondent no.4.

2. The present petition has been filed challenging the order dated 11.04.2019 (Annexure 1) as well as the order dated 22.03.2022 passed by the respondent no.2, as contained in Annexure no.15.

3. The facts in brief giving rise to the petition are as under :

4. The petitioner whose name as recorded in the educational records is Rajni Shrivastava and she wanted to change her name to Rashmi Srivastava and, as such, took steps for getting the same intent published in the newspapers. The publication was carried out in the newspaper 'Dainik Jagran' and 'Hindustan Times' as well as in the Gazette of India. In pursuance to the said publications, the petitioner desirous of changing the name in the school records, moved an application. In the High School Examination, the name of the petitioner was recorded as Rajni Shrivastava, she took the examination in the year 2009 and thereafter completed her intermediate examination in the year 2011. Thereafter the petitioner pursued her graduations studies and she qualified in the year 2015 with the same name i.e. Rajni Srivastava. The petitioner also claims to have got herself registered with the Council for the Nursing and Midwives, U.P. and was also issued a certificate and identity card with the name Rajni Srivastava.

5. After getting the publication done, with an intent to change her name from Rajni Shrivastava to Rashmi Srivastava, the petitioner moved an appropriate application to Aadhar authorities and in terms of the said application, the name was changed from Rajni Shrivastava to Rashmi Srivastava in Aadhar Card and subsequently on her moving an application, the name was changed in the Permanent Account Number (PAN) issued by the Ministry of Finance. As there arose a discrepancy in the Aadhar Card, PAN Card and the Bank Account on one hand as contrasted with the High School Certificate, the Intermediate Certificate and the Graduation Certificate where the name of the petitioner was recorded as Rajni Shrivastava, the petitioner preferred a writ petition before this Court being a Writ Petition No.2219 of 2019 (MS). The said writ petition was disposed off on 25.01.2019 permitting the petitioner to move an appropriate application with directions to the respondents to pass a

reasoned order in the said application. The application of the petitioner was rejected vide order dated 11.04.2019 (Annexure 1) mainly on the ground that in terms of the mandate of the provisions as contained in the Regulations under Chapter III Regulation 7 of the Regulations framed under the Intermediate Education Act 1921 that the said request was beyond the prescribed limitation under the said Regulations. The similar representation of the petitioner before the University authorities and the other authorities were rejected on the ground that unless the correction as desired by the petitioner is made in the High School records, no consequent action can be taken.

6. When again the petitioner approached this Court by filing the present petition, this Court by means of an interim order dated 30.07.2021 directed the authorities to reconsider the grievance of the petitioner in the light of the judgment of this Court in the case of ***Anand Singh vs. U.P. Board of Secondary Education and others (2014) 3 ADJ 443 (DB) and in the case of Kabir Jaiswal vs. Union of India and others; AIR 2021 All 96.*** On the basis of the said order, the petitioner once again approached the respondent authorities and by means of the subsequent order, the request has been rejected once again on 22.03.2022. An amendment application was filed seeking to challenge the subsequent order dated 22.03.2022.

7. The counsel for the petitioner argues that right to change the name has been held is a facet of fundamental right as guaranteed under Article 19(1)(a) of the Constitution of India, as such, he argues that the respondents could not have denied the claim of the petitioner. He further argues that the ground of limitation as taken by the respondents while passing the impugned order is wholly unjustified. He draws my attention to the judgment of this Court in the case of **Anand Singh vs. State of U.P. (supra)** wherein this court while interpreting the Regulation 7 of Chapter III came to the conclusion and recorded as under :-

"The substantive part of Regulation 7 provides for the correction of such entries in the certificate which have arisen because of any inadvertent clerical mistake or omission in the records of the Board or the Institution last attended by the candidate. It also provides that for this purpose, the candidate has to submit an application within three years of the date of issue of the certificate. However, under the proviso, any spelling mistake occurring in the name of the applicant or in the name of the applicant's father/mother in the certificate can be corrected when an application is filed for this purpose. The nature of the error which is contemplated in the substantive part of Regulation 7 is not the same as contemplated in its proviso nor is any time limit set out in the proviso.

It would be useful to examine the particulars of the candidate that are contained in a certificate issued by the Board. They include the year of the examination, the name of the candidate, the names of the parents, date of birth, subjects opted, division obtained, name of the School/Centre, certificate number, appearance as a regular/private candidate and the date of issue of the certificate. Of these, the date of birth, the subjects opted, the year of examination and the division obtained by the candidate are particulars which have an important bearing when admission to higher classes or employment is sought by the candidate. While making any correction in the entries relating to

these matters, the requirement of moving the application within three years has to be adhered to as any correction in regard to these entries would have an impact on the rights of other candidates when they seek admission to higher classes or employment. However, the other particulars contained in the certificate, like the name of the candidate or the names of the parents of the candidate are not that relevant and any correction made in regard to these particulars would have no impact on the admission or employment of other candidates. When so considered, we feel persuaded to hold that the time limit of three years prescribed in the substantive part of Regulation 7 for submission of an application for making correction in the certificate issued by the Board in regard to the name of the candidate or the names of the parents of the candidate should not be insisted upon, particularly when the Board itself has considered it appropriate to have no time limit under the proviso for making correction in regard to any spelling mistake in the name of the candidate or his parents. The applicant must, however, explain to the Board the reasons on the basis of which the application could not be submitted earlier and if it is found that the claim is bona fide and is otherwise justified, there is no reason to reject the application, as in the present case, merely on the ground of delay. Undoubtedly, the Board has to examine whether any genuine ground has been made out for correcting the name and it would be open to the Board to consider all the relevant materials pertaining to the request for correction of the name. "

8. He has further drawn my attention to the judgment of the Apex Court in the case of **Jigya Yadav (Minor) vs. CBSE and others [Civil Appeal No.3905 of 2011 decided on 03.06.2021]** wherein the Apex Court considered the various judgments of the various High Courts and recorded as under :

"171. As regards request for ?change? of particulars in the certificate issued by the CBSE, it presupposes that the particulars intended to be recorded in the CBSE certificate are not consistent with the school records. Such a request could be made in two different situations. The first is on the basis of public documents like Birth Certificate, Aadhaar Card/Election Card, etc. and to incorporate change in the CBSE certificate consistent therewith. The second possibility is when the request for change is due to the acquired name by choice at a later point of time. That change need not be backed by public documents pertaining to the candidate.

(a) Reverting to the first category, as noted earlier, there is a legal presumption in relation to the public documents as envisaged in the 1872 Act. Such public documents, therefore, cannot be ignored by the CBSE. Taking note of those documents, the CBSE may entertain the request for recording change in the certificate issued by it. This, however, need not be unconditional, but subject to certain reasonable conditions to be fulfilled by the applicant as may be prescribed by the CBSE, such as, of furnishing sworn affidavit containing declaration and to indemnify the CBSE and upon payment of prescribed fees in lieu of administrative expenses. The CBSE may also insist for issuing Public Notice and publication in the Official Gazette before recording the change in the fresh certificate to be issued by it upon surrender/return of the original certificate (or duplicate original certificate, as the case may be) by the applicant. The fresh certificate may contain disclaimer and caption/annotation against the original

entry (except in respect of change of name effected in exercise of right to be forgotten) indicating the date on which change has been recorded and the basis thereof. In other words, the fresh certificate may retain original particulars while recording the change along with caption/annotation referred to above (except in respect of change of name effected in exercise of right to be forgotten).

(b) However, in the latter situation where the change is to be effected on the basis of new acquired name without any supporting school record or public document, that request may be entertained upon insisting for prior permission/declaration by a Court of law in that regard and publication in the Official Gazette including surrender/return of original certificate (or duplicate original certificate, as the case may be) issued by CBSE and upon payment of prescribed fees. The fresh certificate as in other situations referred to above, retain the original entry (except in respect of change of name effected in exercise of right to be forgotten) and to insert caption/annotation indicating the date on which it has been recorded and other details including disclaimer of CBSE. This is so because the CBSE is not required to adjudicate nor has the mechanism to verify the correctness of the claim of the applicant.

172. In light of the above, in exercise of our plenary jurisdiction, we direct the CBSE to process the applications for correction or change, as the case may be, in the certificate issued by it in the respective cases under consideration. Even other pending applications and future applications for such request be processed on the same lines and in particular the conclusion and directions recorded hitherto in paragraphs 170 and 171, as may be applicable, until amendment of relevant Byelaws. Additionally, the CBSE shall take immediate steps to amend its relevant Byelaws so as to incorporate the stated mechanism for recording correction or change, as the case may be, in the certificates already issued or to be issued by it."

9. In the light of the judgment in the cases of **Kabir Jaiswal and Jigya Yadav (supra)**, it is now clearly well settled that right to change the name is a facet of fundamental right as guaranteed under Article 19(1) (a) of the Constitution of India and cannot be denied. The said right can be exercised in the manner prescribed in the directions as contained in paragraph 171 and 172 of the judgment of **Jigya Yadav (supra)**, as recorded above.

10. In the present case, the foundation based upon which the impugned orders have been passed namely that the request was made beyond the limitation prescribed under Regulation 7 is wholly untenable and the same militates against the law laid down by this Court in the case of ***Anand Singh vs. U.P. Board of Secondary Education (supra).***

11. In view of the law as laid down and discussed above, the stand taken by the respondents denying the petitioner's right to change her name clearly violates her rights guaranteed under Article 19(1)(a) of the Constitution of India and not sustainable and is liable to be set aside. Thus, the orders dated 11.04.2019 (Annexure 1) and the order dated 22.03.2022 (Annexure 15) are set aside. The petitioner is directed to move an appropriate application afresh along with a copy of this order and the documents including the Aadhar Card and the PAN Card before the respondent no.2 along with the original certificate and mark-sheet. On

receiving such application, the respondent no.2 is directed to carry out the desired change of name in the mark-sheet and Certificate. However, it is clarified that in the fresh certificate and mark-sheet issued to the petitioner, it would contain the name 'Rashmi Srivastava alias/nee, Rajni Shrivastava'. The said exercise shall be completed by the respondent no.2 within six weeks from the date of filing of the application. The petitioner shall thereupon be entitled to file the application before the respondents no.3 and 4 along with original records who shall also make the necessary corrections in the educational certificates/records issued to the petitioner in the light of the said fresh certificate issued to the respondent no.2. It is further directed that the respondent no.2 shall carry out the necessary corrections in the intermediate examination records of the petitioner also which shall be in consonance with the name change, as recorded in the High School Certificate in terms of the directions given above.

12. With the aforesaid observations, the writ petition stands **disposed off.**

(2022)07ILR A113
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DINESH PATHAK, J.

Writ C No. 41628 of 2018

Ashwani Pratap ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinayak Mithal

Counsel for the Respondents:
C.S.C., Sri Pankaj Srivastava

A. Land Law – UP Municipal Corporation Act, 1959 – Sections 3 & 126 – UP Zamindari Abolition and Land Reforms Act, 1950 – Section 117(6) – Lease of the banjar land – Power of Nagar Nigam – After auction, the highest bidder deposited 25% premium amount – Non-execution of the lease – Permissibility – Held, since, Nagar Nigam is now having no right, title or interest in the subject land, it also cannot transfer any right in favour of the petitioner, nor is competent to execute any lease deed. (Para 11)

B. Compensation – Fault committed by the Nagar Nigam – Petitioner acted bona fide by depositing amount of Rs. 14,25,000/- and lease rent – Deprivation of use and enjoyment of the subject land – Entitlement of adequate compensation – High Court directed the Nagar Nigam for payment of compensation of Rs. 5 Lakhs and refund of entire amount with 8% per annum simple interest and release of 25% bid amount as well. (Para 14 and 15)

Writ petition disposed of. (E-1)

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Dinesh Pathak, J.)

1. Heard Sri Vinayak Mithal, learned counsel for the petitioner, learned standing counsel for respondents No. 1, 3 and 4, Sri Pankaj Srivastava for respondent No. 2 and perused the record.

2. At the outset, Sri Vinayak Mithal, learned counsel for the petitioner states that he does not wish to rebut the additional counter affidavit filed on behalf of the second respondent and prays that the instant petition be heard and decided.

3. The facts, which are not in dispute, are that the respondent Nagar Nigam issued an advertisement on 16.10.2004 inviting bids for auction of 25 plots to be settled on lease hold basis. One Jai Prakash Agarwal was the highest bidder for plot No. 604 as he had offered a premium of Rs. 23,50,000/- for obtaining the lease. It seems that twenty five percent of the premium amount was deposited by him on 22.12.2004 as earnest money on fall of the hammer. As per terms of auction, remaining amount was to be deposited within fifteen days of approval of the bid. Thereafter, the allottee had to take steps for execution of the lease deed within one month. On 7.3.2005, Jai Prakash Agarwal was informed that his bid had been accepted. Thereafter, it is alleged that he inspected the plot and came to know that it was under litigation and in illegal occupation of certain person. It also appears from the material placed on record that Nagar Nigam made efforts to obtain possession of the plot by requesting the Senior Superintendent of Police, Meerut to take action against illegal occupants. It is also an admitted fact that on 9.11.2009, Jai Prakash Agarwal submitted an application along with affidavit before respondent No. 2 for transfer of allotment in favour of the petitioner. The said request, it seems, was made in terms of Clause 17 of the auction document. By a communication dated 30.3.2012, the petitioner was informed that the request for transfer of the allotment in favour of the petitioner had been approved by Nagar Ayukt by order dated 6.3.2012 and the petitioner was required to deposit the remaining premium amount i.e. a sum of Rs.14,25,000/- along with 15% lease rent i.e. Rs. 3,52,500/-, in all a sum of Rs. 17,77,500/- to facilitate execution of lease deed in favour of the petitioner. The petitioner deposited Rs. 17,77,500/- on 7.12.2012, however, the lease was not executed in his favour. This compelled the petitioner to file the instant writ petition praying for a mandamus commanding the second respondent no. 2 to execute lease deed in favour of the petitioner and hand over vacant possession of the subject land within stipulated period.

4. According to respondent-Nagar Nigam, initially the original allottee Jai Prakash Agarwal moved an application on 19.3.2005 that he was no more interested in the plot and that the money deposited by him be returned to him. Thereafter, on 23.10.2009, he made request for allotment to be transferred in favour of one Surendra Pratap, followed by another application dated 9.11.2019 for transfer of the allotment in favour of the petitioner herein.

5. The case set up by Nagar Nigam, Meerut before this Court is that now it is not in a position to execute the lease deed. It is alleged that a gazette notification was issued on 11.9.1987 extending the limits of Nagar Nigam, Meerut so as to include the disputed plot as well. The said land, according to respondent No. 2, was banjar land and consequently vested in the government. On its inclusion within limits of Nagar Nigam, it came under the management of Nagar Nigam. In support of said stand, copy of Khatauni has been brought on record wherein the entry is 'Banjar-Nagar Nigam'.

6. The respondent Nagar Nigam contends that by virtue of section 128 of the Uttar Pradesh Municipal Corporation Act, 1959, it did not had any right to transfer the land without prior permission of the State Government and that no such permission was ever granted. It is also the case of the said respondent that

subsequently, the State Government by another notification dated 14.9.2011 resumed the said plot in exercise of power under Section 117 (6) of the UP Zamindari Abolition and Land Reforms Act, 1950 for the Home Department, Uttar Pradesh to establish office of Anti-Terrorism Squad, Meerut Unit. In support of the said plea, copy of Khatauni of 1422-1427 Fasli has been brought on record. It is submitted that as a consequence of above, the Nagar Nigam was divested of all its rights. In other words, the contention is that the Nagar Nigam now does not have any right in the subject land nor is empowered to execute lease deed as has been prayed for in the writ petition.

7. In paragraph No. 13 of the additional counter affidavit, it is alleged that Municipal Commissioner, Nagar Nigam, Meerut passed an order on 26.7.2019 (during pendency of the writ), rejecting the claim of the petitioner. Consequently, cheques representing the sum realised from the petitioner (Rs. 17,77,500/-) were tendered to counsel for the petitioner, but he refused to accept. The said fact is also not disputed by Sri Vinayak Mithal, learned counsel appearing on behalf of the petitioner. He states that as the petitioner was pressing for execution of the lease deed in his favour, therefore, the offer to receive back the money, was declined.

8. He further submitted that in any event, the petitioner not being at fault, he is entitled to refund of the money with interest and exemplary compensation for the losses suffered by him in the process.

9. We have considered the rival submissions. In the backdrop of the admitted facts, we proceed to examine as to whether the petitioner could be granted the principal relief, i.e. a direction to the respondent Nagar Nigam, to execute lease deed in his favour and deliver possession of the subject land.

10. The notification dated 11.9.1987 published in Government Gazette seeks to include certain areas within the limits of Nagar Nigam, Meerut. It was issued in exercise of power under Section 3 of the U.P. Municipal Corporation Adhiniyam, 1959 (previously U.P. Nagar Mahapalika Adhiniyam, 1959). The subject land is plot no. 604, Village Roshanpur Darauli. Indisputably, as a consequence of the notification dated 11.9.1987, the subject land, Plot No. 604 of revenue Village Roshanpur Darauli got included in the territorial limits of Nagar Nigam, Meerut. As per khatauni, it is recorded as 'banjar' in name of Nagar Nigam, Meerut. Section 126 of the Act stipulates the manner of succession to property, assets, rights, liabilities and obligations of the Municipal Corporation constituted under the Act. Sub-Section 1 thereof provides the manner in which vesting of properties and assets takes place in favour of the Corporation. According to it, the plot in dispute, consequent to issuance of notification under Section 3 of the Act ceases to be under the control of the local authority having jurisdiction immediately preceding issuance of notification under Section 3 of the Act and come to be vested in Nagar Nigam, Meerut. Section 126(1)(a) and (b) which are relevant, are extracted below: -

"126. Succession to property, assets, rights, liabilities and obligations in certain cases. - (1) As from the appointed day [and subject to any direction of the State Government in this behalf] -

(a) all property, interests in property and assets including cash

balances, wherever, situate which immediately before such day were vested in any [Municipal Council], Improvement Trust or other local authority established for the area included in the City or any part of such area or in any local authority having jurisdiction both within and outside such area shall vest in and be held by the Corporation of such City, for the purposes of this Act, and

(b) all rights, liabilities and obligations of the aforesaid [Municipal Council], Improvement Trust or other local authority [in relation to the area included in the City] whether arising out of any contract or otherwise, existing immediately before such day shall be the rights, liabilities and obligations of such Corporation."

10. Consequently, on 16.10.2004, when advertisement was issued, Nagar Nigam, Meerut was fully competent to settle it on leasehold basis. It is an admitted fact on record that for one reason or the other, the matter remained pending and on 14.9.2011, a notification was issued under Section 117(6) of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 by the State Government, resuming the subject land for use by the Home Department for constructing office of Anti-Terrorism Squad, Meerut Unit. As a consequence of the same, Nagar Nigam, Meerut was divested of its title, right and interest in the subject land. Section 117(6) which is relevant, is extracted below: -

"117(6) The State Government may, at any time, [by general or special order to be published in the manner prescribed], amend or cancel any [declaration, notification or order] made in respect of any of the things aforesaid, whether generally or in the case of any Gaon Sabha or other local authority and resume such thing and whenever the State Government so resumes any such thing, the Gaon Sabha or other local authority, as the case may be, shall be entitled to receive and be paid compensation on account only of the development, if any, effected by it in or over that thing :

Provided that the State Government may after such resumption, make a fresh declaration under sub-section (2) vesting the thing resumed in the same or any other local authority (including a Gaon Sabha), and the provisions of sub-section (3), (4) and (5), as the case may be, shall mutatis mutandis apply to such declaration."

11. Since, Nagar Nigam, Meerut is now having no right, title or interest in the subject land, it also cannot transfer any right in favour of the petitioner, nor is competent to execute any lease deed, the principal prayer made in the petition. The submission of learned counsel for the respondent Nagar Nigam in this behalf is therefore accepted.

12. However, the matter does not rest here. Initially, Nagar Nigam, Meerut was not in position to deliver possession of subject land to the original allottee on account of certain rival claim of title in the subject land. This is evident from a communication sent by the Municipal Commissioner, Nagar Nigam, Meerut to the District Magistrate, Meerut on 7.4.2005, mentioning that the subject land is recorded as banjar and consequently it vests in Nagar Nigam, Meerut. The rival claim relating to any portion of subject land being part of a burial ground, was disputed in the said communication. Another communication by Municipal Commissioner, Nagar Nigam, Meerut to Senior Superintendent of Police,

Meerut dated 10.8.2007 reveals that subject land was not in possession of Nagar Nigam, Meerut, as it is admitted therein that one Mehak Singh Tank and his accomplices were not permitting the original allottee to take possession of the plot and request was made for providing police aid to facilitate handing over of possession to the allottee. It is also clear beyond doubt that the original allottee being unable to obtain possession, tried to get rid of the predicament by surrendering and transferring the allotment. However, the Nagar Nigam kept dragging its feet in the matter and ultimately it even approved transfer of allotment in favour of the petitioner on 30.6.2012, oblivious of the notification dated 14.9.2011, under Section 117(6) of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, divesting it of all its rights in the subject land. On the other hand, the petitioner bonafidely acting on the assurance extended to him by letter dated 30.3.2012, deposited the balance amount of Rs. 14,25,000/- and 15% lease rent amounting to Rs. 3,52,500/-, in all a sum of Rs. 17,77,500/-, expecting that it would be followed by execution of lease deed and entitlement to use the subject land, but once again Nagar Nigam, Meerut kept the matter pending.

13. It appears from the note sheet that even after 14.9.2011, Nagar Nigam, Meerut was not certain of the course to be adopted and on 20.6.2014, Municipal Commissioner, Nagar Nigam made an endorsement that the matter required permission of the State Government and enquired whether it had been obtained or not. Again note sheet dated 13.6.2014 reveals that there is office noting that on 15.2.2005, a Committee headed by Divisional Commissioner approved settlement of the land by auction; that now no suit was pending in respect of the subject land; that entire sum was in deposit with Nagar Nigam; that the land was vacant and that lease deed could be executed in favour of the petitioner in terms of Clause 17 of the auction document. On 13.6.2014 again, there is noting by Municipal Commissioner that in the first instance, a lease deed would be executed in favour of original allottee and then original allottee would execute lease deed in favour of the petitioner. He also made a query as to why lease deed had not been executed so far and also relating to possession/title of the subject land. It is also the specific case of the petitioner that in respect of other adjoining plots, auctioned on the same day, lease deeds were executed soon after the auction, but only in respect of petitioner's plot, the Nagar Nigam authorities had kept the matter pending.

14. It is clear from the facts noted above that it is Nagar Nigam, Meerut which was at fault in approving transfer of allotment in favour of the petitioner on 30.3.2012, despite issuance of notification under Section 117(6) of U.P.Z.A. & L.R. Act on 14.9.2011. Nagar Nigam, Meerut, at that time, ought to have informed the original allottee that transfer of allotment was not possible as Nagar Nigam, Meerut itself had been divested of its title. The petitioner having deposited huge sum, acting on the representation of Nagar Nigam, Meerut, is entitled to be compensated adequately.

15. Accordingly, we direct Nagar Nigam, Meerut to refund Rs. 17,77,500/- deposited by the petitioner on 7.12.2012, with 8% per annum simple interest, till the date of actual payment and a further sum of Rs. 5 lakhs as compensation in depriving

the petitioner of the use and enjoyment of the subject land. These amounts shall be paid to the petitioner within one month from the date of communication of the instant order, failing which, interest @ 14% will be payable on the entire sum for the period in default, till date of actual payment.

16. In case the petitioner produces No-Objection Certificate along with affidavit of the original allottee for release of 25% of the bid amount deposited by him as earnest money, the said amount shall also be released in favour of the petitioner.

17. The petition stands disposed of accordingly.

(2022)07ILR A118
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2017

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE RAJIV LOCHAN MEHROTRA, J.

Writ C No. 55173 of 2014

Smt. Anshu Garg & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Krishna Ji Khare, Sri Mrityunjay Khare

Counsel for the Respondents:
C.S.C., Sri B. Dayal

A. Land Acquisition Law – Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Section 24(2) – Land Acquisition Act, 1894 – Sections 11 &18 – Compensation – Leeway period of 5 years – Lapse of proceeding initiated under Act of 1894 – Applicability of S. 24 of Act of 2013 – Relevant factor explained – Held, for the purpose of calculating the leeway period of 5 years and for applying the provisions of lapse, the word 'award' in Section 11 would be attracted and not the words 'reference under Section 18' – The definition clause, which defines 'cost of acquisition' has no relevance at all so far as the applicability of provisions of Section 24 are concerned. (Para 6)

Writ petition dismissed. (E-1)

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.
&
Hon'ble Rajiv Lochan Mehrotra, J.)

1. Heard Sri Krishn Ji Khare, learned counsel for the petitioners and Sri Bhupeshwar Dayal, learned counsel for the respondent.

2. The petitioners have come up with a plea that the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 would be attracted on the facts of the present case, firstly because the award will be deemed to have been finally made only when the final amount came to be determined on compromise in the proceedings which according to Sri Khare cannot be termed as proceedings of reference ending in the judgment under Section 18 of the 1984 Act. The second argument of Sri Khare is that the word compensation is included in the definition of the words "cost of acquisition" as defined Section 3(i) of the 2013 Act. The acquisition proceedings where the earlier compromise of 2003 was given effect to, should be read in continuity and therefore the consequential order will relate back to the date of the award under Section 11. He therefore, submits that this will amount to

giving of an award and consequently the provisions of Sub-Section (2) and Section 24 would be attracted as these proceedings have to be treated as award under the aforesaid provision for extending the benefit as prayed for by the petitioner.

3. Section 24 (2) is extracted herein under:

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894) , , where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holding has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

4. It is an undisputed fact that the proceedings which have culminated in the compromise being arrived at was on a reference made by the Collector under Section 18 of the 1894 Act. The argument of Sri Khare that this should not to be treated to have culminated in a judgment in reference therefore, is unacceptable inasmuch as, had the reference not been made then there would have been no compromise and consequently this would be clearly a proceeding of reference under Section 18 for payment of enhanced compensation and not an award by the Collector under Section 11 of the 1984 Act. A reference is decided by a Court and not by the Collector who announces the award under Section 11 of the 1984 Act. The definition of the phrase "cost of proceedings" cannot add any such meaning to the word "award" under Section 11 of the Act.

5. We had framed the following question vide our order dated 10th August 2017:

"Heard Sri Krishan Ji Khare, learned counsel for the petitioners and Sri B.Dayal, learned counsel for the respondents.

The dispute in the present writ petition centers around land acquisition proceedings and about the applicability of section 24 (2) of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

The contention of the learned counsel for the petitioners appears to be that the petitioners having accepted the compensation under protest, they filed a Reference under Section 18 of the 1894 Act which is stated to have been decided on the basis of compromise.The amount awarded in compromise by the Court having not been paid or deposited would attract section 24(2) of the Act, 2013.

Sri B. Dayal refutes the aforesaid contention of the applicability of section 24(2) of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and Section 31 of The Land Acquisition

Act, 1894. Both Sections are categorical to the effect that on making an award under section 11 of the Land Acquisition Act, such proceedings can be taken into account for staking a claim and not on the basis of proceedings under reference ending in an order of adjudication or further adjudication awarding enhanced compensation. In both Sections it is the award under section 11 of the Act, 1894 that is the basis of calculation.Consequently, the plea of the learned counsel for the petitioners cannot be accepted.

Learned counsel for the petitioners prays for time to study the matter.

List in the next cause list."

6. We have not been able to find any answer from Sri Khare to the aforesaid question framed inasmuch as the words used in Sub-Section (2) of Section 24 are clearly to the effect that the same would apply in Land Acquisition proceedings where an award under Section 11 of the1894 Act has been made. Thus for the purpose of calculating the leeway period of 5 years and for applying the provisions of lapse, the word "award" in Section 11 would be attracted and not the words "reference under Section 18". The definition clause relied upon by Sri Khare which defines "cost of acquisition" has no relevance at all so far as the applicability of provisions of Section 24 are concerned. The arguments of Sri Khare are misconceived, therefore, untenable. The argument that in the agreement arrived at in the reference proceedings would relate back to the date of award is equally misconceived inasmuch as no such contingency has been contemplated under Section 24 of the Act.

7. The petition lacks merit and is accordingly rejected.

(2022)07ILR A120
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Capital Case No. 12 of 2021
with
Reference No. 09 of 2021

Harendra ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
From Jail, Sri Arun K. Singh Deshwal

Counsel for the Respondents:
A.G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 302, 201, 376-AB -Capital case - reference for confirmation of death penalty - Protection of Children from Sexual Offences Act, 2012 - Section 2(I)(d), 3 , 5(m)/6 , 42 – for resting a conviction in case of circumstantial evidence - circumstances from which the conclusion of guilt is to be drawn, should be fully established - all the facts so established should be consistent only with the hypothesis of the guilt of the accused - circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis, but the one proposed to be proved - must be a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused - must be such as to show that within all human probabilities, the act must have been done by the accused.(Para -36)

Minor girl (deceased) brutally murdered after rape - dead body recovered from a pit situated in the house of appellant - case rests on circumstantial evidence - no eye witness account of either rape or murder - offence committed by appellant - heinous in nature - manner in which committed shows depravity - appellant is a young man - with no criminal antecedents - possibility of his reformation and rehabilitation.**(Para -19, 80)**

(B) Criminal Law - Question of sentence - The Code of criminal procedure, 1973 - death penalty is an exception and it can only be awarded in the rarest of rare cases - Aggravating circumstances - Mitigating circumstances -while awarding death sentence, the mitigating and the aggravating circumstances have to be balanced - but in the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play - trial court did not consider mitigating circumstances in favour of appellant - merely considered aggravating circumstances - while awarding death penalty .**(Para - 75,78)**

HELD:- Only conclusion hypothesis that can be drawn from the proven circumstance is that it was the appellant who, after committing rape of the deceased, committed her murder and hid her dead body by burying it in a pit. Circumstances in which deceased's body found are so compelling that they conclusively point towards the guilt of the appellant. Trial court rightly convicted the appellant. Death sentence awarded to appellant (young man with no criminal antecedent) is commuted to life imprisonment. Reference to confirm the death penalty is answered in negative.**(Para - 62,65,81)**

Appeal partly allowed. (E-7)

List of Cases cited:-

1. Sarad Birdhichand Sarda Vs St. of Mah. (1984) 4 SCC 116

2. Pappu Vs The St. of U.P. 2022 Live Law (SC) 144.

3. Lochan Shrivas Vs The St. of Chhattisgarh, Manu/SC/1252./2021

4. Pandurang Chandrakant Mhatre & ors. Vs St. of Mah. (2009) 10 SCC 773 P.

5. Rajgopal & ors. Vs The St. of T.N. (2019) 5 SCC

6. Sandeep Kumar Vs The St. (Govt. of NCT of Delhi) & ors. i.e. Writ Petition (Criminal) No.2189 of 2018

7. D.K.Basu Vs U.O.I.(1997) 1 SCC 416

8. Rammi @ Rameshar Vs St. of M.P.(1999) 8 SCC 649

9. Sudam @ Rahul Kaniram Jadhav Vs St. of Mah. , (2019) 9 SCC 388

10. Shatrughan Baban Meshram Vs St. of Mah. , (2021) SCC 596

11. Bachan Singh Vs St. of Punj. ,1980 (2) SCC 684

(Delivered by Sameer Jain, J.)

1. Harendra (the appellant) was convicted under Sections 302, 201, 376-AB IPC and Section 5(m)/6 of Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act) vide judgment and order dated 14.7.2021 and 15.7.2021 passed by Special Judge (POCSO Act), Bulandshahar in Sessions Trial No. 625 of 2021 and has been awarded following punishment:

1. Under Section 302 IPC, death penalty with a fine of Rs. One lacs and in default additional one year simple imprisonment;

2. Under Section 201 IPC, seven years R.I.with a fine of Rs.Twenty Thousand, and in default four months simple imprisonment; and

3. Under Section 5(m)/6 of POCSO Act read with Section 376 AB IPC, death penalty.

All sentences to run concurrently.

2. As the trial court awarded death penalty to the appellant (Harendra) under Sections 302 IPC and Section 5(m)/6 of POCSO Act read with Section 376 AB IPC, it has sent a reference for confirmation of death penalty, which has been registered as Reference No.9 of 2021.

3. Against the aforesaid judgment and order, the appellant has submitted his appeal from Jail, which has been forwarded by the Superintendent of Jail, Bulandshahar vide letter dated 21.7.2021. This appeal has been registered as Capital Cases No.12 of 2021. The appellant has prayed that the judgment and order of conviction and sentence recorded by the trial court be set aside and that he be acquitted of all the charges.

4. Considering the nature of the crime, we are not disclosing the name of the victim, members of her family as well of the witnesses of that area (locality) and, therefore, wherever required, they have been described by their witness number.

5. To represent the appellant, who could not engage a private counsel, Sri Arun Kumar Singh Deshwal, Advocate has been appointed as Amicus Curiae by the High Court, Legal Aid Services Committee.

INTRODUCTORY FACTS:

6. Prosecution case, in brief, is that on 28.2.2021 at about 18.46 hours (6.46 PM) PW-1 lodged a First Information Report against the appellant under Section 363 IPC at Police Station Anoopshahar, District Bulandshahar vide Case Crime No. 104 of 2021. As per the First Information Report, on 25.2.2021, at about 4.00 PM, the daughters of PW-1, namely, PW-4, aged about 15 years, and the deceased, aged about 12 years, went along with their mother (PW-2) to fertilize their field. In the meantime, the deceased went to the house of Ram Niwas (father of appellant) to have water. When she did not return, her mother (PW-2) sent PW-4 to look for her but she (PW-4) could not find the deceased in the house of Ram Niwas though she noticed the door of the house of Ram Niwas bolted from inside. PW-2 thought that the deceased must have gone back home. But when PW-2 returned from the field after about an hour, she did not find her daughter i.e. the deceased at home. When PW-1 returned back, PW-2 narrated the entire incident to him. Immediately whereafter, PW-1 went to the house of Ram Niwas but did not find his daughter (deceased) there. By alleging that from that very day the son of Ram Niwas, namely, Harendra (appellant), is also missing, FIR was lodged by PW-1 expressing suspicion against Harendra (the appellant) that he has vanished with his daughter (deceased).

7. On 2.3.2021, an application (Ext.Ka-2) was submitted by PW-1 stating therein that on 28.2.2021 he lodged a report against Harendra (the appellant) son of Ram Niwas under Section 363 IPC at Police Station Anoopshahar on suspicion whereas, on 2.3.2021 when PW-1 along with Rajni Sadhwi, Bhola Chaudhari, Vishnu Chaudhari, Rajveer, Veerpal entered the house of Ram Niwas in search of the deceased, they found soil near the latrine freshly laid. When he stepped on it, his foot sank. Suspecting something amiss the soil was dug/removed with "a spade".

They then discovered dead body of the deceased lying there. By stating as above and by claiming that the body of the deceased is lying at the spot, prayer was made for appropriate action. On this information, Police arrived at the spot, recovered the dead body from the house of Ram Niwas (father of the appellant) and prepared inquest report (Ext. Ka-6) on 2.3.2021 at about 6.00 PM; whereafter, the dead body was sent for autopsy.

8. On 2.3.2021, at about 11.14 PM, the post mortem examination of the body of deceased commenced which was concluded on 3.3.2021 at about 00.20 hours i.e. 12.20 AM.

9. As per autopsy report (Ex.Ka-5) following ante mortem injuries were found on the body of deceased;

(I) A ligature mark of size 25 cm x 2 cm present around the neck with a gap of 3 cm at back of neck. Mark present at 5cm below both ears horizontally placed above thyroid cartilage. On exploration echymosis present underneath and hyoid bone was found fractured.

According to the autopsy surgeon death was caused due to asphyxia as a result of ante mortem strangulation. The estimated time of death was six to seven days before.

10. During autopsy, Gynaecological Examination was also done. Autopsy report (Ex.Ka-5) in this regard recites as follows:

"Gynaecological Examination of Pelvical Region is done by me and two vaginal smears/slides are prepared and 1 swab is taken from vulva and one smear is taken from vagina. The pubic hair are cut and preserved. 1 comb from pubic hair is preserved and 1 comb from scalp hair is preserved. On local examination of pelvical region:- the margin of labia majora are oedematous and irregular. There is tear in labia majora at 3' 0 Clock position. Blood clot is present. The vaginal introitus is irregular in shape. The pelvical region is covered by soil and after cleaning, examination was done. The nails with scraps are preserved."

11. On 2.3.2021, the Investigating Officer prepared recovery memo (Ext.Ka-11) of the soil from the pit i.e. the place from where the body was recovered. However, the appellant was shown arrested from Chandigarh and on 3.3.2021, at about 3.30 PM, on the pointing out of the appellant, after further digging the pit from where dead body of deceased was recovered, a blue colour lower, red colour T-shirt and one pair of slipper of red colour (belonging to the deceased) and black coloured red blue T-shirt as well as grey colour lower (both belonging to the appellant) were also recovered, which, the appellant was allegedly wearing at the time of incident. In respect of this recovery, a recovery memo (Ext.Ka-12) was prepared.

12. After investigation, on 10.3.2021 charge sheet under Sections 363, 302, 201 and 376 AB, IPC and Section 5(m)/6 of POCSO Act was submitted in the Court of Special Judge (POCSO ACT)/Additional Sessions Judge, Bulandshahr.

13. On 12.3.2021, the trial court framed charges against the appellant under Sections 363, 376 AB,302, 201 IPC and Section 5(m)/6 of POCSO Act. Appellant denied all the charges and claimed trial. During trial, prosecution examined ten witnesses, PW-1, PW-2, PW-4 and PW-5

are witnesses of fact whereas rest of the prosecution witnesses are formal witnesses. After recording the statement of prosecution witnesses, trial court recorded the statement of appellant under Section 313 Cr.P.C. and after analysing the evidence on record, convicted the appellant under Sections 302, 201 and 376 AB, IPC and Section 5(m)/6 of POCSO Act.

14. We have heard Sri Arun Kumar Singh Deshwal, learned Amicus Curiae appointed by the High Court, Legal Aid Services Committee, for the appellant and Sri Amit Sinha along with Sri J.K.Upadhyaya, learned AGA, for the State, and have perused the record of the case.

SUBMISSION ON BEHALF OF THE APPELLANT

15. Learned counsel for the appellant submitted that present case is based on circumstantial evidence and there is no eye witness account of the incident. The trial court wrongly convicted the appellant in spite of the fact that the prosecution failed to prove any of the incriminating circumstances against the appellant beyond the pale of doubt. He submitted that there is no admissible evidence on the basis of which the appellant may be connected with the present crime. Further, there is no evidence of the appellant being last seen alive with the deceased. Even the recovery of the dead body allegedly from the house of appellant is self-serving and in absentia therefore, has no incriminating value.

16. Learned counsel for the appellant further submitted that the alleged disclosure in respect of recovery of clothes of the deceased and of the appellant is not admissible as the place from where these clothes were allegedly recovered had been discovered already on 2.3.2021 i.e. a day before the said recovery. He submitted that on the basis of suspicion alone, the appellant has been falsely implicated. The FSL report cannot be used against the appellant in the present case as no blood was found on the recovered clothes of the appellant and the DNA too, could not be matched.

17. Sri Deshwal, learned counsel for the appellant also submitted that the trial court wrongly interpreted the FSL Report to assume that the lower carried gene material of female origin therefore, the appellant was involved when, in fact, there was no basis to assume that the lower was of the appellant. It was thus prayed that the order of conviction be set aside.

18. Learned counsel for appellant lastly submitted that as the present case rests on circumstantial evidence, death penalty is not to be awarded.

SUBMISSION ON BEHALF OF THE STATE

19 Per contra, learned AGA submitted that this is a case where a minor girl (deceased) has been brutally murdered after rape and as her dead body was recovered from a pit situated in the house of the appellant, this by itself is sufficient to convict the appellant. Learned AGA submitted that from the testimony of PW-2, mother of deceased, and PW-4, the sister of the deceased, it was proved that the deceased went inside the house of the appellant on 26.02.2021 to have water and thereafter, she did not return. PW-1 (the father of the deceased) in his statement disclosed that on the next day i.e. on 26.2.2021, when he went to the house of

the appellant, he met the appellant in his house, who appeared nervous and had scratch marks on his face and neck. Thereafter, appellant absconded from the house.

20. Learned AGA submitted that the incriminating circumstances were duly proved and constituted a chain of circumstances indicating that the appellant is the person who committed rape and murder of the deceased therefore, the trial court has rightly convicted him. Hence, the present appeal is liable to be dismissed.

21. On the question of sentence, learned AGA submitted that as the appellant committed rape of a minor girl, aged below 12 years, and brutally murdered her, the trial court rightly awarded him death penalty.

22. Having noticed the rival contentions and having perused the record, before analysing the evidence in the context of the rival contentions, it would be apposite to notice the prosecution evidence, in brief.

PROSECUTION WITNESSES:

23. PW-1 is the informant. The deceased was his daughter. According to PW-1, deceased was aged about 12 years old and use to stammer. On 25.2.2021, at about 4.00 PM, PW-1, his wife (PW-2), his daughter (deceased) and the other daughter (PW-4), all had gone to the field to sprinkle fertilizer. To have water, the deceased went to the house of Harendra (the appellant). PW-1 saw her entering the house of Harendra (appellant). When she (deceased) did not return back, PW-1's wife (PW-2) sent PW-4 to the house of Harendra (appellant). PW-4 informed that the house is locked from inside and despite call, nobody came out. PW-1's wife (PW-2) therefore thought that the deceased might have return home. But when they arrived at home, they did not find the deceased there. Consequently, they started searching for her. Next day, PW-1 along with others arrived at the house of the appellant (Harendra) and asked him whether he had seen PW-1's daughter as she had come there to have water. PW-1 stated that though the appellant denied seeing the deceased but he could not notice that there were nail scratches on the neck of the appellant. Moreover, the appellant looked nervous. PW-1 queried the appellant about his condition but the appellant did not answer. Thereafter, the appellant left his house and went away. PW-1 proved the FIR dated 28.2.2021 i.e. as Ext. Ka-1. PW-1 stated that on the second day of next month i.e. 2.3.2021 he along with 5-6 persons arrived at the house of Harendra (the appellant) in search of his daughter (the deceased). PW-1's wife (PW-2), Rajveer, Bhola, Veerpal, Rajnish, Mahesh and PW-5 also accompanied him. According to PW-1, near the latrine, the soil appeared fresh (i.e. freshly dug) and the foot sank in that soil. When they dug that place they saw dead body of the deceased lying in the pit. The dead body was naked. PW-1 stated when his daughter had gone to fetch water she was fully clothed wearing a Full Sleeve Kurti, lower, shawl and slippers and had a chain on her neck as also a clip on her hair. According to PW-1, he saw the dead body of the deceased at about 3.00 PM. Whereafter, he got a report scribed by one Bhojraj (not examined), which was thumb marked by him. The report was marked as Ext.Ka-2. PW-1 stated that he gave the report (Ext.Ka-2) at the police station at about 5.00 PM. After that the police arrived at the spot and took out the dead body and

conducted inquest of which he was a witness. In his cross-examination, PW-1 stated that in the house of appellant, his brother Dharmendra, Dharmendra's wife and kids also reside. PW-1 stated that on the next day i.e. 26.2.2021 when he went to the house of Ram Niwas (father of the appellant), he met only the appellant there. PW-1 denied that he went to the house of the appellant in evening of 25.02.2021. PW-1 stated that he went to the house of the appellant in the morning of 26.2.2022. According to PW-1, Ram Niwas's house must be 5-6 Km away from the village abadi or may be a bit less. PW-1 stated that the distance between the house of appellant and the field where he along with his family members were sprinkling fertilizer is about 250 paces. PW-1 admitted that before 28.2.2021, he did not give any information at the Police Station in respect of his daughter (deceased) having gone missing. PW-1 stated that the house of the appellant would be in an area of 'one bigha'. It has high boundary walls and inside the boundary, apart from two rooms, there are two latrines also, but there is no bath room in the house. PW-1 stated that the body was noticed in that pit at about 3.00 PM. The police had arrived at about 5-5.30 PM and then the body was taken out of the pit. He denied the suggestion that body was taken out of the pit without the help of the police. PW-1, however, admitted that at the time of recovery of dead body, neither appellant nor any member of his family was present. PW-1 denied the suggestions that there is enmity between him and the family of the accused and that false recovery has been shown by planting the body there.

24. PW-2 is the mother of the deceased and wife of PW-1 (the informant). PW-2 also stated that on 25.2.2021 at about 4.00 PM she along with her husband (PW-1), elder daughter (PW-4) and younger daughter (the deceased) went to the field to sprinkle fertilizer. From there, her younger daughter (deceased) went to the house of appellant to have water. PW-2 saw the deceased entering the house of appellant. When, for about an hour, the deceased did not return, PW-2 sent PW-4 to look for her in the house of appellant. PW-2 stated that PW-4 gave calls from outside but nobody responded though the door of the house was bolted from inside. Consequently, PW-4 informed PW-2 that deceased was not there. PW-2 thought that the deceased might have returned back home. But when on reaching home, she could not find the deceased, they launched a search for her in the village but could not find her. On the next day, PW-1 went to the house of Harendra (the appellant). On return, PW-1 informed PW-2 that there was a scratch mark on the face and neck of Harendra (appellant). PW-2 stated that the appellant had absconded from the village. She stated that on 2nd, her husband (PW-1), brother-in-law (Mahesh), PW-5, Rajveer and Rajni went in search of the deceased. During search, the deceased was found in a pit inside the house of appellant of which information was received by her. On information, she arrived at the spot and saw that the dead body of her daughter was lying in the pit with no clothes on it. She stated that when her daughter had gone to sprinkle fertilizer she wore a blue coloured lower, an orange and coco cola-double coloured T-shirt and also had a chain on the neck and had worn a cotton shawl. She also wore pink coloured slippers and a clip to tie her hair.

25. In her cross-examination, PW-2 stated that her daughter (PW-4) had informed her that the deceased was not in the house of

Harendra (appellant) and that the appellant was sleeping after bolting the door from inside. She was also informed by her husband (PW-1) i.e. the informant that the appellant has left the village. This information was given to her on the next day of the incident. She, however, admitted that when daughter's body was recovered, at that time, nobody was present in appellant's house and his house was locked. She denied the suggestions that she did not notice the body in that pit. She also denied the suggestion that she is taking the name of the appellant only on the basis of suspicion.

26. PW-3 is Constable Amit Chaudhary. He prepared the chik FIR of the case and proved the same as (Ext. Ka-3). PW-3 also proved the G.D. entry no. 35, dated 28.10.2021, at 18.40 hours, which was marked as Ext. Ka-4.

27. PW-4 is the elder daughter of PW-1 (the informant). She is sister of the deceased. PW-4 stated that the deceased was her younger sister. On 25.02.2021, at about 4.00 PM, PW-4 along with her parents and the deceased had gone to the field to sprinkle fertilizer. From there the deceased went to the house of Harendra (appellant) to have water. PW-4 saw the deceased entering the house of the appellant. After some time, when the deceased did not return, her mother (PW-2) told her to look out for the deceased. When she arrived at the house of appellant, she found that his house was bolted from inside and despite her calls, nobody responded, as a result, she returned back and informed her parents. Upon which, PW-2 felt that the deceased might have returned back home. But they did not find her at home. PW-4 stated that after five days she saw the body of deceased lying in a pit inside the house of Harendra in a naked condition. During her cross-examination, PW-4 stated that when she arrived at the house of appellant in search of her sister (deceased), she had pushed the door which appeared bolted from inside.

28. PW-5 is a villager. He stated that PW-1 informed him that on 25.02.2021 at about 4.00 PM deceased went to the house of the appellant to have water and she was seen entering the house of the appellant. PW-5 stated that on 02.03.2021 while they were searching for the deceased, they entered the house of the appellant. There, in the soil, feet got stuck. On being suspicious, they dug out the place and found the body of the deceased buried there. PW-5 stated that the body of the deceased was taken out from the pit then the police arrived. The police again arrived on 3rd and on the pointing out of the appellant, the clothes of the victim were recovered from the pit. PW-5 admitted that on paper no. 8A/2 there was his thumb impression. In his cross-examination, PW-5 stated that the dead body was taken out from the pit by him and Mahesh (not examined) and other villagers were also present there. According to this witness, the dead body was taken out by about 3.00 PM and the police arrived there by about 5.30-6.00 PM. PW-5 stated that paper no. 8A and 8A/2 bear his thumb impression but what is written there, he does not remember now. PW-5 stated that he could come to know about the victim having gone missing after about six days, that is on 02.03.2021. PW-5 stated that in the house of the appellant his brother, sister-in-law (bhabhi), two children and father also use to reside. PW-5 denied the suggestion that body was not found in appellant's house but was planted there.

29. Dr.Kirti PW-6 is one of the doctors in the panel of Doctors who conducted the post mortem of the body of the deceased. PW-6 conducted the Gynae-internal examination of the body. PW-6 proved the injuries recited in the autopsy report of the deceased. According to PW-6 the estimated time of death was about 6 to 7 days before and death was a result of asphyxia due to ante-mortem strangulation. On the statement of PW-6 the post mortem report was marked Ext. Ka-5. PW-6 accepted the possibility of rape of the deceased before her death. PW-6 told the Court that there was a tear in labia majora at 3 O' clock position. Blood clot was also found and that it may be a case of sexual assault.

30. PW.7-S.I. Maharaj Singh. He prepared the inquest report of the deceased on 02.03.2021. He proved the inquest report as Ext. ka-6. He also proved the documents including Chalan Nash prepared in connection with autopsy as Ext. Ka-7 to Ka-10. PW-7 stated that on 02.03.2021, the mud of the pit from where the body was recovered was lifted and sealed in separate boxes of which memo was prepared and proved as Ext. Ka-11. This witness stated that on 03.03.2021 on the pointing out of the appellant, from inside the pit from where the dead body of deceased was recovered, after digging. Further, a blue colour lower, colour T-shirt and one pair of red colour slippers of the deceased and red and black colour full sleeves T-shirt and grey colour lower of the appellant worn at the time of the incident were recovered. He prepared a recovery memo of the articles which was marked Ext. Ka-12. In his cross-examination, PW-7 stated that he was not the Investigating Officer of the present case. PW-7 stated that the accused appellant had himself dug out the clothes from the pit but if this was not written while recording his statement under Section 161 Cr.P.C then he cannot give reason for the same.

31. PW-8 S.I. Aman Singh. He is the first Investigating Officer of the case when it was registered under Section 363 IPC on 28.2.2021. He stated that he recorded the statement of PW-1 and prepared site plan at the instance of PW-1 which was marked as Ext. Ka-13. PW-8 stated that on 28.02.2021 he tried to search out the appellant but he could not get any clue. Thereafter, on 02.03.2021, the appellant house was raided but he could not be found. Later, the application moved by the informant (PW-1) was entered in the CD and Section 302 and 201 IPC were added. On addition of Sections 302 and 201 IPC investigation was taken over by Station House Officer. In his cross-examination, PW-8 stated that after the FIR, first he visited the field where PW-1 was doing agricultural work along with his wife (PW-2) and children. PW-8 stated that he visited the field on 28.02.2021 at about 3-4 PM; thereafter, he went to the house of appellant along with the informant (PW-1), where he prepared the site plan. According to PW-8, the house of appellant was not locked and a small gate was open. There he recorded the statement of PW-1. PW-8 stated that on 2.3.2021 at about 6.00 PM he received an application from PW-1 at the Police Station. After perusing the application, he added the Sections. PW-8 also stated that before 28.02.2021 he did not receive any information with regard to the incident.

32. PW-9-S.S.I. Ram Khet Singh. According to this witness, after addition of Section 302 and 201 IPC, he took over investigation of the case. After retrieving the body from the pit in the house of

appellant, inquest report was prepared and at the instance of PW-1, he prepared the site plan of the place from where the dead body of the deceased was recovered. The site plant was marked Ext. Ka-14. PW-9 stated that the deceased used to study in Primary School from where her date of birth certificate was obtained which disclosed her date of birth as 04.05.2010. PW-9 stated that the photographs and the articles recovered by the field unit team from the spot were deposited. He proved the photographs which were marked material exhibits 1 to 6. According to PW-9, on the basis of information received from an informer, appellant was arrested from PGI Gate No. 2, Chandigarh and his statement was recorded in the C.D. Thereafter, the appellant was handed over to S.I. Mahraj Singh and dispatched to go to the spot. On the same day, on the pointing out of the appellant, his clothes and clothes of the deceased were recovered. On 04.03.2021, biological material was obtained for DNA profiling. On 5.3.2021, after preparation of dockets, the recovered articles were sent to FSL, Ghaziabad through Constable -Navin Kumar. PW-9 further stated that he recorded the statement of witnesses during investigation and Section 376AB IPC and Section 5(m)/6 POCSO Act were added. PW-9 stated that on 8.3.2021, Constable Naveen Kumar delivered the recovered items at FSL, Ghaziabad. Entry of its delivery was made in the C.D. On 9.3.2021, he submitted charge sheet against the appellant, which was marked Ext. Ka-15. In his cross-examination PW-9 stated that on 2.3.2021 at the time of recovery of dead body he was present at the spot. He stated that information about discovery of the body was received on 02.03. 2021 at about 5.00 PM on the R.T.Set. At that time he was at Manakpur from where he straight away went to the spot. He arrived at the spot at about 5.30 PM. He stated that within 10 minutes of his arrival at the spot, Police Force from the Police Station arrived. PW-9 stated that when he arrived at the spot, the dead body was in the pit. He denied that by the time he reached the spot, the villagers had taken out the body from the pit. PW-9 stated that after arrest, the entry of appellant at the police station was made on 3.3.2021 at 14:51 hours (2:51 pm). PW-9 proved the fact that all the photographs taken by the field unit were of the house of appellant which were marked as material Ext. Ka 1 to 6. He, however, admitted that in the photograph no mark of the house is visible . PW-9 denied the suggestion that body was not recovered from the house of the appellant.

33. PW-10 Raj Kumar Singh Raghav is the Principal of the Primary School where the victim studied. This witness proved the date of birth of the deceased as 4.5.2010. PW-10 proved the photo copy of the Scholar Register and the Transfer Certificate of the deceased which were marked as Ext. Ka-16 and Ka-17, respectively.

ANALYSIS

34. The present case rests on circumstantial evidence. There is no eye witness account of either rape or murder. The law with regard to conviction on the basis of circumstantial evidence is now settled. The Supreme Court in the case of **Sarad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116** reiterated the legal principles in that regard as follows:

"153. A close analysis of this decision would show that the following conditions

must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793] where the observations were made :

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be' and "must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the 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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence. "

35. The above principles have been recently discussed and followed by a three Judges Bench of the Apex Court in the case of **Pappu Vs. The State of Uttar Pradesh 2022 Live Law (SC) 144**.

36. Summarising these legal principles, in **Lochan Shrivas Vs. The State of Chhattisgarh, Manu/SC/1252./2021**, a three Judge Bench of the Supreme Court, in para-14, observed as under:

"14. It is thus clear that for resting a conviction in the case of circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn, should be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis, but the one proposed to be proved. There must be a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused, and it must be such as to show that within all human probabilities, the act must have been done by the accused."

37. Bearing these legal principles in mind, we shall now evaluate the evidence of the case in hand. In the present case, the prosecution has relied upon the following circumstances:-

(I) On 25.2.2021 at about 4 PM the deceased entered the house of the appellant and was not seen alive thereafter.

(II) On 26.2.2021 PW-1 (father of the deceased) went to the house of the appellant to enquire about his missing daughter (the deceased) where he met the appellant. At that time though the appellant denied having any knowledge about

informant's daughter but he noticed the appellant was nervous and having scratch marks on his neck.

(III) That except the appellant no other family member was present in the house on 26.02.2021 and, thereafter, the appellant left the hosue.

(IV) That on 2.3.2021, at about 3.00 PM, PW-1 (father of the deceased), accidentally, during search, found the dead body of his daughter (deceased) buried in a pit inside the house of the appellant.

(V) Upon receipt of information from PW-1, on 2.3.2021 the dead body was taken out from the pit by the Police and after inquest, autopsy was conducted on 03.03.2021, which suggested that the deceased was subjected to sexual assault and killed. The cause of death was due to asphyxia as a result of ante-mortem strangulation and the death was estimated to have occurred 6-7 days before, which coincides with the date of entry of the deceased in that house. Further, in the FSL Report presence of blood in the soil was found though its origin could not be confirmed due to disintegration.

(VI) On 3.3.2021 the appellant was arrested and on his disclosure statement, clothes of appellant and deceased, alleged to have been worn at the time of incident, were recovered from that pit where the dead body of the deceased was found, after digging further.

(VII) FSL report shows presence of human sperm on the underwear, lower and a used condom recovered from the spot by the field unit team.

(VIII) As per FSL report, male allele presence was found on vaginal slide, vaginal swab,vulval swab, piece of cloth plus hair of the victim and the DNA of the Hair comb of the victim matched with the biological material found present in the lower and it was of female origin.

FIRST CIRCUMSTANCE RELIED BY PROSECUTION.

38. PW-1, father of the deceased, PW-2- mother of the deceased, and PW-4 (elder sister of the deceased) in their testimony stated that on 25.2.2021 at about 4.00 PM deceased entered the house of appellant to have water and thereafter she could not be traced and on 2.3.2021 her body was dug out from a pit inside the house of appellant. Although PW-1 in his examination-in-chief stated that he had also witnessed the deceased entering the house of appellant but in his cross-examination PW-1 stated that when he returned home at about 6.00 PM, his wife (PW-2) had informed him about the deceased going there and then, on the next day, he visited the house of appellant. Thus, the testimony of PW-1 that he also witnessed the victim entering the house of appellant on 25.2.2021 at about 4.00 PM appears doubtful.

39. However, the testimony of PW-2, the mother of the deceased, and PW-4, elder sister of the deceased, is consistent with regard to the deceased entering the house of the appellant on 25.2.2021 at about 4.00 PM to have water. According to PW-2 and PW-4, they saw the deceased entering the house of appellant. During cross-examination no suggestion was put to either of the two witnesses, namely, PW-2 and PW-4, that they did not witness the deceased entering the house of appellant. Therefore, the fact that on 25.2.2021, at about 4.00 PM, deceased entered the house of appellant has been proved by the prosecution beyond reasonable doubt.

SECOND CIRCUMSTANCE RELIED BY PROSECUTION.

40. PW-1 (father of the deceased) stated that on 26.2.2021 he visited the house of appellant to enquire about the deceased. He then met the appellant at his house. When he enquired about his daughter (the deceased), the appellant did not provide any information but appeared nervous and he left his house thereafter. PW-1 further stated that he noticed scratch marks on the neck of the appellant. Notably, no suggestion was put to this witness that there were no scratch marks or that the witness is telling lies in respect of the presence of scratch marks. Further, there is no suggestion to this witness that he did not visit the house of the appellant on 26.02.2022 or that on 26.02.2022 he did not meet the appellant in that house. Therefore, in our view, PW-1 proved beyond reasonable doubt the presence of the appellant at his house on 26.2.2021 and that when he met the appellant, PW-1 noticed scratch marks on the neck of the appellant.

41. At this stage, we may notice the submission of learned counsel for the appellant. He submitted that in the FIR it is specifically mentioned that on 25.2.2021 PW-1 went to the house of appellant and could not find him and since 25.2.2021 appellant is untraceable. It was argued that this statement in the FIR, which was lodged on 28.02.2021, is at variance with the statement in Court that on 26.2.2021 he went to the house of appellant and met him therefore it cannot be accepted.

42. In this regard, we may observe that the law is settled that an FIR is not a substantive piece of evidence unless it falls in any of the specified categories. Ordinarily, it can be used either to corroborate or contradict its maker. (**See. Pandurang Chandrakant Mhatre and others Vs. State of Maharashtra (2009) 10 SCC 773).**

43. In the present case, during cross-examination, PW-1 was not confronted with the contents of the FIR. Therefore, in our view, averments in the FIR cannot be taken into consideration as the Court can only consider the substantive evidence. In the present case, during cross-examination of PW-1, no attempt was made to confront PW-1 with the averments made in the FIR so as to demonstrate that he did not visit the house of appellant on 26.2.2021. In this view of the matter, in our view, the uncontradicted testimony of PW-1 would have to be believed. We are therefore of the view that the second circumstance relied by the prosecution that on 26.2.2021 PW-1 met the appellant at his house with scratch marks on his neck, is duly proved.

44. To create a doubt with regard to the testimony of PW-1, it was also contended by the learned counsel for the appellant that if PW-1, the informant, met the appellant at his house on 26.2.2021 and had noticed scratch marks on his neck then why the FIR was not lodged by PW-1 before 28.2.2021. It was urged that as the FIR is delayed and PW-1 has offered no explanation with regard to the delay, the testimony of PW-1 is unworthy of credit.

45. In this regard we may observe that the law in respect of delay in lodging the FIR is settled too. In cases like the present one, where a minor daughter has gone missing, the delay of three days is not very material because the family members of a missing girl to hide shame and probing questions, before making their grievance public, make all out effort to trace out the missing girl. It is only when they become helpless that they take recourse to legal

process. Therefore, in such cases, the delay in lodging the FIR is not fatal to the prosecution case.

46. Otherwise also, where there is no plausible reason for false implication, delay in setting the law into motion is ordinarily to be condoned. In this regard we may profit from the observations of the Apex Court in the case of **P. Rajgopal and others Vs. The State of Tamil Nadu (2019) 5 SCC** where, in paragraph-12, a three-judge Bench of the Supreme Court, it was observed :

"12. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely."

47. In the present cae, notably, the defence did not even suggest existence of any kind of enmity of the informant (PW-1) or his family with the appellant. Therefore, there was no occasion for PW-1 to falsely implicate the appellant. Further, PW-1 stated that he had been searching for his daughter (deceased) but when his efforts could not bear fruit, he lodged the FIR on 28.2.2021. Under these circumstances, in our view, three days delay in lodging the FIR is natural and is not such which may render the prosecution version untrustworthy or make it look contrived.

CIRCUMSTANCE NO.3.

48. Learned counsel for the appellant submitted that as the gate of the house of appellant was open and was accessible to all and, further, the evidence of PW-1 and PW-5 would suggest that in that house appellant's brother and his family also resided, the recovery of the dead body from a pit inside the house, cannot be considered a clinching circumstance against the appellant. In this regard, we find that though in the testimony of PW-1 and PW-5 it has come that in the house of appellant, his brother and his family also resided but there is no evidence that on 25.2.2021 or till the date of recovery of dead body i.e. 2.3.2021, the brother of the appellant or his family was present in the house. Further, in his statement under Section 313 Cr.P.C. the appellant did not even state that on 25.2.2021 or on 26.2.2021 he was not present in that house or on those dates his brother and/or his family members were present. Rather, in this statement under Section 313 Cr.P.C., he admitted his presence in that house on 1.3.2021. It is not his case that he was elsewhere and returned on 01.03.2021. Further, there is evidence of PW-1 that on 26.2.2021 the appellant was present in that house. In fact, PW-4, elder sister of deceased, also stated that when on 25.2.2021 she went to the house of the appellant to look for the deceased, she noticed that the door of the house was bolted from inside. In our view, since the presence of the appellant in that house on 26.2.2021 is proved by PW-1 and the appellant has not denied his presence in that house on 25.2.2021 or 26.2.2021 and in fact admitted his presence in that house on 1.3.2021, in absence of any evidence or explanation that he was not present in the house on 25.2.2021, it can safely be inferred that on 25.2.2021, at about 4.00 PM, when the deceased entered the house of appellant, he was present in that house and as there is no evidence that his other family members were also present in that house, no benefit can be extended to the appellant on the basis of the testimony of prosecution witnesses that others also resided in that house.

CIRCUMSTANCES NOS. 4 AND 5 RELIED BY PROSECUTION

49. Testimony of PW-1 and PW-5 shows that on 2.3.2021 at about 3.00 PM the dead body of the deceased was found buried in a pit inside the house of appellant and on the information furnished by PW-1, Police arrived at the spot and took out the dead body from that pit on 2.3.2021. The prosecution heavily relies on this circumstance as a clinching circumstance pointing towards the guilt of the appellant. Although, during cross-examination, both the witnesses, namely, PW-1 and PW-5, were given suggestion that the dead body was planted in the house of the appellant but both the witnesses denied the suggestion. Nothing was suggested to those witnesses and nothing could come out from their cross-examination to impute motive to them to make false accusations against the appellant. In our view, therefore, the testimony of PW-1 and PW-5 proves that the dead body of the deceased was discovered by PW-1 and PW-5 on 2.3.2021 buried in a pit inside the house of appellant and on the same day i.e., 2.3.2021 Police on the information furnished by PW-1 took out the dead body of the deceased from that pit.

50. Even PW-2 (mother of the deceased) and PW-4 (elder sister of the deceased) though are not witnesses of discovery of the dead body but they proved that on receipt of information they arrived at the house of appellant and saw the dead body of the deceased lying in the pit in a naked condition. The statement of Police Personnel Maharaj Singh (PW-7), the SI, who conducted the inquest proceeding, and Ram Khet Singh (PW-9), the Investigating Officer of the case, also proves that the dead body of the deceased was recovered on 2.3.2021 from a pit inside the house of appellant on the information given by PW-1.

51. We may also notice here that it is not the case of appellant that the dead body of the deceased was not recovered from his house. Rather, suggestions were put to PW-1 and PW-5 that the dead body was planted in his house. It is therefore established beyond doubt that the dead body was recovered from a pit situated inside the house of appellant. Since the appellant could not suggest any kind of enmity of the prosecution witnesses with him, we reject the defence plea that the dead body was brought from some where else and planted in the house of the appellant. Thus, in our considered view, prosecution has successfully proved that dead body of the deceased was discovered by PW-1 and PW-5 on 2.3.2021, at about 3.00 PM, in a pit situated in the house of appellant and, whereafter, the Police took it out from the pit on the same day and carried out inquest proceeding on the spot.

CIRCUMSTANCE NO.6 RELIED BY PROSECUTION.

52. The next circumstance relied by the prosecution is that on 3.3.2021 at about 15.30 hours (3.30 PM) the clothes of appellant and deceased, alleged to have been worn by them at the time of incident, were recovered from the pit at the instance of the appellant. Statement of Ram Khet Singh (PW-9)(the Investigating Officer) shows that the appellant was arrested from PGI Gate No.2, Chandigarh. Surprisingly, PW-9 did not disclose the date and time of arrest of the appellant. In his cross-examination, PW-9 stated that the entry of the appellant at the Police Station was made on 3.3.2021 at 14.51 hours (2.51

PM). PW-9 neither produced nor proved the G.D. entry of arrest and entry of the appellant at the Police Station. Prosecution did not even produce the arrest memo regarding the arrest of the appellant from Chandigarh. PW-9 in his testimony did not even state that he arrested the appellant. He only stated that on 3.3.3021 at 14.51 hours the entry of appellant at Police Station was made. All of this would suggest that PW-9 did not arrest the appellant. Rather, his arrest was made by some other officer. Therefore, in our view, prosecution has failed to prove the date, time and place of arrest of the appellant.

53. This aspect of the matter may be examined from another angle. According, to the prosecution, the appellant was arrested at Chandigarh. If it is so, it becomes an inter-state arrest therefore, it was necessary for the officer concerned to follow the guidelines issued by Courts from time to time in respect of such arrests. In the case of **Sandeep Kumar vs. The State (Govt. of NCT of Delhi) and others** i.e. Writ Petition (Criminal) No.2189 of 2018, decided on 12.12.2019), a Division Bench of Delhi High Court, approving the report of a Committee in respect of Protocol to be followed in respect of inter-state arrest, observed as under:

"15. The Committee has, after examining all of the above material in detail, given detailed suggestions as to the protocol to be followed by the police in the event of inter-state arrest. These read as under:

"1. The Police Officer after assignment of the case to him, must seek prior permission/sanction of the higher/superior officers in writing or on phone (in case of urgency) to go out of State/UT to carry out investigation.

2. In a case when the police officer decides to effect an arrest, he must set out the facts and record reasons in writing disclosing the satisfaction that arrest is necessary for the purpose of investigation. At first instance, he should move the Jurisdictional Magistrate to seek arrest/search warrants under Section 78 and 79 Cr PC except in emergent cases when the time taken is likely to result in escape of the accused or disappearance of incriminating evidence or the procurement of arrest/search warrant would defeat the purpose. The Police Officer must record reasons as to what were the compelling reasons to visit other State without getting arrest/search warrants.

3. Before proceeding outside the State, the police officer must make a comprehensive departure entry in the Daily Diary of his Police Station. It should contain names of the police officials and private individuals accompanying him; vehicle number; purpose of visit; specific place(s) to be visited; time and date of departure.

4. If the possible arrestee is a female, a lady police officer be made part of the team. The Police Officers should take their identity cards with them. All police officers in the team should be in uniform; bear accurate, visible and clear identification and name tags with their designations.

5. Before visiting the other State, the Police Officer must endeavour to establish contact with the local Police Station in whose jurisdiction he is to conduct the investigation. He must carry with him the translated copies of the Complaint/FIR and other documents in the language of the State which he intends to visit.

6. After reaching the destination, first of all, he should inform the concerned police station of the purpose of his visit to seek assistance and co-operation. The

concerned SHO should provide/render all legal assistance to him. Entry to this effect must be made at the said police station.

7. After reaching the spot of investigation, search, if any should be strictly conducted in compliance of the procedure laid down u/s 100 Cr PC. All endeavour should be made to join independent public witnesses from the neighbourhood. In case of arrest, the police officer must follow the procedure u/s 41A and 41B and Section 50 and 51 Cr PC. The process of arrest carried out by the police must be in compliance with the guidelines given in DK Basu case (Supra) and the provisions of CrPC.

8. The arrested person must be given an opportunity to consult his lawyer before he is taken out of State.

9. While returning, the police officer must visit the local police station and cause an entry made in the Daily Diary specifying the name and address of the person(s) being taken out of the State; articles if any, recovered. The victim's name be also indicated.

10. Endeavor should be made to obtain transit remand after producing the arrestee before the nearest Magistrate unless exigencies of the situation warrant otherwise and the person can be produced before the Magistrate having jurisdiction of the case without infringing the mandate of S. 56 and 57 of Cr.P.C. within 24 hours.

11. The magistrate before whom the arrestee is produced, must apply his mind to the facts of the case and should not grant transit remand mechanically. He must satisfy himself that there exists material in the form of entries in the case diary that justifies the prayer for transit remand. The act of directing remand of an accused is fundamentally a judicial decision. The magistrate does not act in executive capacity while ordering detention of the accused. He must ensure that requirements of S. 41 (l)(b) are satisfied. The police officer must send the case diary along with the remand report so that the magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. The magistrate should briefly set out reasons for his decision. (Manubhai Ratilal Patel v. State of Gujarat, (2013) 1 SCC 314)

12. Another mandatory procedural requirement for the Magistrate considering a transit remand application is spelt out in Article 22 (1) of Constitution of India. This entitles the person arrested to be informed as soon as may be the grounds of such arrest. The Magistrate has to ensure that the arrested person is not denied the right to consult and to be defended by a legal practitioner of his choice. The Magistrate should ask the person arrested brought before him whether in fact he has been informed of the grounds of arrest and whether he requires to consult and be defended by any legal practitioner of his choice. (DK Basu, Supra) After the pronouncement of this judgment by the Hon'ble Supreme Court, new Sections 41A to 41D have been added to prevent unnecessary arrest and misuse of powers. Denying a person of his liberty is a serious matter.

13. In terms of S. 41C, control rooms be established in every district. Names and addresses of the persons arrested and designation of the Police Officers who made the arrest be displayed. Control Room at State level must collect details of the persons so arrested.

14. The police officer must record all the proceedings conducted by him at the spot and prepare an 'arrest memo' indicating time, date of arrest and name of

the relation/friend to whom intimation of arrest has been given. It must reveal the reasons for arrest.

15. Since the arrestee is to be taken out of his State to a place away where he may not have any acquaintance, he may be permitted to take along with him (if possible), his family member/acquaintance to remain with him till he is produced before the jurisdictional Magistrate. Such family member would be able to arrange legal assistance for him.

16. The arrested person must be produced before the jurisdictional Magistrate at the earliest, in any case, not beyond 24 hours from the date of arrest excluding the journey time so that arrest of such person and his detention, if necessary, may be justified by a judicial order. The 24 hours period prescribed u/s 57 Cr PC is the outermost limit beyond which a person cannot be detained in police custody. It does not empower a police officer to keep a person in police station a minute longer than is necessary for the purpose of investigation and it does not give him an absolute right to keep a person till 24 hours.

17. On arrival at the police station, the police officer must make an arrival entry in the record and indicate the investigation carried out by him, the person arrested and the articles recovered. He should also inform his senior police officers/SHO concerned about it immediately. The superior Police Officer shall personally supervise such investigation.

18. The police officer should effect arrest u/s 41(l)(b) Cr PC only when he has reasonable suspicion and credible information. He must satisfy himself about the existence of the material to effect arrest. There must be definite facts or averments as distinguished from vague surmises or personal feelings. The materials before him must be sufficient to cause a bona-fide belief. He cannot take shelter under another person's belief or judgment. He must affect arrest at his own risk and responsibility as the effect of illegal arrest could be commission of offence of wrongful confinement punishable u/s 342 IPC. Burden lies on the IO to satisfy the Court about his bona-fide. No arrest can be made because it is lawful for the police officer to do so. Denying a person of his liberty is a serious matter.

19. Medical examination soon after arrest to avoid possibility of physical torture during custody should be conducted.

20. The IO must maintain a complete and comprehensive case diary indicating the investigation carried out by him.

21. The log book of the vehicle used for transportation must be maintained and signed. The IO must indicate whether the vehicle was official or a private one; name of its driver and how and by whom it was arranged. Only official vehicle should be used for transportation to the extent possible.

22. At the time of recovery of the prosecutrix, the police officer, if he is satisfied that she is adult, should ascertain from her at the spot, whether she was present there with her free will. If the victim/prosecutrix is not willing to accompany the police officer or her relatives, the police officer must not exert force on the prosecutrix to take her away against her wishes. However, if the prosecutrix/victim of her own accord expresses willingness to accompany the police officer/relatives, her consent in writing should be obtained at the spot.

23. In case where the police officer finds the victim/prosecutrix to be a 'minor', soon after recovery, she should be produced before the local Child Welfare Committee for further decision regarding

her custody. She must not be made to stay in the Police Station during night hours.

24. Statement of the prosecutrix u/s 164 Cr.P.C. must be recorded at the earliest.

25. MHA/Central Govt/Commissioner of Police must frame suitable guidelines for police officers to render all suitable assistance. The failure to adhere to the rules/guidelines should render the police officer liable for departmental action as well as contempt of the Court.

26. The public prosecutor should provide required assistance to the police officer visiting his State at the time of seeking transit remand.

27. The MHA/State Government should circulate the Rules/Guidelines/Notifications etc from time to time to the Police officers in the State to create awareness. Periodically training should be provided to the Police Officers to sensitize them.

28. Instructions/Guidelines of similar nature should exist in all the States/UTs for speedy, smooth and effective inter-State investigation.

29. The delinquent Police Officer can be directed to pay compensation under the public law and by way of strict liability."

54. In the present case, the arrest of appellant was made in a most casual and cursory manner without following due procedure. It is not disclosed as to what time and by whom the appellant was arrested. Further, there is nothing on record to show whether, before and after the arrest, any information was provided to local authorities of Chandigarh Administration or not. Even an arrest memo was not prepared. Thus, in view of the law laid down by Supreme Court in the case of **D.K.Basu Vs. Union of India (1997) 1 SCC 416** and Division Bench of Delhi High Court in the case of **Sandeep Kumar (supra)**, the arrest of the appellant appears to be illegal.

55. In the case of **Rammi alias Rameshar Vs. State of M.P.(1999) 8 SCC 649**, the Apex Court declined to place reliance on the information furnished by the accused as being basis of the recovery as there appeared material discrepancy between the testimony of the eye witnesses and the I.O. regarding the time when the accused was taken into custody.

56. In the present case, as there is no clear evidence as to when and from where the accused-appellant was arrested whereas the place from where the recovery of clothes etc. was made was already a dug out pit, we are not inclined to accept the information provided by the appellant as the basis of the recovery alleged or that it was made on the pointing out of the appellant.

57. Further, since the recovery of clothes of appellant and deceased was allegedly made on 3.3.2021 from the same pit from where a day before(i.e. on 2.3.2021), dead body of the deceased was recovered, in our view, the evidence that it was recovered at the instance of the appellant is not worthy of acceptance.

CIRCUMSTANCE NO.7 AND 8 RELIED BY PROSECUTION:

58. The next circumstance relied by the prosecution are the FSL reports which show presence of human sperm on the underwear, lower and used condom recovered by the field unit team. The other FSL report relied is in resect of presence male allele found on vaginal slide, vaginal swab, piece of cloth plus hair of the victim.

There is also FSL report with regard to the DNA match of the biological material found on the lower with that of the deceased. In so far as presence of human sperm in condom, lower and under wear is concerned, there is no satisfactory evidence as to whose garments or used condom they were. Further, there is no DNA match report that the sperm had origin in the appellant. Notably, the prosecution does not dispute that in the past other family members resided there. Therefore, in our view , the same is not a clinching circumstance as against the appellant. In so far as presence of male allele on vaginal slide, swab, etc. are concerned even though a DNA match may not have proved that it related to the appellant but it does corroborate the medical report in respect of rape of the victim. In so far as DNA of the biological material found on the lower matching with the deceased is concerned, it cannot be taken as a clinching circumstance against the appellant as it has not been proved satisfactorily that it was appellant's lower and nobody else's.

AGE OF THE DECEASED

59. According to PW-1 (father of the deceased) and PW-2 (mother of the deceased), the deceased was below 12 years of age. During cross-examination, accused-appellant did not contradict the age of the deceased as given by her parents (PW-1 and PW-2). Raj Kumar Singh Raghav (PW-10), the Principal of Primary School, Siraura, Anoopshahar, District Bulandshahar, where the deceased was a student of Class-V, on the basis of record, proved the date of birth of the deceased as 4.5.2010. PW-10 produced the transfer certificate of the deceased issued by the School which was marked Ext. Ka-17. The prosecution thus succeeded in proving that the deceased was a student of Class-V and her date of birth is 4.5.2010. As the date of incident is 25.2.2021, therefore, at the time of incident the age of the deceased would be around 10 years 9 months 21 days. We therefore hold that the deceased was below the age of 12 years on the date of the incident.

DOCTOR'S TESTIMONY

60. According to the Doctor Kirti (PW-6), who proved the post mortem report of the deceased and also did her gynaecological examination, there was tear in labia majora of the deceased at 3 0' Clock position and blood had clotted. PW-6 stated that margin of labia majora was edematous. During cross-examination, PW-6 (Dr. Kirti) accepted the possibility of rape of the deceased. On a question put by the Court, PW-6 stated that the deceased might have been subjected to sexual assault. Further, the presence of allele of male origin in the vaginal smear slide and swab confirm that the deceased was sexually assaulted. We are therefore of the view that before her murder the deceased was subjected to penetrative sexual assault.

61. From the discussion made above, following facts emerge:

(a) On 25.2.2021 at about 4.00 PM deceased entered the house of the appellant to have water and was not seen alive thereafter. Later, on 2.3.2021 her dead body, in a naked condition, was found buried in a pit inside the house of the appellant.

(b) On 25.2.2021 and 26.2.2021 appellant was present in that house and except the appellant, no other member of his family was present in that house on 25.2.2021 and 26.2.2021.

(c) On 26.2.2021, the appellant was noticed in that house by PW-1 with a scratch mark on his neck. Upon query about the girl (the deceased), the appellant appeared nervous and thereafter he escaped.

(d) On 02.03.2021, the body of the deceased was dug out from a pit inside the house. The loose surface of the soil suggested that the pit was recently dug to bury the body.

(e) The autopsy and medical evidence confirmed rape and murder of the deceased on or about 6 to 7 days before the autopsy (i.e. 02.03.2021) which suggests that the deceased was raped and murdered on or about 25.02.202, that is the day when she entered the house of the appellant to have water.

(f) The appellant gave no explanation either in respect of recovery of the body from his house or in respect of involvement of any other person. He also did not deny his presence in the house on 25.02.2021 or on 26.02.2021. The appellant also gave no explanation as to the reason for his implication or about his enmity with the prosecution witnesses so as to demonstrate that it is a case of false implication.

62. When all the above-mentioned proven circumstances are put together, in our view, they form a chain of circumstances so complete that they conclusively point towards the guilt of the appellant and rule out any other hypothesis consistent with his innocence. Thus, in our considered view, the only conclusion hypothesis that can be drawn from these proven circumstance is that it was the appellant who, after committing rape of the deceased, committed her murder and hid her dead body by burying it in a pit of his house.

OFFENCE UNDER POCSO ACT.

63. Penetrative sexual assault is defined in Section 3 of POCSO Act, which runs as follows:

"**3. Penetrative sexual assault**.-A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

63. As we have found the deceased to be a child within the meaning of Section 2 (I)(d) of POCSO Act, the appellant is held guilty of the offence of penetrative sexual assault of a child. According to Section 5(m) of POCSO Act, whoever commits penetrative sexual assault on a child below 12 years then he will be deemed to commit an offence of aggravated penetrative sexual assault and would be punished under Section 6 of POCSO Act. In the present case, the post mortem report (Ext.Ka-5 of the deceased) and statement of Dr. Kirti (PW-6) clearly suggests that the death of the deceased was committed by strangulation and she was subjected to sexual assault. The condition of vagina and labia majora (tear at 3 0'Clock) as well as presence of male allele in the vaginal smear

and vaginal swab of the deceased clearly suggests that the accused committed penetrative sexual assault on the deceased before her murder and as the age of the girl (the deceased) was below 12 years, the appellant committed the offence of aggravated penetrative sexual assault punishable under Section 6 of POCSO Act.

64. As there was rape of woman below 12 years of age, Section 376-AB IPC also gets attracted. Section 376-AB IPC reads as under:

"376-AB. Punishment for rape on woman under twelve years of age.--Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim."

65. Thus, in our considered view, trial court rightly convicted the appellant under Sections 302, 376 AB, 201 IPC and Section 6 POCSO Act but as there was no commission of offence of kidnapping inasmuch as the deceased on her own entered the house of the appellant, the trial court rightly acquitted him of the charge of offence punishable under Section 363 IPC.

66. As we uphold the conviction of appellant both under Section 376 AB IPC and Section 6 of POCSO Act, under Section 42 of POCSO Act, the appellant may either be punished under Section 6 of POCSO Act or under Section 376 AB IPC , dependent on which one provides for greater punishment.

67. According to Section 42 of the POCSO Act, if an accused is found guilty of an offence punishable under Section 376-AB IPC and also under the provisions of POCSO Act, he is to be punished either under POCSO Act or under IPC, whichever provides greater punishment. Section 42 of POCSO Act is extracted below:

"42. **Alternate punishment**.-Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, ** [376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], ***376E, section 509 of the Indian Penal Code or section 67B of the Information Technology Act, 2000, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."

68. From a bare reading Section 42 of the POCSO Act it is clear the appellant may be punished either under Section 6 of POCSO Act (punishment for aggravated penetrative sexual assault) or under Section 376-AB IPC, dependent on whichever provides for a greater punishment.

69. Punishment for aggravated penetrative sexual assault has been provided under Section 6 of POCSO Act as follows:

"6. ***(1)Punishment for aggravated penetrative sexual assault.****--Whoever*

commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section(1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

70. A comparative reading of Section 6 of POCSO Act and Section 376-AB of IPC would reveal that the punishment provided therein is at par with each other . Under both the Sections, the minimum sentence is 20 years which may be extended to imprisonment for life, which means remainder of offender's natural life, and with fine or with death.

71. As the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) is a Special Act, in our view, if the punishment provided under POCSO Act and the Indian Penal Code is the same then being a Special Act, it would be appropriate that the accused is punished under the provisions of POCSO Act. We therefore hold that the appellant is to be sentenced under Section 6 of POCSO Act instead of Section 376-AB IPC in addition to other offences for which he has been held guilty.

QUESTION OF SENTENCE:

72. The present case is based on circumstantial evidence. Though learned counsel for the appellant vehemently argued that in a case based on circumstantial evidence death penalty should not be awarded but the law is now settled that even a case based on circumstantial evidence, death penalty can be awarded. In the case of **Sudam alias Rahul Kaniram Jadhav Vs. State of Maharashtra reported in (2019) 9 SCC 388**, a three-Juge Bench of the Supreme Court in paragraph 19.1 observed as under:

"At this juncture, it must be noted that though it may be a relevant consideration in sentencing that the evidence in a given case is circumstantial in nature, there is no bar on the award of the death sentence in cases based upon such evidence (see Swamy Shraddananda v. State of Karnataka, (2007) 12 SCC 288; Ramesh v. State of Rajasthan, (2011) 3 SCC 685)."

Similar view has been reiterated in another three-judge Bench decision of the Supreme Court in the case of **Shatrughan Baban Meshram Vs. State of Maharashtra, (2021) SCC 596**.

73. In view of the decisions noticed above, we find no force in the argument advanced by learned defence counsel that the appellant cannot be awarded death penalty as the case is based on circumstantial evidence.

74. Now we shall consider whether it is a case in which death penalty is warranted or not ?.

75. It is settled that the death penalty is an exception and it can only be awarded in the rarest of rare cases. The Constitution Bench of the Apex Court in the case of **Bachan Singh Vs. State of Punjab** reported in **1980 (2) SCC 684** took notice of certain aggravating circumstances on the basis of which death penalty may be awarded. These were as follows:

"202. xxxxxxxxxxxxxxxxxxx,

Aggravating circumstances : A Court may, however, in the following cases

impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if. the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed – 3

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

Thereafter, in paragraph 204, it took notice of certain mitigating circumstances on the basis of which death penalty may be commuted to imprisonment for life. These were as follows:

"204. xxxxxxxxxx

Mitigating circumstances:- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct."

In **Shatrughan Baban Meshram's case (supra)**, the Supreme Court observed that while awarding death sentence, the mitigating and the aggravating circumstances have to be balanced but in the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play.

76. In the present case, the aggravating circumstances against the appellant are:

(i) The appellant committed rape and murder of a minor girl aged below 12 years.

(ii) The deceased was not only a minor girl, below 12 years, but was not totally fit as she used to stammer.

(iii) The appellant exploited the situation of deceased entering the house for water.

(iv) After committing the rape and murder, the appellant buried the body in a pit inside his house to remove the evidence of crime.

77. The mitigating circumstances in favour of the appellant are as follows:

(i) The appellant is a young man aged about 26 years.

(ii) He is not a habitual offender and there is no other case to his credit except the present one.

(iii)There are chances of him being reformed as there is no material on record to suggest that the appellant cannot be reformed or that he is likely to commit offence of the nature under consideration in their appeal.

78. A perusal of the impugned judgement would reflect that the trial court did not consider the mitigating circumstances in favour of appellant while awarding death penalty. Trial court merely considered the aggravating circumstances while awarding death penalty to the appellant. The trial court convicted the appellant on 14.7.2021 and next day i.e. 15.7.2021 awarded him death penalty.

79. Recently, in **Pappu Vs. The State of Uttar Pradesh (supra)** a three-Judge Bench of the Apex Court deprecated such practice while observing as under:

"42. It could at once be noticed that both the Trial Court as also the High Court have taken the abhorrent nature of crime alone to be the decisive factor for awarding death sentence in the present case. As noticed, the Trial Court convicted the appellant on 07.12.2016 and on the next day, proceeded to award the sentence. The impugned sentencing order of the Trial Court does not indicate if the appellant was extended reasonable opportunity to make out a case of mitigating circumstances by bringing relevant material on record. The sentencing order also fails to satisfy if the Trial Court consciously pondered over the mitigating factors before finding it to be a "rarest of rare' case. The approach of the Trial Court had been that the accused-appellant was about 33-34 years of age at the time of occurrence and was supposed to be sensible. The Trial Court would observe that "if such heinous crime is committed by him, it is not justifiable to show any sort of mercy in the punishment.' The High Court though has made rather intense comments on the menace of rape and brutal murder of children as also on the society's abhorrence of such crime but has, thereafter, proceeded to confirm the death sentence with a cursory observation that there were no substantial mitigating factors and the aggravating circumstances were aplenty.

42.1. In other words, the impugned orders awarding and confirming death sentence could only be said to be of assumptive conclusions, where it has been assumed that death sentence has to be awarded because of the ghastly crime and its abhorrent nature. The tests and the norms laid down in the relevant decisions commencing from those in Bachan Singh (supra) seem not to have acquired the requisite attention of the Trial Court and the High Court. It would have been immensely useful and pertinent if the High Court, while taking up the question of confirmation of death sentence and making several comments in regard to the abhorrent nature of crime and its repulsive impact on society, would have also given due consideration to the equally relevant aspect pertaining to mitigating factors before arriving at a conclusion that option of any other punishment than the capital

one was foreclosed. The approach of the Trial Court and the High Court in this matter while awarding sentence could only be disapproved; and we do so in no uncertain terms."

80. In the present case, no doubt the offence committed by the appellant was henious in nature and the manner in which it was committed shows depravity but at the same time it is noticed that appellant is a young man with no criminal antecedents and there is nothing on record to rule out the possibility of his reformation and rehabilitation, in our view, therefore, it would be just and proper to award him life imprisonment instead of death sentence. Accordingly, we commute the death penalty awarded by trial court to life imprisonment.

81. The present appeal is thus allowed in part. The death sentence awarded to the appellant is commuted to life imprisonment. The reference to confirm the death penalty is answered in negative. We modify the sentence awarded by the trial court to the appellant under Section 302 IPC and Section 6 of POCSO Act, as follows:

(a)Life imprisonment under Section 302 IPC.

(b)Life imprisonment under Section 6 POCSO Act.

82. Subject to above, the other sentences awarded to the appellant by the trial court including the amount of fine and default sentence will remain intact. The sentence and punishment awarded to appellant under Section 201 IPC is confirmed.

83. Let a copy of this order/judgment and the original record of the lower court be transmitted to the trial court concerned forthwith for necessary information and compliance. The office is further directed to enter the judgment in compliance register maintained for the purpose of the Court.

(2022)07ILR A145
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.07.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Crl. Appel. No. 381 of 2016

Heera Lal & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Saurabh Srivastava, Maneesh Kumar Singh, Navita Sharma, Sheo Prakash Singh, Vimal Srivastava

Counsel for the Respondents:
Govt. Advocate, Amitabh Tripathi

(A) Criminal Law - Indian Penal Code, 1860 - Sections 147, 364, 302/149 & 201 - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Sections 2/3 - The Code of criminal procedure, 1973 - Section 157 - mere delay in sending the FIR to the Magistrate in compliance of Section 157 of Cr.P.C cannot be a good ground for acquittal of the accused -Delay in giving the FIR by itself cannot be a ground to doubt the prosecution case - Circumstantial evidence – "last seen together" - while dealing with circumstantial evidence - onus is on the prosecution to prove that the chain is complete - infirmity of lacuna in prosecution cannot be cured by false defense or plea. (Para -34,39,42)

Case rests on circumstantial evidence - convict/appellant convicted - murder of

daughter of informant P.W.1 (victim ''x') - on testimonies of the informant (P.W.1), his wife (PW-2) and (P.W.3), who are the father, mother and uncle (fufa), respectively, of the deceased - Inordinate and unexplained delay of two days in lodging of F.I.R. – no evidence of causing death .**(Para - 32,33,41,45,)**

(B) Evidence Law - Indian Evidence Act, 1872 - Section 106 - Burden of proofing fact especially within knowledge - burden on convict/appellant to explain injuries on the body of deceased - convict/appellant rightly convicted by trial court for murder of daughter of informant (victim ''x'). **(Para - 48,)**

(C) Criminal Law jurisprudence - distinction between related and interested witness - witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim - witness may be called "interested" - only when he or she derives some benefit from the result of a litigation in the decree in a civil case - or in seeing an accused person punished.(Para -53)

HELD:-Prosecution successfully established that the convicts/appellants committed murder of the victim is based on unimpeachable evidence of ''last seen' supported by medical evidence and the conduct of the appellants themselves prior to and soon after the incident.**(Para - 50,57)**

Appeal dismissed. (E-7)

List of Cases cited:-

1. Bhupinder Sharma Vs St. of H.P., (2003) 8 SCC 551

2. Nipun Saxena & anrs. Vs U.O.I. & ors., 2018 SCC Online 2772

3. Tara Singh & ors. Vs St. of Punj., AIR 1991 SC 63

4. St. of H.P. Vs Gian Chand , AIR 2001(1) SC 2075

5. Ombir Singh Vs St. of U.P. & anr., (Criminal Appeal No.982 of 2011)

6. Sharad Birdhichand Sarda Vs St. of Mah., AIR 1984 SC 1622

7. Ravi Vs St. of Karn. , AIR 2018 SC 2744

8. Mohibur Rahman Vs St. of Assam , (2002) 6 SCC 715

9. Malleshappa Vs St. of Karn. , (2007) 13 SCC 399

10. Sudhakar Vs St., (2018) 5 SCC 435

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

(1) Two accused persons, **Heera Lal** and **Vrindavan**, were tried by the Special Judge, Gangster Act/Additional Sessions Judge, Court No.5, Raebareli in Sessions Trial No.467 of 2012: *State of U.P. Vs. Heera Lal and anothe*r, arising out of Case Crime No.20 of 2008 under Sections 147, 364, 302/149, 201 I.P.C. and Sections 2/3 of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Khiro, District Raebareli.

(2) Vide judgment and order dated 24.02.2016, the Special Judge, Gangster Act/Additional Sessions Judge, Court No.5, Raebareli acquitted accused/appellants under Sections 2/3 of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 (hereinafter referred to as "Gangster Act") and convicted and sentenced them in the manner as stated hereinbelow:-

(i) Under Section 302 read with Section 149 I.P.C. to undergo life imprisonment and fine of Rs.10,000/- each. In default of fine to undergo additional three months imprisonment.

(ii) Under Section 364 I.P.C. to undergo ten years rigorous imprisonment

and fine of Rs.3,000/- each. In default of fine to undergo additional one month imprisonment.

(iii) Under Section 201 I.P.C. to undergo three years imprisonment and fine of Rs.1,000/-. In default of fine, to undergo additional ten days imprisonment.

(iv) Under Section 147 I.P.C. to undergo one year imprisonment.

All the sentences were directed to run concurrently and the period of incarceration of the accused persons was directed to be set off against the sentence of imprisonment.

(3) Aggrieved with their aforesaid conviction and sentence, the convicts/appellants, **Heera Lal** and **Vrindavan** preferred the instant appeal before this Court.

(4) It is pertinent to mention that during pendency of the instant appeal, convict/appellant no.2-Vrindavan died, hence, the instant appeal filed on his behalf was ordered to be abated vide order dated 24.03.2022. Now the instant appeal survives only against convict/appellant No.1-Heera Lal.

(5) In view of the judgments of the Apex Court in ***Bhupinder Sharma vs. State of Himachal Pradesh : (2003) 8 SCC 551 and Nipun Saxena and anothers vs. Union of India and others : 2018 SCC Online 2772***, the name of the victim is not being mentioned and transcribed her as victim 'x' in the judgment hereinafter.

(6) At the first instance, application dated 07.02.2008 (Ext. Ka. 2) was moved by the informant Shyam Lal (P.W.1) before the Station House Officer, Police Station Khiro, District Raebareli to the effect that he is the resident of Village Pure Durgin Ka Purwa, Police Station Khiro, District Raebareli. In the evening of about 03:00 O'clock on 05.02.2008, his daughter (victim "x') aged about 5 years, while playing, went towards the house of his neighbour Vrindavan (convict/appellant No.2). After that, his daughter (victim "x') could not be traced despite of search in village and nearby areas. It has been alleged that the son of his brother Ganga Prasad, namely, Avadhesh was murdered one year ago by the family members of Ganga Dhar, against whom legal action was initiated. Therefore, he apprehended that due to the said enmity, these people picked up his daughter (victim "x').

(7) The informant Shyam Lal (P.W.1) got the aforesaid written report (Ext. Ka.2) scribed by his nephew Gyanendra outside the police station Khiro, who after scribing, read it over to him and after that informant put his signature on it and then proceeded to Police Station Khiro, District Raebareli and lodged the same.

(8) The evidence of P.W.6-Constable Brij Kishore Rawat shows that on 07.02.2008, he was posted as Constable Moharrir at Police Station Khiro, District Raebareli. On the basis of written report submitted by the informant Shyam Lal (P.W.1), he prepared Chik F.I.R. No. 07/08 and registered the case as Case Crime No. 20 of 2008, under Section 364 I.P.C. He proved the Chik F.I.R. (Ext. Ka. 9) and G.D. (Ext.Ka. 10).

(9) A perusal of the chik FIR shows that the distance between the place of incident and Police Station Khiro was 15 kilometers. It is significant to mention that a perusal of the chik FIR also shows that on its basis, a case crime no. 20 of 2008, under

Section 364 I.P.C. was registered against the family members of Gangadhar, resident of Village Durgin Ka Purwa, Police Station Khiro, District Raebareli.

(10) Thereafter, on 08.02.2008, informant, Shyam Lal (P.W.1) had filed another application/written report (Ext.Ka.1) at Police Station Khiro, District Raebareli, informing that on 07.02.2008 he gave information about the missing of his daughter (victim 'x'). However, on 08.02.2008, in the morning at about 6-6:15 A.M., his wife Smt. Dhanawati (P.W.2) and his niece Milana daughter of Shiv Shankar Yadav came and told him, family members and relatives that his neighbours Heera Lal Yadav (convict/appellant no.1) s/o Triloki, Anil Kumar Yadav s/o Shakun Chandra Yadav, Resu d/o Prem Candra Yadav, Urmila and Vrindavan Yadav (convict/appellant no.2) went towards an under construction house of Prabhudei (D.W.1) wife of Gaya Prasad Yadav while carrying white sack, which seemed to be heavy and full. On this information, he (P.W.1), his brother Ganga Prasad, Sri Lal and his relatives Dev Narayan Yadav (P.W.3), Awadh Pal and Gyanendra Kumar Yadav (who transcribed the written report Ext. Ka.2) ran to the under construction house of Prabhudei (D.W.1) and saw that aforesaid accused persons were hiding the white sack in the under construction house of Prabhudei (D.W.1). Thereafter, Heera Lal Yadav (convict/appellant no.1) and Urmila were caught on the spot, whereas accused Anil Kumar Yadav and Resu fled away from there. Thereafter, when they opened the sack, they found the corpse of his daughter (victim "x'). On hue and cry, the police personnel present in the village reached at the place of occurrence.

(11) The evidence of P.W.8-S.I. Karunesh Singh shows that on 08.02.2008, he was posted as Constable Maharir at Police Station Khiro District Raebareli. On the said date at 7:15 A.M., the informant (Shyam Lal Yadav P.W.1) of Case Crime No. 20 of 2008 under Section 364 I.P.C. came at Police Station Khiro District Raebareli and submitted an application regarding the corpse of his missing daughter (victim 'x') and also about catching the accused persons. On the aforesaid written report (Ext. Ka.1), Sections 147, 302, 201, 120B I.P.C. were added in Case Crime No. 20 of 2008.

(12) The evidence of P.W.5, S.I. Raj Pal Singh shows that on 03.03.2007, he was posted as Principal Writer at Police Station Khiro District Raebareli. On the said date, on the basis of written report of Shri Ganga Prasad, chik No.14 of 2007, Crime No.43 of 2007 under Sections 302/201 I.P.C. was lodged at 11:15 A.M. against accused persons Anil Kumar, Vrindavan and Prem Chandra. He proved the said F.I.R. (Ext. Ka-7) and concerned G.D. (Ext. Ka-8).

(13) The investigation of the case was conducted by P.W.10 S.I. Rakesh Pratap Singh, who in his examination-in-chief, had deposed before the trial Court that on 07.02.2008, he was posted as Station House Officer at Police Station Khiro District Raebareli. On 07.02.2008, he started the investigation of Case Crime No.20 of 2018, under Section 364 I.P.C. On 07.02.2008, he recorded the statements of informant, Shyam Lal (P.W.1), his wife Smt. Dhanawati (P.W.2) and also inspected the place of occurrence and prepared the site plan (Ext. Ka-17).

P.W.10 had further deposed that on 08.02.2008, when the informant Shyam Lal (P.W.1) submitted an application regarding the corpse of his daughter (victim 'x') and caught hold of Heera Lal Yadav (convict/appellant no.1), Vrindavan Yadav (convict/appellant no.2), Kumari Urmila along with a corpse, report No.10 was lodged at Police Station Khiro at 07:15 A.M. After that he went along with S.I. S.N. Pandey (P.W.9), S.I. Radhey Shyam Chaudhary, informant Shyam Lal (P.W.1) and Dev Narayan (P.W.3) at the place of occurrence and found the corpse inside the sack. At the place of occurrence, family members of the informant, namely, Awadh Pal Yadav, Sri Lal, Constable Nawal Singh, Constable Ramteerath, Hira Lal Yadav (convict/appellant no.1), Vrindavan Yadav (convict/appellant no.2), Km. Urmila Yadav and some other villagers were also present. Thereafter, he directed S.I. S.N. Pandey (P.W.9) to conduct panchayatnama in accordance with law.

P.W.10 had further deposed that the proceeding to conduct panchaytnama of the corpse was started at 10 A.M. and ended at 11:30 A.M. Thereafter, Heera Lal Yadav, Vrindavan Yadav and Km. Urmila were taken into custody and sent along with S.I. Radhey Shyam Chaudhary, Constable Nawal Singh and Ramteerath to Police Station Khiro. He seized blood-stained plastic sack and prepared the recovery memo (Ext. Ka-5) and also collected blood soaked and plain soil from the spot and prepared recovery memo (Ext. Ka-4). After that, he reached the Police Station Khiro and recorded the statement of the accused Kumari Urmila, Heera Lal (convict/appellant no.1) and Vrindavan (convict/appellant no.2) under Section 161 Cr.P.C. On 09.02.2008, he recorded additional statement of the informant and inspected the place of occurrence on pointing out of informant and prepared the site plan (Ext. Ka-19). On the same day, he also recorded the statement of Dhanawati (P.W.2) and Km. Milana. On the information of an informer, he arrested the accused Ganga Dhar Yadav at 3:40 P.M. from Paho Tiraha. After that investigation of the case was conducted by S.I. Saroj Kumar Singh (P.W.11). In cross-examination, P.W.10 had deposed that on 07.02.2008, the F.I.R. of the incident was lodged in his presence. He denied that informant Shyam Lal (P.W.1) did not tell him in his statement recorded under Section 161 Cr.P.C. that accused Urmila had called his daughter by showing plums (ber). He further deposed that when he reached at the place of the incident, he found that several thatches were put on fire but he did not record statement of anyone to know how, when and who had set fire on the thatches. He did not see anyone dousing the fire. He did not mention the factum of fire in the investigation proceedings. However, he mentioned in the case diary that he informed the Fire Brigade for dousing the fire. He further deposed that he did not mention in the site plan, about the fire. The first site plan was prepared by him on 07.02.2008 when he searched the house of the accused, however, he did not find anything therein. He further deposed that during search, none of the accused tried to escape and the search was made in the presence of the accused. He searched the house of the accused on his own and neither informant nor his wife nor any witness had told him that accused persons had kept the victim "x' there after kidnapping. On 07.02.2008, he did not search the house of Prabhudei (DW 1). On 08.02.2008, he sent the corpse of deceased (victim "x') for postmortem examination at about 11:30 P.M.

P.W.10 had further deposed that he did not record the statement of Constable Ramteerath and Constable Nawal Singh, however, he deputed them to search for the victim "x'. He further deposed that

investigation of the case was with him for about ten days, during this period, he did not record the statement of any of the Constable mentioned above. Neither of these Constables informed him about the incident or corpse of the victim "x'. He denied the suggestion that he did not prepare the recovery memo on spot. He also denied the suggestion that as both the aforesaid Constables did not support the prosecution case, hence he did not record their statements under Section 161 Cr.P.C.

(14) The evidence of P.W.9- Surendra Narayan Pandey shows that on 08.02.2008, he was posted as Chowki In-charge at Semri P.S. Khiro District Raebareli. He conducted the panchayatnama of the corpse of the deceased (victim "x') on the direction of Station House Officer Rakesh Pratap Singh (P.W.10). First of all, he appointed the "panchan' and in their presence, he conducted the "panchayatnama', thereafter he sealed the corpse and sent that for post-mortem examination through Constable Shiv Shankar Yadav and Home Guard Vijay Kumar alongwith necessary documents viz. photo lash (Ext. Ka.14), letter to C.M.O. (Ext. Ka.15), challan lash (Ext. Ka. 16).

In cross-examination, P.W.9 had deposed that when he reached at the place of incident, the thatches were on fire and Station House Officer R.P. Singh (P.W.10) was present there. He further deposed that he did not remember whether R.P. Singh (P.W.10) had prepared memo of fire or not. He deposed that corpse was found from the under construction house of Gaya Prasad. He further deposed that at the time of conducting the "panchayatnama', copy of the F.I.R. was with him. He also deposed that signature of Investigating Officer was not on "panchyatnama' (Ext. Ka.3). He denied the suggestion that "panchayatnama' (Ext. Ka-3) was prepared after due deliberation at police station.

(15) The evidence of P.W.11- Saroj Kumar Singh shows that on 19.02.2008, he was posted as Station House Officer at Police Station Khiro District Raebareli. The investigation of Case Crime No.20 of 2008, under Sections 147, 364, 302, 201, 120B I.P.C. was entrusted to him on transfer of former Investigating Officer R.P. Singh (P.W.10). On 22.02.2008, he took arrested accused persons on police custody remand. On 06.03.2008, he arrested accused Anil Kumar Yadav and also recorded his statement. On 25.04.2008, Gangster Act was imposed upon accused Anil Kumar, Hira Lal and Vrindavan after the recommendation of the higher officials. On 30.04.2008 after recording the statement of witnesses, Awadh Pal, Ganga Prasad, Sri Lal S/o Lala, Shri Devnarayan S/o Suraj Bali, Gyanendra Kumar S/o Ram Pal Yadav, Bablu S/o Rajjo Yadav, Shiv Shankar Yadav, S.I. S.N. Pandey, submitted charge-sheet (Ext. Ka.21) before the Court under Sections 147, 302, 201, 364 and 120-B I.P.C. against accused Urmila D/o Vrindavan, Ganga Dhar S/o Triloki Yadav.

In cross-examination, P.W.11 had deposed that he himself prepared the gang chart. He denied the suggestion that he knowingly gave false evidence.

(16) The evidence of P.W.7- Shiv Kumar Sharma shows that the investigation of Case Crime No.20 of 2008 under Sections 147, 302, 201, 120B, 364 I.P.C. was handed over to him as per orders of Divisional Officer, Division Lucknow, Government of Uttar Pradesh. He started investigation from 18.06.2008. He perused the proceedings conducted by earlier Investigating Officer, Anita Chauhan and

recorded her statement. During the investigation, on 24.10.2008, the statement of Sri Surendra Narayan Pandey, Sub Inspector (P.W.9), Sri Radhey Shyam Chaudhary, Sub Inspector, Constable, Ram Tirath, former Investigating Officer Sri Saroj Kumar Singh (P.W.11) and constable Naval Singh were recorded. On 25.10.2008, the statements of constable Braj Kishore Rawat (P.W.6), informant, Shyam Lal (P.W.1), witness Smt. Dhanawati (P.W.2), Kumari Milana Yadav, witness Shri Ganga Prasad, Shri Dev Narayan Yadav (P.W.3) and Shri Gyanendra Kumar alias Babloo were recorded and on the pointing out of informant, he inspected the kidnapping site and prepared the site plan (Ext. Ka-11). After that statements of witness, Shri Tej Narayan Shukla and Shri Suresh Trivedi and Shri Ram Vilas Yadav of the village were recorded. On 26.10.2008, the statements of witnesses, Shri Rajan Shukla, Smt. Kamala @ Mantrani, Shri Ram Manohar, Smt. Prabhudei (D.W.1) and Kumari Bina alias Vithalla and Shri Anil Kumar Yadav and Shri Surya Narayan Yadav were recorded.

P.W.7 further deposed that on 28.03.2009, a warrant under Section 55 Cr.P.C. was issued against the wanted accused Kumari Reshu. On 09.04.2009, the permission of the Superintendent of Police was obtained to submit the charge sheet under the U.P. Gangster Act, the details of which were mentioned by him in C.D. and submitted the charge sheet No. 7 of 2009 (Ext. Ka.12), under Sections 147, 302, 201, 364 I.P.C. and 2/3 of U.P. Gangster Act against the accused Heeralal Yadav (appellant no.1), Vrindavan Yadav (appellant no.2), Anil Kumar Yadav in the Court.

In cross-examination, P.W.7 had deposed that former Investigating Officer also, had prepared two site plans; first site plan was related to the place from where the victim "x' was Kidnapped; and second site plan was related to the place from where she was recovered. He (P.W.7) did not prepare the site plan of the place from where the victim "x' was recovered. However, he prepared a separate site plan of the place from where the victim "x' was kidnapped because he found some difference about the place of occurrence and site plan.

(17) The post-mortem examination of the corpse of the deceased was conducted on 08.02.2008 at about 4:30 P.M. at District Hospital, Raebareli by P.W.4- Dr. Arvind Kumar, who found the following ante-mortem injuries on the dead body of the deceased (victim "x').

"Ante-mortem injuries of the deceased (victim ''x')

1. Contused swelling 4 cm x 4 cm on the (Lt.) side of head, about 5 cm above the (Lt.) Ear, on palpation underlying bone fractured.

2. L.W. 1 cm x 0.5 cm x muscle deep on the (Rt.) sub- mandibular region.

3. L.W. 3 cm x 1 cm on the (Lt.) side of chest, just above the sternal notch.

4. Abraded contusion 6 cm x 4 cm on the upper part of chest below the sternal notch.

5. Abraded contusion 3 cm x 2 cm on the (Lt.) knee.

6. Blood & Blood clots are present over the back."

The cause of death spelt out in the autopsy report of the deceased (victim "x') was shock and haemorrhage as a result of ante-mortem injuries.

(18) It is significant to mention here that P.W.4-Dr. Arvind Kumar has mentioned the

aforesaid cause of death of the deceased/victim "x' in his statement before the trial Court. He has stated that deceased/victim "x' was aged about 05 years and the probable time of her death was approximately 2½ days ago. He further deposed that on external examination of the corpse of the deceased/victim "x', he found that the corpse was of normal stature and after death, 'rigor mortis' was passed away from the upper and lower parts; the eyes were closed and swollen; the mouth was half open; blood stains were present on the face; soil and straw were present on the body of the corpse; and there was froth of blood from both nostrils and mouth. He further deposed that on internal examination, he found that the brain membrane on the left was torn in the parietal region; the brain on the left was torn; 100 ML blood and blood clots were found in the cranial cavity; there was about 100 ML of undigested food inside the stomach; the gall bladder was half full; and uterus was empty. He proved the post-mortem report (Ext. Ka. 6).

In cross-examination, P.W.4 had deposed that no cut or cut mark was present on the body of the deceased/victim "x'. All the injuries of the deceased were caused by some hard and blunt object. He accepted the suggestion that if someone falls on a hard object, then such injuries could be attributable. He deposed that though he told that injuries were 2½ day's old but considering the nature of the injuries, it could be possible that injuries were caused 10 hours back (i.e. 10 hours ahead of post-mortem examination)

(19) The case was committed to the Court of Sessions on 05.09.2008. After getting gang-chart (Ext.Ka.20) approved as per law, P.W.11 Sri Saroj Kumar Singh had filed a charge-sheet under Sections 147, 302, 201, 364 I.P.C. and Sections 2/3 of Gangster Act against Heera Lal, Vrindavan and Anil Kumar on 09.04.2009, upon which the Court took cognizance on 02.05.2009. As accused Anil Kumar was juvenile, hence his trial was separated and sent to Juvenile Justice Board. On 10.01.2013, the case of accused Km. Urmila was also separated and sent to Juvenile Justice Board. After that a charge-sheet under Sections 147, 302, 201, 364 I.P.C. against accused Km. Reshu was submitted before the Court concerned by P.W.7-Shiv Kumar Sharma and subsequently her trial was separated. On 25.10.2012, the Special Judge, Gangster Act, Court No.5, Raebareli, framed charges against convicts/appellants, Heera Lal and Vrindavan under Sections 147, 302/149, 201 I.P.C. and Sections 2/3 of Gangster Act. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(20) During trial, in all, the prosecution examined eleven witnesses viz. P.W.1-Shyam Lal, the informant of the case and father of the deceased (victim "x'); P.W.2- Smt. Dhanawati, mother of the deceased (victim "x'); P.W.3- Devnarayan, uncle (fufa) of deceased (victim "x'); P.W.4-Dr. Arvind Kumar, who conducted post-mortem of the deceased (victim "x'); P.W.5-S.I. Raj Pal Singh, who was posted as Principal Writer at Police Station Khiro, Raebareli and lodged Chik No. 14/17 on the basis of written report submitted by Sri Ganga Prasad; P.W.6- Constable Braj Kishore Rawat, who lodged chik F.I.R.; P.W.7- Shiv Kumar Sharma, who is the third Investigating Officer of the case; P.W.8- S.I. Karunesh Singh, who was posted as Constable Moharrir and received an application from P.W.1 regarding corpse of his missing daughter (victim 'x') and

requested to arrest the accused persons; P.W.9- Surendra Narayan Pandey, who conducted the panchayatnama proceeding of the corpse of the deceased (victim "x'); P.W.10- S.I. Rakesh Pratap Singh, who is the first Investigating Officer of the present case; P.W.11- Saroj Kumar Singh, who investigated the present case due to transfer of former Investigating Officer R.P. Singh (P.W.10).

(21) After completion of prosecution, statements of convicts/ appellants were recorded under Section 313 Cr.P.C., wherein they denied the prosecution evidence and stated that they have been falsely implicated due to enmity. They examined Prabhudei as D.W.1, in defence.

(22) P.W.1- Shyam Lal, who deposed in his examination-in-chief that deceased (victim "x') was his daughter, who was five years old at the time of incident. The incident is of 5th February, 2008 at 3 P.M. His daughter was plucking plum from a plum tree located in front of his house. Thereafter, Urmila called his daughter and took her to her house. His wife Dhanawati (P.W.2) was feeding the bullocks at the door. He was in Lalganj on that date. On the same day at 3:30 P.M., his wife Dhanawati went to house of Urmila in search of her daughter, then father of Urmila said that her daughter (victim "x') did not come to his house. His (complainant's) wife informed him about the missing of their daughter through telephone when he was at Lalganj. Thereafter, he came to home at 5 P.M. He asked his wife about his daughter, she told that Urmila took his daughter to her house to give plums but she did not come back. Then he, his wife Dhanawati (P.W.2) and his brother went to search out his daughter in the house of Urmila where father of Urmila, Vrindavan (convict/appellant no.2) said that victim "x' did not come to his house. After that Vrindavan (convict/appellant no.2), Heera Lal (convict/appellant no.1) and Urmila picked up a lathi and said that his daughter (victim "x') did not come here and get away from there. On the next day too, he searched his daughter (victim "x') but his daughter (victim "x') was not traceable. Thereafter, when he went to lodge report at the police station about missing of his daughter (victim "x'). The police met him at the Sahajaura hotel and he told whole factum to the police. Thereafter, the policemen asked him to search his daughter (victim "x') and they will go and tell the Inspector at police station. Thereafter, he again searched his daughter (victim "x') on 6th February, 2008 but could not find her. On the next day i.e. on 7th February, 2008, he went to the police station and told the whole factum of the incident to the Inspector. Thereafter, the Inspector told him to write an application about the incident. After that he went outside the police station and got scribed report from his nephew, who after scribing read it over to him and after that he signed on it and reached police station and lodge F.I.R..

P.W.1 had further deposed that, on 08.02.2008, at 06:00-6:15 A.M. his wife Dhanawati (P.W.2) and niece Milana were returning after attending the call of nature and when they reached near the under construction house of Prabhudei (D.W.1), they saw that Vrindavan, Heera, Urmila, Reshu and Anil were holding a white sack and coming towards the house of Prabhudei (D.W.1). After that, his wife and niece came home and told him that the aforesaid accused persons were bringing a loaded sack. Thereafter, he, his brother Ganga Prasad, Srilal and his relatives, who had

come to his house after knowing about the incident, ran towards the house of Prabhudei (D.W.1) and saw that the accused persons were hiding a sack in a wall. On seeing them, all the accused persons got amazed and Reshu and Anil ran away after pushing Dhanawati (P.W.2). However, they caught Urmila, Heeralal and Vrindavan. When he opened the sack, he saw the corpse of his daughter (victim "x') in the sack and her throat was slit with a knife. They started crying, then, people of his village and two patrolling policemen came there. Thereafter, he went to his house, wherein he got transcribed an application (Ext. Ka. 1) by his nephew Gyanandra and proceeded along with his nephew Gyanendra and Dev Narayan to police station and lodged it. He proved Ext. Ka.1. On it F.I.R. was lodged against the accused persons and a copy of which was also handed over to him. Thereafter, he went to his house. The police came at the place of the occurrence and conducted "panchyatnama' of the corpse and also made interrogation.

P.W.1 further deposed in his examination-in-Chief that a year before this incident i.e. on 28.02.2007, his nephew was murdered by the family members of the accused. He was also a witness in that case and he did 'pairvi' of the case. On account of this enmity, the accused killed his daughter. The accused Heeralal, Umashankar, Ramesh used to meet at the Chaupal of Gangadhar and threatened him by saying that they have got the accused liberated and now they will teach him a lesson. He deposed that in the murder of his daughter, there was conspiracy of Gangadhar, Umashankar and Ramesh.

In cross-examination, P.W.1- Shyam Lal deposed that apart from the injuries on neck, he also noticed other injuries on the body of his daughter. He further deposed that he could not say, till now as to how many injuries were present on the body of the deceased in total, as he did not see the injuries on the body of the deceased because after completion of "panchayatnama', the dead body was taken away. His wife Dhanawati (P.W.2) and Milana also did not tell him about the injuries. He was upset, so he did not try to see the injuries on the body of the deceased till cremation.

P.W.1 had further deposed that on 07.02.2008, the Inspector had recorded his statement and in that statement he had stated that his daughter, while playing, went missing on 05.02.2008. After the murder of Avadhesh, the women and children of his house and the women and children of the house of Vrindavan did not use to go to the house of each other. His wife did not stop his daughter to go to the house of Urmila when Urmila called his daughter.

P.W.1 had further deposed that fire in the thatch of Vrindavan broke out on the second day of the incident i.e. on 8.2.2008 when the dead body of his daughter was found. The day when the fire broke out, the police came. The police had seen fire on the thatch of Vrindavan. He did not know whether the police had put off the fire or not. He did not even see whether the policemen collected the ashes and remains of the burnt thatch. He further deposed that the policeman brought the dead body of the deceased at police station between 11-12 A.M. and he, Dev Narayan, Ganga Prasad, Shiv Lal and other villagers were also accompanied. He further deposed that the police did not take his signature on the place where the dead body of the deceased was found nor the police took signature of anyone there, nor the police took signature at police station in his presence of anyone.

P.W.1 had further deposed that the police did not bring any sealed items from the place of recovery of the dead body of the deceased. He did not tell who had set

ablaze the thatch of the accused. The fire broke out after recovery of the dead body of the deceased and at that time, two patrolling policemen were in the village. On being thrashed by crowd, Gangadhar sustained injuries and he saw those injuries on the person of Gangadhar but he did not know, whether the police took Gangadhar for medical examination or not. He further deposed that there was no knife or weapon in the sack. The sack was of fertilizer, white in colour. He saw the sack. During investigation, he did not bring the Inspector to the house of Urmila but he brought the Inspector to the place where the dead body of the deceased was found. When the dead body of the deceased was found in the house of Prabhudei (D.W.1), Prabhudei (D.W.1) was at her house. He had no enmity with Pradbhudei (D.W.1). He further deposed that the house of Gaya Prasad was adjacent to the place where the dead body of the deceased was found. His house was on northern side of the house of Gaya Prasad and the house of Prem Chandra was on the eastern side of the house of Gaya Prasad. The house of Vrindavan was on the western side of the house of Gaya Prasad. There was no house on the southern direction of the house of Vrindavan but the field of Gaya Prasad was there on the southern direction of the house of Vrindavan. The under constructed house of Prabudei (D.W.1) was on the eastern direction of the house of Vrindavan. The house of Prabhudei (D.W.1) was situated in south-north direction and in the middle there was a gallery.

(23) P.W.2- Smt. Dhanawati, who is the wife of P.W.1 and mother of the deceased, deposed in her examination-in-chief that she knew the accused Vrindavan (convict/appellant no.2), Heeralal (convict/appellant no.1), Urmila, Anil, Reshu, Umashankar, Ramesh and Gangadhar. Umashankar is a resident of Thakurain Kheda, whereas Ramesh is from Tekhar and the rest of the accused are of her village Durgin ka Purva and her neighbours. The deceased was her daughter, who was about 5 years old at the time of the incident. On the date of the incident at about 03-3:30 P.M., her daughter (victim "x') was playing at her door and she (P.W.2) was feeding her animals there. There was a plum tree in front of her house. Urmila, who is daughter of accused Vrindavan, came with a long stick (laggi) and plucked the plums from the tree and went towards her house with the plums and from there, she called her daughter after showing the plums. When her daughter moved, she asked her not to go, but her daughter said that she would come in a while and went to the house of Urmila. After 20-25 minutes, when her daughter did not return, she went to house of Urmila while searching her daughter. However, father of Urmila, namely, Vrindavan (convict/appellant no.2) met at his door. She asked him about her daughter, then, Vrindavan started scolding her and told her that her daughter did not come there and after that Vrindavan picked up a danda, on this, she came back. She deposed that on that day, her husband (P.W.1) was not at home but in Lalganj. After getting the information, he (P.W.1) came home at 5-5:30 in the evening, then she told the whole factum to her husband. Thereafter, she and her husband (P.W.1) went to the door of Vrindavan to inquire about their daughter, then, they found accused Vrindavan, Urmila, Ganga Dhar and mother of Urmila at their door and when they asked about their daughter (victim "x') then, they all started fighting and picked up lathi-danda and asked them to get lost from there, and they came back. Thereafter, they

searched their daughter in the field, orchard, well, pond but her daughter could not be traced.

On the next day, her husband went to the police station Khiro to inform about the incident, however, in the way, he found two policemen on the Raula-Sahajaura road. When her husband told those policemen about the girl, policemen said that they would give information to the police station and asked them to go and search their daughter. When on search, from 5th to 7th her daughter could not be traced then on 7th her husband, nephew Gyanendra and relative Devnarayan (P.W.3) went to police station and told the whole factum of the incident to the Inspector at the police station. Her husband got written a report and gave to the Inspector. Thereafter, the policemen asked them to go to their village and they (policemen) would come there. On the next day at 6-6:30 A.M., when she was returning after defecation, then, she saw that Heeralal (convict/appellant no.1), Vrindavan (convict/appellant no.2), Anil, Reshu and Urmila were dragging a heavy white sack from the house of Vrindavan (convict/appellant no.2) towards half-built house of Prabhudei (D.W.1). Thereafter, she rushed from there and told everything to her brother-in-law, husband, nephew, Devendra Kumar etc. On this, they all reached at half-built house of Prabhudei (D.W.1) and saw that all the five persons were keeping the same sack in the house of Prabhudei. On seeing them, the accused were taken aback and tried to run away. However, they caught Vrindavan (convict/appellant no.2), Heeralal (convict/appellant no.1), Urmila, whereas other two people, Reshu and Anil, managed to ran away. At the same time, when they opened the sack, they saw the body of her daughter in the sack. On their noise, some people of village and two policemen had also come on the spot. Her husband went to the police station, leaving the body of her daughter and three arrested accused under the custody of both the constables. About two and a half hours later, the Inspector came on the spot. The "panchayatnama' of the body of the deceased was conducted by policemen. The Inspector took his statement twice; firstly, before the body was found; and secondly, after the body was found. She had shown both the places to the police i.e. where Urmila had called her daughter and the place where the body of her daughter was found. Her daughter had injuries on her neck, head and legs.

P.W.2 further deposed in her examination-in-chief that a year ahead of the incident, Vrindavan (convict/appellant no.2), Anil, Sushil and Prem Chandra had murdered the son of her brother-in-law Avadesh. Her husband used to do 'pairvi' of that case and was also a witness. For the said reason, accused had enmity with them and on account of the said enmity, the accused killed her daughter. He deposed that Umashankar and Ramesh often sitting at the chaupal of Gangadhar Yadav used to ask not to do 'pairvi' of Awadhesh's case and not to spend money and her husband should not do 'pairvi' of the case, otherwise, they will teach her a lesson soon, when she used to pass from there.

In cross-examination, P.W.2 had deposed that the Inspector had recorded her statement on the next date of missing of her daughter. Her husband (P.W.1) came after 1-1½ hours of the missing of her daughter. Before coming of her husband, no report of missing of her daughter was lodged. He had apprehension that accused persons were involved in missing of her daughter. She did not see her daughter going to the house of Urmila but she only saw her daughter going near to Urmila. She did not ask Urmila as to why she called her

daughter. Her daughter used to play there everyday.

P.W.2 had further deposed that after lodging the report, Inspector came at the place of occurrence. The "panchayatnama' of the dead body of her daughter was not conducted in her presence. The sack in which dead body of the deceased was found, was taken away by the Inspector but she was never called by the Inspector at police station regarding any proceeding related to the said sack.

(24) P.W.3- Devnarayan deposed in his examination-in-chief that he is the brother-in-law of Shyam Lal (P.W.1). The daughter of Shyam Lal (P.W.1) was kidnapped about 6 years ago. He also went to the house of Shyam Lal (P.W.1) after getting information about the kidnapping of victim "x'. Other relatives also came to his house. He got information about kidnapping on telephone on 06.02.2008 and then he went to the house of Shyam Lal (P.W.1). On 08.02.2008, he was present at the house of Shyam Lal. On the same day at 6-6:15 A.M., Dhanawati (P.W.2) and Milana told that Vrindavan, Heeralal, Anil Kumar, Kumari Reshu and Urmila were going towards under construction house of Prabhudei (D.W.1) carrying a white sack. On this information, when Shyam Lal (P.W.1), Ganga Prasad, Shri Lal, Dhanawati (P.W.2), Avadhpal reached the house of Prabhudei (D.W.1), the aforesaid accused were hiding the sack there. Thereafter, they caught three people, namely, Heeralal (convict/appellant no.1), Vrindavan (convict/appellant no.2) and Urmila on the spot. Anil and Kumari Reshu fled away from there. When they opened the sack, they saw dead body of daughter of Shayam Lal (P.W.1) in it. When they made hue and cry, the villagers and two policemen also came to the spot. The three people whom they had caught were handed over to the villagers and the policemen. He and Shyam Lal (P.W.1) went to the police station Khiro on a motorcycle. Shyam Lal (P.W.1) had lodged a report about the incident at police station Khiro. By the time they came back from the police station, the police had also arrived on the spot. Accused persons were taken into custody by the police. The police had conducted the "panchayatnama' proceeding of corpse of deceased in front of "Panchan'. He was also one of the "Panchan'. The Inspector had prepared the "panchayatnama' (Ext Ka-3). The deceased (victim "x') had a head injury, a slit throat, injury on her cheek, knees, feet and back. The blood was there on injuries. After the proceeding of "panchayatnama', the dead body of the deceased was sealed in a cloth and sent for post-mortem examination. The Inspector collected the blood soaked and plain soil in two separate containers from half-constructed house of Prabhudei (D.W.1) in his presence. His statement was recorded by the Inspector about two and a half to three months after the incident.

P.W.3-Devnarayan, in cross-examination, had deposed that on 06.02.2008, he got the information of kidnapping on mobile through his relative Shyam Lal (P.W.1) and on this information, he went to the house of Shyam Lal (P.W.1) on 06.02.2008 and during that time, two policemen of the village were present. When the thatch of the accused caught fire, he was not present there as he had gone to the police station. He did not know as to when and how the fire broke up.

(25) D.W.1- Prabhudei w/o Gaya Prasad, in her examination-in-chief, deposed that she had a complete built house and another a half-built house. There is difference of twenty five steps between her two houses. On 07.02.2008, when she went

towards the half-built house in order to get fire wood around eight o'clock in the evening, he saw a hand protruding from a sack. Thereafter, she came outside the said house and made noise, then, Shyam Lal (P.W.1) and women of his house came there by running. Thereafter, Shyam Lal (P.W.1) and his women opened the sack and saw that it was the dead body of their daughter. On the next day, around four o'clock in the morning, the police came and took away the sack and the body from the spot. The Inspector did not ask anything from her.

In her cross-examination, D.W.1-Prabhudei deposed that Heeralal (convict/appellant no.1) and Vrindavan (convict/appellant no.2) were their brothers-in-law. Heeralal, Gaya Prasad, Vrindavan, Gangadhar are the sons of Triloki. She did not know whether Heeralal, Gaya Prasad, Vrindavan and Gangadhar had bequeathed Lala's land or not. She did not even know that Shyam Lal (P.W.1), Ganga Prasad, Srilal had filed a suit in Tehsil for their father's land. When she went to bring wood from under constructed house, then, she saw in the light of a torch a hand protruding from a sack. She denied that she saw the dead body on the next morning at 08:00 O'clock and not in the night. She also denied that when she went to her half-built house at 08:00 O'clock in the morning, she saw the dead body and five men standing near a sack. She also denied that one boy and a girl ran away when the villagers came. He also denied that Heera Lal (convict/appellant no.1), Vrindavan (convict/appellant no.2) and Urmila were caught by Shyam Lal (P.W.1) and his relatives near the sack on the spot.

(26) The learned trial Court believed the evidence of prosecution witnesses and found the appellants, Heera Lal and Vrindavan guilty for the offences punishable under Sections 302 read with Section 149, 364, 201 and 147 I.P.C., and accordingly, convicted and sentenced the appellants in the manner stated in paragraph-2. However, the appellants were acquitted for the offences punishable under Sections 2/3 of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(27) Hence the instant appeal.

(28) Heard Shri Maneesh Kumar Singh, learned counsel for appellant No.1/Heera Lal and Shri Arunendra, learned A.G.A. for the State-respondents. However, Shri Amitabh Tripathi, learned counsel for complainant is not present.

(29) Challenging the impugned judgment and order, the learned counsel for appellant No.1 has argued that:-

(I) There was delay in lodging and sending the FIR to the Magistrate concerned. According to him, it has been alleged in the F.I.R. that the daughter of the informant, P.W.1- Shyam Lal was missing from 05.02.2008 but the F.I.R. of the incident was lodged on 07.02.2008 i.e. after two days from the date of the incident. His submission is that the F.I.R. of the alleged incident was lodged after due deliberations just to implicate the convict/appellant, hence the benefit of doubt in lodging the F.I.R. belatedly ought to be granted to the convict/appellant.

(II) There is no eyewitness of the alleged occurrence and the case rests on circumstantial evidence. His submission is that the circumstances relied on, would not establish continuity in the links of the chain of circumstances to lead to an irresistible conclusion regarding the guilt of the convict/appellant. Thus, the

convict/appellant is entitled to get the benefit of doubt in view of such circumstances and as such, the conviction and sentence awarded is liable to be set aside and he is entitled to be acquitted.

(III) P.W.1- Shyam Lal, P.W.2- Smt. Dhanawati and P.W.3- Devnarayan are highly interested and partisan witnesses as they are father, mother and uncle (fufa), respectively, of the deceased (victim "x'). His submission is that the family members of the deceased were examined as witnesses and they being interested witnesses cannot be relied upon. Furthermore, the prosecution did not examine any independent witness and, therefore, the prosecution has failed to establish its case beyond reasonable doubt.

(IV) The evidence of "last seen' the convict/appellant together with the victim has not been properly appreciated by the trial Court.

(V) The evidence of defense witness D.W.1-Prabhudei has not been properly dealt with by the trial Court and the trial Court erred in disbelieving the evidence of D.W.1- Prabhudei.

(V) The investigation of the case was tainted and the convict/appellant has falsely been implicated in the instant case.

(VI) There was no motive on the part of the convict/appellant to commit the murder of the deceased (victim "x') and the convict/appellant was falsely implicated in the instant case on account of old enmity.

(30) On the other hand, learned Additional Government Advocate while supporting the impugned judgment had argued that

(I) There is no delay in lodging the F.I.R., as the P.W.1- Shyam Lal (informant) has categorically deposed before the trial Court that on the date of the incident i.e. 05.02.2008, he was informed by his wife Smt. Dhanawati (P.W.2) at 5 P.M. that his daughter (victim "x') was not traceable, therefore, he searched his daughter. Inspite of all his efforts, his daughter could not be traced, therefore, on the next day of the incident, he went towards police station Khiro but on the way he met with a policeman, who asked that he should first search his daughter. He searched his daughter again but his daughter could not be traced. Thereafter, on 07.02.2008 he went to the police station again and informed the Inspector. The Inspector asked him to come with proper application. Thereafter he went outside the police station and after getting scribed the written report from his nephew Gyanendra, who after scribing the report read it over to him, put his (complainant's) signature thereon and thereafter lodged the F.I.R. of the incident. Thus delay, if any, in lodging the F.I.R. has properly been explained by the P.W.1- Shyam Lal, therefore, it cannot be said that this ground is fatal one to the prosecution case.

(II) The motive on the part of the convict/appellant has been established as it comes out from the evidence on record that before a year of the incident, nephew of the informant was murdered by the family of the convict/appellant in which the informant was one of the witness and doing pairvi of the case. This fact has also been supported by P.W.2- Smt. Dhanawati, therefore, it cannot be said that there was no motive to the convict/appellant to commit the murder of the victim "x'.

(III) The present case is based on circumstantial evidence and the prosecution has succeeded in establishing every circumstance of the chain of events that would fully support the view that the convict/appellant is guilty of the offence. The trial court has passed the judgment

under appeal, after proper appreciation of evidence, and has come to the right conclusion by means of the impugned judgment and order.

(IV) The plea of the convict/appellant that P.W.1, P.W.2 and P.W.3 are highly interested and partisan witnesses as they are the family members of the deceased victim "x', is not sustainable because these witnesses have proved their presence. Moreso, the convict/appellant was arrested on spot along with sack, from which dead body of the daughter of the informant (victim "x') was recovered.

(V) The medical evidence also corroborates the prosecution case.

(VI) The trial Court, after appreciating the evidence on record, has rightly convicted the appellant by means of the impugned judgment and order. Thus, the instant appeal is liable to be dismissed.

(31) We have considered the arguments of Shri Maneesh Kumar Singh, learned counsel for appellant No.1/Heera Lal and Shri Arunendra, learned A.G.A. for the State-respondents and have carefully gone through the impugned judgment and order of conviction and sentence awarded by the learned trial Court by means of the impugned judgment as well as the lower Court record.

(32) It would become manifest from the aforesaid that the learned trial Court has based the conviction of convict/appellant on testimonies of the informant Shyam Lal (P.W.1), his wife Smt. Dhanawati (PW-2) and Devnarayan (P.W.3), who are the father, mother and uncle (fufa), respectively, of the deceased.

(33) The first issue relates to the credibility of the F.I.R. So far as the credibility of the FIR in this case is concerned, learned counsel for the appellants has questioned its reliability on the ground that there was inordinate and unexplained delay of two days in lodging of the F.I.R. which has rendered the entire prosecution liable to be rejected. The issue whether prosecution case is liable to be thrown out merely on the ground of delay itself or not has been considered and examined by the Apex Court in several decisions, and it will be useful to refer to some of the authorities on the issue.

(34) The Hon'ble Apex Court in **Tara Singh and others Vs. State of Punjab** : AIR 1991 SC 63, in paragraph 4 of its judgment has observed as hereunder:-

"4. It is well-settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the" report. Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny

and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case. In the instant case there are three eye-witnesses. They have consistently deposed that the two appellants inflicted injuries on the neck with kirpans. The medical evidence amply supports the same. In these circumstances we are unable to agree with the learned Counsel that the entire case should be thrown out on the mere ground there was some delay in the FIR reaching the local Magistrate. In the report given by P.W.2 to the police all the necessary details are mentioned. It is particularly mentioned that these two appellants inflicted injuries with kirpans on the neck of the deceased. This report according to the prosecution, was given at about 8.45 P.M. and on the basis of the report the Investigating Officer prepared copies of the FIR and dispatched the same to all the concerned officers including the local Magistrate who received the same at about 2.45 A.M. Therefore we are unable to say that there was inordinate and unexplained delay. There is no ground to doubt the presence of the eye-witnesses at the scene of occurrence. We have perused their evidence and they have withstood the cross- examination. There are no material contradictions or omissions which in any manner throw a doubt on their varasity. The High Court by way of an abundant caution gave the benefit of doubt to the other three accused since the allegation against them is an omnibus one. Though we are unable to fully agree with this finding but since there is no appeal against their acquittal we need not further proceed to consider the legality or propriety of the findings of the High Court in acquitting them. So far as the appellants are concerned, the evidence against them is cogent and convincing and specific over tacts are attributed to them as mentioned above. Therefore we see absolutely no grounds to interfere. The appeal is, therefore, dismissed."

(35) In **State of Himanchal Pradesh Vs. Gian Chand** reported in AIR 2001(1) SC 2075, the Hon'ble Apex Court has held that :-

"Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case."

(36) Thus the legal position which emerges after going through the aforesaid dictum of the Apex Court referred to herein above is that it is settled principle of criminal jurisprudence that mere delay in lodging the FIR may not prove fatal in all cases, but in the given circumstances of the case delay in lodging the FIR can be one of the factors which may corrode the credibility of the prosecution version but delay in lodging the FIR cannot be a

ground itself for throwing away the entire prosecution version as given in the FIR and later substantiated by the evidence, unless there are indications of fabrication. The Court has to further seek explanation for delay and check the truthfulness of the version to inquire and if the court is satisfied then the case of prosecution cannot fall on this ground alone.

(37) In the present case, the offence is said to have been committed on 05.02.2008 at 03:00 P.M., whereas the F.I.R. of the incident was lodged on 07.02.2008 at 08.00 P.M. at police station Khiro, district Raebareli, which is situated at a distance of 15 Kms. from the village of the informant P.W.1. It transpires from the record that on 07.02.2008, informant P.W.1 had submitted a written report (Ext. Ka.2) at Police Station Khiro, District Raebareli, stating therein that on 05.02.2008, at 03:00 P.M., his daughter, victim "x', aged about 05 years, while playing, went towards the house of Vrindavan (convict/ appellant no.2) and thereafter, his daughter, victim "x', could not be traced, even after search in the village and nearby areas. It was also alleged in the F.I.R. that Avadhesh, who was the son of his brother Ganga Prasad, was murdered one year ago by the family members of Gangadhar and an F.I.R. was lodged against them, therefore, he had apprehension that due to the said enmity, these people have picked up his daughter (victim "x') and hid her somewhere. On the basis of the aforesaid written report (Ext. Ka.2), an F.I.R., bearing Case Crime No. 20 of 2008, was registered on 07.02.2008, at 08:00 P.M. under Section 364 I.P.C. against the family members of Gangadhar. P.W.1-Shyam Lal, in his examination-in-chief, has stated before the trial Court that on the date and time of the incident i.e. on 05.02.2008 at 03:00 P.M., he was at Lalganj. His wife, Dhanawati (P.W.2), had telephonically informed him that when she was feeding bullocks at the door, Urmila called their daughter (victim "x') by showing plumps, on this, their daughter (victim "x') went towards the house of Urmila but when she did not return, she went to the house of Urmila at 03:30 P.M. to enquire, then, the father of Urmila told her that victim "x' did not come to his house. On receipt of this information, he came to his house at 05:00 P.M. and immediately thereafter went to the house of Urmila along with his wife Dhanawati (P.W.2) and his brother and asked the father of Urmila, namely, Vrindavan (convict/appellant no.2) about their daughter, then, Vrindavan told them that their daughter (victim "x') did not come to his house and thereafter, Vrindavan, Hira Lal and Urmila picked up lathi and asked them to leave the place. On the next day i.e. on 06.02.2008, he again searched his daughter (victim "x') but he could not find her. Thereafter, he proceeded to the police station for lodging report of missing of his daughter, however, in the way at Sahjaura Hotel, policemen met him and he told whole factum of the incident to the policemen, who, in turn, asked him to search his daughter (victim "x') and they would inform to the Inspector. On this assurance, he returned to his house and searched his daughter (victim "x') but could not find her. On the next date i.e. on 07.02.2008, he went to the police station Khiro, district Raebareli, wherein he stated whole factum of the incident of missing of his daughter to the Inspector, who, in turn, asked him to write down an application in this regard. Thereafter, he came outside

the police station Khiro, wherein he got scribed a written report from his nephew Gyanendra, who after scribing it read over to him and thereafter he signed thereon and lodged it at the police station Khiro. On 08.02.2008, the informant P.W.1-Shyam Lal had submitted another written report (Ext. Ka.1) scribed by his nephew Gyanendra at police station Khiro in furtherance of the aforesaid incident and stated therein that on 08.02.2008, at 06:00-06:15 A.M., his wife Dhanawati (P.W.2) and his niece Milana, who went to attend the call of nature, came and informed him, his family members and his relatives that his neighbours Hira Lal Yadav, Anil Kumar Yadav, Reshu, Urmila and Vrindavan carrying a loaded white-sack from their house, went towards under construction house of Prabhudei (D.W.1). On this information, they all went towards the under construction house of Prabhudei and when they reached there, they saw that Hira Lal Yadav, Anil Kumar Yadav, Reshu, Urmila and Vrindavan were hiding a loaded white-sack in a under construction house of Prabhudei (D.W.1). Thereafter, Hiralal Yadav, Vrindavan and Urmila were caught on the spot along with the white-sack, whereas Anil Kumar Yadav and Reshu fled away. After that, when they opened the white sack, they found the dead body of his daughter (victim "x'). The informant P.W.1-Shyam Lal had proved Ext.Ka.1 and Ext. Ka.2. P.W.2-Dhanawati had supported the testimony of P.W.1. In these backgrounds, this Court is of the view that the delay, if any, in lodging the F.I.R. stands explained by the prosecution and is, in no way, fatal to the case of the prosecution.

(38) Now, this Court would deal with the contention of the learned Counsel for the appellant No.1 that there was delay in sending the F.I.R. to the Magistrate, therefore, the benefit of the same be accorded to the convict/appellant.

(39) It is pertinent to mention that Section 157 of the Cr.P.C. and its legal impact on the trial has been examined by the Apex Court in **Ombir Singh v. State of Uttar Pradesh and Anr.** (Criminal Appeal No.982 of 2011, decided on 26.05.2020), wherein the Apex Court had reiterated that mere delay in sending the FIR to the Magistrate in compliance of Section 157 of Cr.P.C cannot be a good ground for acquittal of the accused. Therefore, submission of the convict/appellant in this regard cannot be sustained.

(40) The next argument of the learned Counsel for the appellant No.1 is that there is no eye witness of the incident and the case rests on circumstantial evidence and the circumstances relied on would not establish continuity in the links of the chain of circumstances to lead to an irresistible conclusion regarding guilt of the convict/appellant, hence the convict/appellant is entitled to get the benefit of doubt.

(41) It is true that the present case rests on circumstantial evidence and the convict/appellant has been convicted for the murder of the daughter of the informant P.W.1 (victim "x') vide impugned judgment. In respect to convict the person in a case of circumstantial evidence, the Apex Court in the celebrated case of Sharad Birdhichand Sarda v. State of Maharashtra: AIR 1984 SC 1622, has held that the following

conditions must be fulfilled before a case against an accused can be said to be fully established :-

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

2. The facts so established should be consistent with the hypothesis of guilt and 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."

(42) The aforesaid principles of law, which have been laid down by the Apex Court, show that while dealing with circumstantial evidence, the onus is on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea.

(43) In a case of circumstantial evidence, conditions precedent, before conviction could be based on circumstantial evidence, must be fully established such as *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must' or "should' and not "may be' established; (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (3) the circumstances should be of a conclusive nature and tendency; (4) they should exclude every possible hypothesis except the one to be proved; and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

(44) Keeping in mind the aforesaid principles of law, we proceed to examine the instant case whether the prosecution has been able to establish a chain of circumstances so as not to leave any reasonable ground for the conclusion that the allegations brought against the accused persons are sufficiently proved and established.

(45) This Court has gone through the evidence of P.W.1-Shyam Lal and P.W.2-Dhanawati and have no hesitation in observing that their testimonies are wholly credible and reliable. It is true that there is no evidence of any witness who might have seen the convict/appellant causing death of the daughter of the informant Shyam Lal (P.W.1) and the prosecution case is based on circumstantial evidence of "last seen together" and P.W.2-Dhanawati has been examined to prove this fact. The statement of PW-2-Dhanawati is significant as an evidence of the circumstance of last seen. The last seen evidence is very important circumstantial evidence and if proved and found trustworthy, it can singularly lead to the inference of guilt.

(46) At this juncture, it would be apt to mention that in **Ravi v State of Karnataka : AIR 2018 SC 2744**, reversing the conviction based on "last seen together"

where there was a time gap of four days between last seen and recovery of dead body and as per postmortem report, the death must have occurred 30 hours ago, the Apex Court held that the time gap was considerably large and no corroboration was forthcoming, and therefore, in absence of any other circumstance which could connect the accused with crime, reasonable doubt as to involvement of accused is created and in such situation, the burden would not shift under section 106 of the Evidence Act. Following the judgments in **Mohibur Rahman vs State of Assam : (2002) 6 SCC 715 and Malleshappa vs State of Karnataka : (2007) 13 SCC 399**, the Hon'ble Apex Court held as under:

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

(47) In the instant case, P.W.2-Dhanawati is the mother of the deceased victim "x'. She deposed before the trial Court that on the date of the incident i.e. on 05.02.2008, at 03:00-03:30 P.M., her daughter was playing in front of her door and she was also feeding her animals there. There was a plum tree in front of her house. Urmila (daughter of convict/appellant No.2, Vrindavan) came with a long stick (laggi) and plucked the plums from the tree and went towards her house with the plums and from there, she called her daughter, showing the plums. Thereafter, when her daughter started to go there, she tried to stop her, however, her daughter told her that she would come in a while and she went to the house of Urmila. After 20-25 minutes, when her daughter did not return, she went to the house of Urmila in search of her daughter. However, father of Urmila, namely, Vrindavan (convict/appellant no.2) met at his door and when she asked him about her daughter, then, Vrindavan told her that her daughter did not come there and after that Vrindavan took a danda, on this, she returned back. From the aforesaid, it is crystal clear that P.W.2-Dhanawati is the witness of "last seen' of her daughter going towards the house of Vrindavan. Appellant/convict has not disputed the fact that they were not arrested on spot along with loaded white sack, from which dead body of the deceased victim "x' was recovered. After a close scrutiny of the evidence given by P.W.1, P.W.2 and PW-3 and medical evidence, the learned trial Court has rightly concluded that the appellants committed the murder of the daughter of informant (victim "x').

(48) Furthermore, once it is established that Urmila, who was the daughter of convict/appellant Vrindavan, called the daughter of the informant (victim "x') by showing plums and on this, daughter of informant (victim "x') went towards the house of Urmila (i.e. Vrindavan house), it was on the convict/appellant to explain what happened thereafter. In view of Section 106 of the Evidence Act, the burden was on the convict/appellant to explain as to how injuries were found on the body of the deceased which could not have been caused. The learned trial Court has rightly convicted the convict/appellant for the murder of the daughter of the informant (victim "x').

(49) The next argument of the learned Counsel for the appellant No.1 that appellants were falsely implicated, but, there appears to be no reason for their false

implication. Had it been so as alleged by appellants, any of the villagers would definitely come to adduce evidence in support of the appellants. This Court find that there is no force in the argument of the appellants regarding their false implication. If read in conjunction with the statement of last seen given by PW-2 Dhanawati, medical evidence as well as spot arrest conclusively indicate the hypothesis that it was they and they only, who have committed murder of the deceased.

(50) In view of the above discussion, this Court find that the conclusion of the learned trial court that the prosecution has successfully established that the convicts/appellants committed murder of the victim is based on unimpeachable evidence of "last seen' supported by medical evidence and the conduct of the appellants themselves prior to and soon after the incident.

(51) Learned Counsel for the appellant has next argued that though P.W.1- Shyam Lal, P.W.2- Dhanawati and P.W.3- Devnarayan are father, mother and 'fufa' (uncle) respectively, of the deceased (victim "x'), therefore, their testimonies cannot be relied upon as they are interested and partisan witnesses.

(52) It cannot be ignored that presence of P.W.1, P.W.2 and P.W.3 at the time of the arrest of the convict/appellant along with loaded white-sack is well established and there appears to be no inconsistency in the evidence to show that their evidence is not a reliable one and the trial Court has also examined their evidence and did not find anything contrary on record to disbelieve their evidence.

(53) The criminal law jurisprudence makes a clear distinction between a related and interested witness. A witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. The witness may be called "interested" only when he or she derives some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished as held by the Hon'ble Apex Court in ***Sudhakar Vs. State : (2018) 5 SCC 435.*** Thus, from the facts and circumstances of the case, it cannot be said that the testimonies of P.W.1, P.W.2 and P.W.3 are not trustworthy and are not reliable.

(54) The medical evidence also corroborates the testimonies of the prosecution witnesses. The P.W.4- Dr. Arvind Kumar, who conducted the post-mortem of the deceased (victim "x') has opined the cause of death of the deceased (victim "x') due to shock and haemorrhage as a result of ante-mortem injuries. P.W.4- Dr. Arvind Kumar had also opined that the death of the deceased (victim "x') was attributable on 05.02.2008 between 3 to 3:30 P.M. and the age of the deceased at the time of death was five years.

(55) So far as the submission of the learned Counsel for the convict/appellant that there was no motive on the part of the convict/appellant to commit the murder of the daughter of the informant P.W.1 is concerned, it transpires from the record that Avadhesh, who was son of the brother of the informant, was murdered before one year from the date of the incident by the family members of convict/appellant. The informant P.W.1 was one of the witness of that case and also doing pairvi of that case. Thus, the enmity between the family members of the convict/appellant and family members of P.W.1 and P.W.2 is well established. Thus, the contention of the

convict/appellant is not sustainable in this regard.

(56) So far as the contention of the learned Counsel for the convict/appellant that the testimonies of defense witness i.e. D.W.1 Prabhudei has wrongly been discarded by the trial Court, is concerned, it transpires from the record that Section 39 of Cr.P.C. deals with the duty of the public to give information forthwith related to commission of certain offences if they became aware of such commission or of the intention of any other person to commit such offence. In absence of any reasonable excuse, since it is the duty of public to forthwith give information to the nearest Magistrate or police officer relating to the commission of offences or of the intention of any other person to commit any offence as specified under section 39 of Cr.P.C., if a person takes a plea of any reasonable excuse for not giving such information then the burden of proving such excuse shall lie on him. The evidence of D.W.1-Prabhudei shows that on 07.02.2008 at 08:00 P.M., when she had gone to her under construction house for picking up wood, she saw a hand protruding outside a sack and thereafter she came outside the under construction house and made noise, upon which Shyam Lal (P.W.1) and other family members came there. It is not in dispute that when D.W.1 Prabhudei saw a hand protruding outside a sack on 07.02.2008 at 08:00 P.M., she did not inform the police in terms of Section 39 of the Cr.P.C. but instead in her statement, she herself had stated before the trial Court that the police came on the next day at 04:00 A.M. In these backgrounds, this Court is of the view that the trial Court has rightly disbelieved the testimony of D.W.1 Prabhudei.

(57) Thus, from the evidence led by the prosecution it is well established that it was the convict/appellant, who was involved in the present case and has murdered the daughter of informant P.W.1-Shyam Lal. The prosecution has proved its case beyond reasonable doubt against the convict/appellant and the trial Court after scanning the entire prosecution evidence has rightly convicted and sentenced the convict/appellant for the offence in question.

(58) In view of the above and for the reasons stated hereinabove, no interference of this Court is called for in the instant appeal as the learned trial Court has rightly convicted and sentenced the convict/appellant by the impugned judgment and order.

(59) The instant appeal on behalf of appellant no.1- Heera Lal fails and deserves to be dismissed and is accordingly **dismissed**.

(60) The appellant no.1-Heera Lal, who is in jail, shall serve the sentence as awarded by the trial Court.

(61) Let a certified copy of this order as well as Lower Court Record be transmitted to the Court concerned for necessary information and compliance forthwith.

(2022)07ILR A167
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.07.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE SAURABH LAVANIA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Crl. Appeal No. 1000 of 2018

Ghulam Rasool Khan & Ors. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:

Counsel for the Respondents:
Mr. Prachis Pandey, Addl. Govt. Adv., Mr. Sandeep Singh

(A) Special Law - The Code of Criminal Procedure, 1973 - Section 482 - inherent power , Section 439 - Special powers of High Court or Court of Session regarding bail - The Schedule Castes And The Schedule Tribes (Prevention of Atrocities) Act , 1989 - Section 14 A – Reference - Administrative side - Appeals .

Appellants filed an appeal under Section 14A of 1989 Act - delay of 180 days - cognizance by court below - appellants summoned to face trial - bailable warrants issued against appellants – matter referred by Single Judge to a larger bench.**(Para - 2)**

(B) Special Law - Question refered - conversion of appeal under Section 14 A of the Act, 1989 into a bail application by exercising the inherent powers under Section 482 of the Cr.P.C. by single judge - held - answered in negative - Rohit Vs State of U.P. and another, (2017) 6 ALJ 754 has been overruled by Full Bench of this Court in In Re : Provision of section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015, (2018) 6 ALJ 631. **(Para -17)**

(C) Special Law - Question refered - an aggrieved person having two remedies available of preferring an appeal under the provisions of Section 14 A of the Act, 1989 as well as a bail application under the provisions of Section 439 of the Cr.P.C. - held - answered in negative - an aggrieved person will not have two remedies namely, i.e. filing an appeal under Section 14A of the 1989 Act as well as filing a bail application in terms of Section 439 Cr.P.C.. **(Para -17)**

(D) Special Law - Question refered - an aggrieved person not availed remedy of an appeal under the provisions of Section 14 A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr.P.C. - held - answered in negative - aggrieved person having remedy of appeal under Section 14A of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court under Section 482 Cr.P.C. **(Para -17)**

(E) Special Law - Question refered - remedy available to an aggrieved person who has failed to avail the remedy of appeal under the provision of Act, 1989 and the time period for availing the said remedy has also lapsed - held - no limitation to file an appeal against an order under the provisions of 1989 Act. Remedies can be availed of as provided. **(Para -17)**

HELD:-Single Judge judgment of this Court in Rohit's case has been overruled in In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015. Hence, the answer to the question is in negative. **(Para - 17)**

Criminal appeal before appropriate court. (E-7)

List of Cases cited:-

1. Rohit Vs St. of U.P. & anr.,(2017) 6 ALJ 754

2. In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015,(2018) 6 ALJ 631

3. Rohit Vs St. of U.P. & anr., (2017) 6 ALJ 75

(Delivered by Hon'ble Rajesh Bindal, C.J.)

1. On a reference made by the learned Single Judge vide order dated August 3, 2018 to a larger Bench and constitution thereof by Hon'ble the Chief Justice, on administrative side, for consideration of the following questions, the matter has been placed before us :

(i) Whether a Single Judge of this Court while deciding Criminal Appeal (Defective) No. 523/2017 In re : Rohit Vs. State of U.P. and another vide judgment

dated 29.08.2017 correctly permitted the conversion of appeal under Section 14 A of the Act, 1989 into a bail application by exercising the inherent powers under Section 482 of the Cr.P.C.?

(ii) Whether keeping in view the judgment of **Rohit (supra)**, an aggrieved person will have two remedies available of preferring an appeal under the provisions of Section 14 A of the Act, 1989 as well as a bail application under the provisions of Section 439 of the Cr.P.C.?

(iii) Whether an aggrieved person who has not availed of the remedy of an appeal under the provisions of Section 14 A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr.P.C.?

(iv) What would be the remedy available to an aggrieved person who has failed to avail the remedy of appeal under the provision of Act, 1989 and the time period for availing the said remedy has also lapsed?

2. It is a case in which the appellants had filed an appeal under Section 14A of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 19891 challenging the order dated September 14, 2017 vide which the learned Court below had taken cognizance of the matter and the appellants had been summoned to face trial. The order dated April 12, 2018, vide which bailable warrants had been issued against the appellants, was also challenged.

3. Learned counsel for the appellants while referring to an order passed by a Single Bench of this Court in **Criminal Appeal Defective No. 523 of 2017 titled as Rohit Vs State of U.P. and another**2 submitted that an appeal filed after expiry of period of limitation provided under Section 14A of the 1989 Act, can be converted into a bail application in exercise of inherent powers under Section 482 Cr.P.C. As in the case in hand, the appeal was filed beyond 180 days, the same should be permitted to be converted into bail application and dealt with accordingly.

4. On the other hand, learned counsel appearing for the respondents submitted that primarily all the questions, which have been referred to be considered by Full Bench of this Court, have been answered by a Full Bench of this Court in **In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015**3. He further submitted that Section 14A (3) of the 1989 Act, which provides period of limitation for filing an appeal and limited discretion in case of delay, has been struck down. Meaning thereby, an appeal against an order passed by the Court below under the provisions of the 1989 Act, can be filed at any time. The judgment in **Rohit's case (supra),** as relied by learned counsel for the appellants, has specifically been overruled. This Court cannot rewrite the provisions of law, the same have to be interpreted as such.

5. Heard learned counsel for the parties and perused the paper book.

6. To appreciate the arguments raised by learned counsel for the parties with reference to interpretation of Section 14A of the 1989 Act, it would be appropriate to reproduce the aforesaid Section hereunder :

"14A. Appeals.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an

Exclusive Special Court, to the High Court both on facts and on law.

(2) Notwithstanding anything contained in sub-section (3) of section 378 of the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.

(3) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days.

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

(4) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal."

7. The aforesaid Section was inserted in the 1989 Act vide Act No. 1 of 2016 with effect from January 26, 2016. Sub-section (1) thereof starts with non-obstante clause. It provides that notwithstanding anything contained in the Code of Criminal Procedure, an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the Court concerned. Sub-section (2) thereof provides that notwithstanding anything contained in Section 378(3) of Cr.P.C., an appeal shall lie to this Court against an order of the court below granting or refusing bail. Sub-section (3) thereof, which again starts with non-obstante clause, provides for a period of ninety days to challenge any judgment, sentence or order in appeal. However, delay in filing the appeal can be condoned if sufficient cause is shown. Second proviso to sub-section (3) provides that no appeal shall be entertained after expiry of one hundred and eighty days. This provides for limited condonation of delay.

Question No. (I)

Whether a Single Judge of this Court while deciding Criminal Appeal (Defective) No. 523/2017 In re : Rohit Vs. State of U.P. and another vide judgment dated 29.08.2017 correctly permitted the conversion of appeal under Section 14A of the Act, 1989 into a bail application by exercising the inherent powers under Section 482 of the Cr.P.C.?

8. The aforesaid question does not require discussion in detail for the reason that the earlier judgment of this Court in **Rohit's case (supra)** has specifically been overruled by a Full Bench of this Court in **In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015 (supra).** The relevant paragraph 109 of the aforesaid judgment is extracted hereunder :-

"109. The proposition of a revival of the powers of this Court either under Section 482 Cr.P.C. or Sections 397 Cr.P.C. cannot be countenanced, more so in view of our opinion on the first question. The view expressed by the learned Judge in Rohit in this context to the effect that since there is no express repeal of Section 439 Cr.P.C., the same would revive upon the expiry of 180 days also does not commend acceptance. The learned Judge, in our considered view, has clearly erred in proceeding to consider the applicability of

Section 439 Cr.P.C. on the principles of an express or implied repeal of a provision. What we find is an implied exclusion of the applicability of Section 439 Cr.P.C. by a special statute. We, therefore, find ourselves unable to sustain the line of reasoning adopted by the learned Judge in Rohit that the provisions of Section 439 Cr.P.C. would remain in suspension during the period of 180 days and thereafter revive on its expiry. The conclusion so arrived at cannot be sustained on any known principle of statutory interpretation. We are therefore, constrained to hold that both Janardan Pandey as well as Rohit do not lay down the correct law and must, as we do, be overruled."

(emphasis supplied)

9. The Single Judge judgment of this Court in **Rohit's case (supra)** has been overruled in **In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015 (supra)**. Hence, the answer to the question is in negative.

Question No. (II)

Whether keeping in view the judgment of Rohit (supra), an aggrieved person will have two remedies available of preferring an appeal under the provisions of Section 14 A of the Act, 1989 as well as a bail application under the provisions of Section 439 of the Cr.P.C.?

10. While considering the validity of Section 14A (2) of the 1989 Act and second proviso to sub-section (3) thereof, the Full Bench of this Court in **In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015 (supra)** found that the 1989 Act being a Special Statute, will override the provisions of Cr.P.C. Section 14A of the 1989 Act starts with non-obstante clause which gives overriding effect on anything contained in Cr.P.C. As far as sub-section (3) thereof is concerned, it overrides anything contained in any other law for the time being in force. Meaning thereby the provisions of the Limitation Act, 19634 has also been overridden. While dealing with the issue of validity of Section 14A(2) of the 1989 Act, the Full Bench of this Court in **In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015 (supra)** opined that the provisions of Section 439 Cr.P.C. are clearly excluded as far as its application to the specific procedure provided in the 1989 Act is concerned. The relevant paragraphs 27, 28 and 31 are extracted hereunder :-

"27. The sole issue which ultimately arises for consideration is whether the provisions of Section 439 Cr.P.C. stand overridden and in case the answer to this question be in the affirmative whether in such a situation sub-section (2) is rendered ultra vires. Having conferred our thoughtful consideration on the submissions advanced in this respect, we find ourselves unable to conclude that sub-section (2) is liable to be declared ultra vires. At the very outset, we cannot possibly loose sight of the fact that the 1989 Act is a special statute and would on basic principles of statutory construction, override any other general enactment which may govern the investigation, enquiry and trial of criminal offences. We also cannot possibly ignore the non obstante clauses employed by the Legislature in the substantive provisions of Section 14A. We must also necessarily bear in mind that Section 20 of the 1989 Act in unambiguous and unequivocal terms provides that it would have overriding effect over all other statutes that may contain or prescribe a procedure to the contrary.

28. The provisions of this special enactment would also clearly have overriding effect over other enactments including the Cr.P.C. in light of Sections 4 and 5 thereof. While Section 4(2) of the Cr.P.C. provides that all offences under any other law are to be investigated, enquired into, tried and otherwise dealt with in accordance with its provisions, this statutory mandate is subject to the provisions in any other enactment which may regulate the manner of enquiring into, trying or dealing with offences. Section 5 only preserved those enactments which incorporated or embodied specific provisions contrary to the Code which were in force at the time when Cr.P.C. was promulgated. The provisions of the Cr.P.C. therefore would apply only in a situation where an enactment did not make any provision for investigation, enquiry or trial independently or where it was silent on these aspects. The 1989 Act however erects a comprehensive machinery for enquiry, investigation and trials of offences under the Act. It is therefore evident that it is the provisions of this special enactment which must prevail when it is found that its provisions prescribe a procedure inconsistent with those in the Cr.P.C. The answer to the first part of the question formulated by us, must necessarily be in the affirmative and we do therefore hold that the provisions of section 439 Cr.P.C. clearly stand eclipsed in light of the special procedure put in place by the 1989 Act. It is manifest that the concurrent powers recognised as existing in the High Courts by virtue of Section 439 Cr.P.C. stand impliedly excluded and overridden.

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31. The decision of the Supreme Court in Salimbhai is thus in our considered opinion a clear and complete answer on the exclusion of the powers of the High Court under sections 439 and 482 Cr.P.C. insofar as the issue of bail is concerned."

11. Thus the answer to Question No.(II) will be in negative. An aggrieved person will not have two remedies namely, i.e. filing an appeal under Section 14A of the 1989 Act as well as filing a bail application in terms of Section 439 Cr.P.C.

Question No. (III)

Whether an aggrieved person who has not availed of the remedy of an appeal under the provisions of Section 14 A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr.P.C.?

12. The aforesaid question has been dealt with by Full Bench of this Court in **In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015 (supra),** where the question framed was as under :

"Whether in view of the provisions contained in Section 14-A of the Amending Act, a petition under the provisions of Article 226/227 of the Constitution of India or a revision under Section 397 of the Code of Criminal Procedure (in short "Cr.P.C.') or a petition under Section 482 Cr.P.C., is maintainable. OR in other words, whether by virtue of Section 14-A of the Amending Act, the powers of High Court under Article 226/227 of the Constitution or its revisional powers under Section 482 Cr.P.C. shall stand ousted?"

13. The answer to the aforesaid was in the negative. It was held that against the judgments or orders, for which remedy has been provided under Section 14A of the

1989 Act, invoking the jurisdiction of this Court by filing petition under Articles 226 or 227 of the Constitution of India, a revision under Section 397 Cr.P.C. or an application under Section 482 Cr.P.C., will not be maintainable. The relevant paragraphs thereof are extracted below :-

"**64.** At the outset, our answer to the first part of the question is in the negative. In other words, where an appeal under sub-section (1) and/or sub-section (2) of Section 14A of the Amending Act is maintainable against any judgment, sentence or order, not being interluctory in nature, a petition under the provisions of Articles 226/227 of the Constitution of India or a revision under Section 397 Cr.P.C. or a petition under Section

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89. In our considered view, the contention which has been urged by Sri Sushil Shukla that the powers of the High Court under section 482 Cr.P.C. and its revisional power under section 397/401 Cr.P.C. along with the provisions contained under Article 226/227 of the Constitution of India are not ousted by the provisions of Section 14 A of the Act of 2015 where an appeal has been provided from any judgment/sentence or order not being an interlocutory order of a Special Court/Exclusive Special Court to the High Court both on facts and on law is too broadly framed so as to merit acceptance. It must be borne in mind that the statute itself provides a remedy to an accused against any judgment, sentence and order of the Special Court/Exclusive Special Court to the High Court. Therefore, any person, who is aggrieved by an order of the Special Court/Exclusive Special Court can approach and prefer an appeal to the High Court for redressal of his grievance and any grievance of an accused/victim against the order of the court below can be examined both on facts and law by the High Court.....

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94. We, therefore, answer Question (B) by holding that while the constitutional and inherent powers of this Court are not "ousted" by Section 14A, they cannot be invoked in cases and situations where an appeal would lie under Section 14A. Insofar as the powers of the Court with respect to the revisional jurisdiction is concerned, we find that the provisions of Section 397 Cr.P.C. stand impliedly excluded by virtue of the special provisions made in Section 14A. This, we hold also in light of our finding that the word "order" as occurring in sub-section(1) of Section 14A would also include intermediate orders."

14. Hence, the answer to Question No.(III) will be in negative namely, that the aggrieved person having remedy of appeal under Section 14A of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court under Section 482 Cr.P.C.

Question No. (IV)

What would be the remedy available to an aggrieved person who has failed to avail the remedy of appeal under the provision of Act, 1989 and the time period for availing the said remedy has also lapsed?

15. In the earlier Full Bench of this Court in **In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015 (supra)**, one of the questions considered was with regard to validity of second proviso to sub-section(3) of Section 14A of the 1989 Act, which provides limitation for condonation of delay in filing appeals under Section 14A of the aforesaid Act. The aforesaid proviso was held to be ultra vires. The relevant paragraphs are extracted below :-

"**55**. .....It has left an aggrieved person without of remedy of even a first appeal against any judgment, sentence or order passed under the 1989 Act on the expiry of 180 days. As we contemplate the fatal consequences which would visit an aggrieved person on the expiry of 180 days, we shudder at the deleterious impact that it would have and find ourselves unable to sustain the second proviso which must necessarily be struck down, as we do, being in violation of Article 14 and 21 of the Constitution.

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62. While we reject the challenge to section 14A (2), we declare that the second proviso to Section 14A (3) is violative of Articles 14 and 21 of the Constitution and it is consequently struck down."

16. The second proviso to sub-section(3) of Section14A of the 1989 Act having been struck down by this Court in **In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015 (supra)**, there will be no limitation to file an appeal against an order under the provisions of 1989 Act. Hence, the remedies can be availed of as provided.

17. In view of our aforesaid discussions, the answers to the questions referred are as under :-

(i) Question No.(I) is answered in negative as **Rohit Vs State of U.P. and another, (2017) 6 ALJ 754** has been overruled by Full Bench of this Court in **In Re : Provision of section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015, (2018) 6 ALJ 631.**

(ii) Question No.(II) is answered in negative holding that an aggrieved person will not have two remedies namely, i.e. filing an appeal under Section 14A of the 1989 Act as well as filing a bail application in terms of Section 439 Cr.P.C.

(iii) Question No.(III) is answered in negative holding that the aggrieved person having remedy of appeal under Section 14A of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court under Section 482 Cr.P.C.

(iv) Question No.(IV) - There will be no limitation to file an appeal against an order under the provisions of 1989 Act. Hence, the remedies can be availed of as provided.

18. While answering the questions referred to by the learned Single Judge, let the present criminal appeal be now placed before appropriate Court as per the roster on August 11, 2022.

(2022)07ILR A174
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Crl. Appel. No. 1014 of 2012

Rajesh Singh ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sanjiv Kumar Pandey, Shabana Shabbir, Sri Surendra Singh, Sri Rajeev Kumar Pandey

Counsel for the Respondents:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Sections 302 & 299 - Section 300 - Arms Act, 1959 - Section 25 - The Code of Criminal Procedure, 1973 - Section 313

Culpable homicide - appeal against conviction - punishment for murder power to examine accused -"murder' - "culpable homicide not amounting to murder'.

Accused and deceased stayed in New Dharamshala Hotel - with fake names - Next day, deceased found dead in room - accused absconded - no eye-witness of occurrence - circumstantial evidence - knife recovered - no injury.**(Para – 10,16)**

HELD:-Offence punishable under Section 304 part-I of the IPC . No injuries caused by knife found from room where dead body was found. Accused committed culpable homicide not amounting to murder. Sentence of default maintained. Fine and imprisonment for default under Section 25 Arms Act maintained. **(Para - 17,18)**

Appeal partly allowed.(E-7)

List of Cases cited:-

1. Maru Ram Vs U.O.I., 1981 (1) SCC 107

2. Vikas Yadav Vs St. of U.P, 2016 (9) SCC 541

3. Tukaram & ors.Vs St. of Mah., (2011) 4 SCC 250

4. B.N. Kavatakar & anr. Vs St. of Karn., 1994 SUPP (1) SCC 304

5. Veeran & ors. Vs St. of M.P. , (2011) 5 SCR 300

(Delivered by Hon'ble Ajai Tyagi, J.)

1. Heard Sri Surendra Singh, learned counsel for the appellant and Sri Nagendra Kumar Srivastava, learned A.G.A. for the State.

2. This appeal challenges the judgment and order dated 2.12.2011 passed by Additional Sessions Judge, Court No.1, Kanpur Nagar in Sessions Trial No.1057 of 2007 convicting accused-appellant under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo imprisonment for life with fine of Rs.20,000/- and in default of payment of fine, further to undergo imprisonment for six months and in Sessions Trial No. 1058 of 2007 convicting him under Section 25 of Arms Act and sentencing him to undergo six months imprisonment with fine of Rs.1,000/- and in case of default of fine, further to undergo one month imprisonment.

3. Brief facts giving rise to this appeal are that a first information report was lodged by the complainant Balister Singh, Manager of New Dharamshala Hotel, Kanpur Nagar with the allegations that last night two persons namely, Mahesh and Pooran stayed in the aforesaid hotel and told their address as Mohalla Khataina House No.10/275, Agra. On the next morning, i.e., 04.06.2007, the day of FIR, the Manager took round of the room of the hotel at 8:00 am. When he called the above guests in room No.45 none responded. The Manager thought that the guest would have been sleeping. At 2:00 pm, when he again called from outside the room and none responded again, then he pushed the door of the room and it opened. The Manager entered the room and saw a person lying on the bed in a dead position and a blood stained brick was also lying there on the bed. The bed and wall of the room were also having blood on it. The Manager informed the owner of the hotel Sunny Singh and told him that the name of the dead person is Pooran and his associate Mahesh has run away after killing Pooran. Investigating officer took up the investigation. Blood stained pillow cover, blood stained plain earth, piece of bed sheet and sleepers etc were taken into possession. A knife was also recovered from the room. A sketch of the accused- Mahesh was circulated and on 22.07.2007, accused Mahesh was

arrested by the I.O. During the course of investigation inquest report was prepared. Post mortem of the dead body of the deceased was conducted and after completion of the investigation, charge sheet was filed against the accused in the name of Rajesh Singh because the earlier name Mahesh was wrongly informed to the hotel deliberately and the actual name of deceased was Brijendra Singh.

4. The offence committed being exclusively triable by court of sessions the learned Magistrate committed the case to court of sessions.

5. The accused was summoned and on appearing he was read over the charges. the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined 9 witnesses who are as follows:

1	Balister Singh	PW1
2	Sani Singh	PW2
3	Mahesh Chandra Gupta	PW3
4	Dr. A.K. Nigam	PW4
5	Shiv Narain Singh	PW5
6	Dori Lal Gautam	PW6
7	Rakesh Chandra	PW7
8	Shiv Kumar Gupta	PW8
9	Harpal Singh	PW9

6. In support of ocular version following documents were filed:

1	F.I.R. u/s 302 IPC	Ex.Ka4
2	F.I.R. u/s 25 Arms Act	Ex.Ka19
3	Written Report	Ex.Ka2
4	Recovery Memo of Blood Stained pillow cover & Knife, blood stained & plain earth, piece of Bedsheet & Slippers, Coins Beedi and Matchstick	Ex.Ka13
5	Recovery memo of 'Tamancha', Live Cartidges & Arrest of Memo	Ex.Ka14
6	Postmortem Report	Ex. Ka3
7	Panchayatnama	Ex.Ka2/6
8	Site Plan u/s 302 IPC	Ex.Ka12
9	Site Plan u/s 25 Arms Act	Ex.Ka16A
10	Charge-sheet u/s 302 IPC	Ex.Ka15
11	Charge sheet u/s 25 Arms Act	Ex.Ka 17

7. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellant as mentioned above.

8. The accused-appellant is in jail since 22.7.2007. Learned counsel for the appellant has made three fold submissions. One, it is a clear case of acquittal as the circumstantial evidence is not sufficient and the chain is not complete which would point only to the guilt of accused-appellant who is in jail. Two, in the alternative, he

has submitted that the injuries which are found though on the temporal part of the deceased, there is only one blow and that was with the brick and not by sharp edged knife which was found from the accused. There is no mention of any incised wound on the body of the deceased and, therefore, the offence is one which would be punishable under Section 304 Part I of IPC. Three, in the alternative, he has submitted that even if it is considered that the accused has committed the offence punishable under Section 302 of I.P.C., the term "life" in view of the judgments of the Apex Court in **Maru Ram Vs. Union of India, 1981 (1) SCC 107 and in Vikas Yadav Vs. State of U.P, 2016 (9) SCC 541**, would not be till last breath of appellant as it cannot be said that the death is so gruesome, that the appellant should be incarcerated in jail till the end of his life.

9. Sri N.K. Srivastava, learned A.G.A. for the State submits that it is not a case of acquittal as reason given by the learned Sessions Judge are cogent and the accused appellant cannot be given benefit of doubt. It is further submitted that this is also not a case which falls under Section 304 Part I. It is a clear case of murder and punishment under Section 302 of I.P.C does not call for interference.

10. Prosecution case is that before one day of the occurrence, accused and deceased stayed in New Dharamshala Hotel, Kanpur Nagar with fake names. Next day, deceased Brijendra Singh, earlier Pooran, was found dead in room No.45 of the hotel and the accused Rajesh Singh, earlier Mahesh, was found absconded from there. A blood stained brick was also found lying on the bed. There is no eye-witness of the occurrence. It is a case of circumstantial evidence. In a case of circumstantial evidence, the chain of circumstances should be completed in such a manner, as there is left no doubt that offence is not committed by anyone else but the accused only. During the course of the investigation, the motive is established, which was usurping the amount of Rs.1,50,000/- from the deceased. Evidence is there that the accused withdrew the amount from the account of the deceased by using his ATM card. Hotel record goes to show that accused and deceased stayed together in the same room of the hotel and the deceased was last seen in the company of the deceased by the Manager of the hotel and after that deceased was not seen with anybody-else. It is also a circumstance against the accused that he absconded from the hotel without informing the hotel staff and arrested later on by the investigating officer with the help of his sketch.

11. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant.

12. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge*

that he is likely by such act to cause death, commits the offence of culpable homicide."

13. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLED GE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

14. At the time of post mortem of the deceased following ante mortem injuries were found as per the post mortem report:-

(i) One contused swelling of 15cm x 10cm on the right side of the head, just above ear and there were several lacerated wounds just above it of size 1cm x 1cm

(ii) Behind the head in the area of 7cm x 5 cm there was contused swelling in which there were several lacerated wounds of size 1cm x 1cm

15. On internal examination a 10cm long fracture in temporal and parietal bone was found.

16. The above ante mortem injuries were inflicted by the brick which was found on the bed where the dead body was lying. It is very relevant to mention that a knife was also recovered from the room of the hotel but there was no injury of incised wound on the person of the deceased, which goes to show that the knife was not used by the accused.

17. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of**

Maharashtra, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC as there are no injuries caused by knife found from room where dead body was found.

18. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, but the intention has to be inferred as the injuries were sufficient in the ordinary course of nature to have caused death, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

19. In view of the above, we hold that the accused has committed culpable homicide not amounting to murder and punish him to undergo rigorous imprisonment for 10 years and fine of Rs.10,000/-. Sentence of default is maintained. Period of sentence for six months imprisonment under Section 25 Arms Act has already been undergone by the appellant. Fine and imprisonment for default under Section 25 Arms Act is maintained. If 10 years' incarceration is over, the Jail authority would release the accused if not wanted in any other offence.

20. This appeal is partly allowed. Record and proceedings be sent back to the Tribunal forthwith.

(2022)07ILR A179
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Crl. Appel. No. 1030 of 2013

Sikander & Anr. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Uma Shankar Pal, Sri Raj Kumar Mishra, Ms. Pooja, Sri Arvind Kumar Kushwaha

Counsel for the Respondents:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Sections 299,302/34 ,304B & 498A - The Code of Criminal Procedure, 1973 - Dowry Prohibition Act,1961 - Section 4 - Indian Evidence Act, 1872 - Section 32 - dying declaration - it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused - when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles - if it is recorded so then there cannot be any challenge regarding its correctness and authenticity. (Para - 23,34)

Deceased died after four days of burning - post mortem report - died due to septicaemia shock - septicaemial death - homicidal death - dying declaration - Death caused by accused persons - not pre-meditated - intentionally caused such bodily injuries which were likely to cause death - culpable homicide not amounting to murder - accused in jail for last more than 14 years.**(Para -28,29,36)**

(B) Evidence Law - evidence of a hostile witness cannot be discarded as a whole,

and relevant part thereof, which are admissible in law, can be used by prosecution or the defense - none of witnesses or authorities - involved in recording dying declaration - turned hostile - fully supported case of prosecution - dying declaration - reliable, truthful and voluntarily - can be acted upon without corroboration - can be made sole basis of conviction - trial court committed no error on acting on the sole basis of dying declaration **.(Para -16,26)**

HELD:-Case falls under exceptions (1) and (4) to Section 300 of IPC. While considering Section 299 IPC, offence committed will fall under Section 304 (Part-I) IPC. Conviction of appellants under Section 302 IPC converted into conviction under Section 304 (Part-I) IPC**. (Para -35,36,37)**

Appeal partly allowed.(E-7)

List of Cases cited:-

1. Maniben Vs St. of Guj. , 2009 Lawsuit SC 1380

2. Koli Lakhmanbhai Chandabhai Vs St. of Guj. ,1999 (8) SCC 624

3. Ramesh Harijan Vs St. of U.P. , 2012 (5) SCC 777

4. St. of U.P. Vs Ramesh Prasad Misra & anr. ,1996 AIR (Supreme Court) 2766

5. Lakhan Vs St. of M.P. ,(2010) 8 SCC 514

6. Krishan Vs St. of Har. ,(2013) 3 SCC 280

7. Ramilaben Hasmukhbhai Khristi Vs St. of Guj., (2002) 7 SCC 56

8. St. of U.P. Vs Mohd. Iqram & anr., (2011) 8 SCC 80

9. Bengai Mandal @ Begai Mandal Vs St. of Bihar, (2010) 2 SCC 91

10. Maniben Vs St. of Guj. , (2009) 8 SCC 796

11. Chirra Shivraj Vs St. of A.P., (2010) 14 SCC 444

12. Gautam Manubhai Makwana Vs St. of Guj., Criminal Appeal No.83 of 2008

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred against the judgment and order dated 31.01.2013, passed by the learned Additional Sessions Judge, Court No.6, Jaunpur, in Session Trail No.362 of 2010 State of UP vs. Sikander and another arising out of Case Crime No.328 of 2010 under Section 302/34 IPC, Police Station-Machhlishahar, District-Jaunpur, whereby the appellants are convicted and sentenced for the offence under Section 302 IPC for life imprisonment with a fine of Rs.10,000/- and in default of payment of fine, further imprisonment for one year.

2. The brief facts of the case are that first information report of this case was lodged by complainant with the averments that the marriage of his daughter was solemnized with accused Sikander S/o Ram Khelawan. Till the two years of marriage, the relation between the husband and wife were cordial but in the meantime Sikander developed illicit relations with his elder sister-in-law (Badi Bhabhi). This was intimated by his daughter Seema to her parents. On this score the relations between her daughter and son-in-law became strained and Sikander started beating his daughter and pressurized her to bring Rs.50,000/- from her house. Once his daughter caught her husband and sister-in-law (Jethani) red handed in compromising position. Husband had beaten her badly. On 09.04.2010 his son-in-law came to his house at evening and told that his daughter had caught fire. He reached to the spot and found his daughter was lying unconscious in burning condition. She had 95 percent burn. She made dying-declaration also and

died on 13.04.2010 during the course of treatment.

3. A first information report was registered on the basis of above written report. During course of investigation, I.O. recorded statement of witnesses, prepared site-plan. Dying-declaration of injured Seema was recorded by Nayab Tehshildar, Jaunpur. After the death of the deceased, inquest report was prepared and post mortem was conducted. Post mortem report is also placed on record. After making thorough investigation, charge sheet was submitted against the accused Sikander, husband of the deceased and Ram Khelawan, father-in-law of the deceased. Learned trial court framed charges against both the accused persons under Sections 498A & 304B IPC and under Section 4 Dowry Prohibition Act. Accused-appellants denied the charges and claimed to be tried. In alternative charge under Section 302 read with Section 34 IPC was also framed.

4. Prosecution examined following witnesses:

1.	Hawal Dar	PW1
2.	Kala Vati	PW2
3.	Ram Bodh	PW3
4.	Pyare	PW4
5.	Ramesh Chandra Srivastava	PW5
6.	Awdhesh Kumar	PW6
7.	Dr. A.K. Srivastava	PW7
8.	Suresh Kumar	PW8
9.	Ombir Singh Dhaka	PW9
10.	Shyam Narayan Mishra	PW10

5. Apart from aforesaid witnesses, prosecution submitted following documentary evidence, which was proved by leading the evidence:

1.	FIR	Ex.ka5
2.	Written report	Ex.ka2
3.	Dying-declaration	Ex.ka4/17
4.	Post mortem report	Ex.ka7
5.	Panchayatnama	Ex.ka8
6.	Charge-Sheet	Ex.ka15
7.	Site plan	Ex.ka14

6. Deceased was hospitalised after the occurrence by the accused persons themselves. She died after 4 days of the occurrence during the course of treatment.

7. Heard Arvind Kumar Kushwaha, learned counsel assisted by Ms. Pooja, learned counsel for the appellants-Sikander and Ram Khelawan and Shri Patanjali Mishra, learned AGA for the State.

8. Learned counsel for the appellants submitted that accused persons have been falsely implicated in this case. The deceased caught fire while cooking the food. It is further submitted by learned counsel that all the witnesses have turned hostile. PW1 is complainant and father of the deceased. He has not supported the prosecution case and declared hostile. PW2 Kalavati is mother of the deceased. She has also denied the demand of any amount or any sort of torturing her daughter by the accused persons. PW3 Ram Bodh is grandfather of the deceased and he has not supported the prosecution version. PW4 Pyare is also a witness of fact and has turned hostile. All these witnesses have not supported the prosecution version and on the basis of analysis of their evidence, no

guilt against the accused appellants is established and proved.

9. Learned counsel for the appellants next submitted that dying-declaration of the deceased was recorded when she was surviving, but this dying-declaration has no corroboration with any prosecution evidence. All the witnesses of fact have turned hostile and nobody supported the version, which is mentioned in dying-declaration. Therefore, learned trial court committed grave error by convicting the accused on the basis of dying-declaration only when it was not corroborated at all.

10. Learned counsel for the appellants additionally submitted that if, for the sake of argument, it is assumed that appellants have committed the offence, in that case also no offence under Section 302 IPC is made out. Maximum this case can travel up to the limits of offence under Section 304 IPC because the deceased died after 4 days of the occurrence due to developing the infection in her burn-wounds, i.e., septicaemia. As per catena of judgments of Hon'ble Apex Court and this Court, offence cannot travel beyond section 304 IPC, in case the death occurred due to septicaemia. Learned counsel for the appellants also submitted that postmortem report also shows that cause of death was septicaemia. Learned counsel relied on the judgment in the case of ***Maniben vs. State of Gujarat*** [2009 Lawsuit SC 1380], and the judgment in Criminal Appeal Nos.1438 of 2010 and 1439 of 2010 dated 7.10.2017 and judgment of Criminal Appeal No.2558 of 2011 delivered on 1.2.2021 by this Court and several other judgments.

11. No other point or argument was raised by the learned counsel for the appellants and confined his arguments on above points only.

12. Learned AGA, per contra, vehemently opposed the arguments placed by counsel for the appellants and submitted that conviction of accused can be based only on the basis of dying-declaration, if it is wholly reliable. It requires no corroboration. Moreover, testimony of hostile witnesses can also be relied on to the extent it supports the prosecution case. Learned trial court has rightly convicted the appellants under Section 302 IPC and sentenced accordingly. There is no force in this appeal and the same may be dismissed.

13. First of all learned counsel for the appellants has raised the issue relating to the hostility of the witness, 4 witnesses of the fact were examined before learned trial court, namely, PW1 Hawal Dar, PW2 Kalavati, PW3 Ram Bodh, PW4 pyare. All these witnesses have turned hostile, but the testimony of hostile witnesses cannot be thrown away just on the basis of the fact that they have not supported the prosecution case and were cross-examined by the prosecutor. The testimony of hostile witnesses can be relied upon to the extent it supports the prosecution case. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

14. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat*** [1999 (8) SCC 624], as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial

and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

15. In ***Ramesh Harijan vs. State of U.P***. [2012 (5) SCC 777], the Hon'ble Apex Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

16. In ***State of U.P. vs. Ramesh Prasad Misra and another*** [1996 AIR (Supreme Court) 2766], the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defense.

17. Perusal of impugned judgment shows that learned trail court has scrutinised the evidence on record very carefully.

18. As far as the dying-declaration is concerned, it was recorded by Ramesh Chandra Srivastava, Nayab Tehsildar, Sadar District Jaunpur who was examined as PW5. Dying-declaration was recorded by PW5 after obtaining the certificate of mental-fitness from doctor in the hospital. After completion of dying-declaration also the said doctor has given certificate that during the course of statement, the victim remained conscious.

19. Learned counsel for the appellants has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh*** [(2010) 8 Supreme Court Cases 514], in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

20. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such

an eventuality no corroboration is required. It is also held by Hon'ble Apex Court in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

21. Deceased survived for 4 days after the incident took place. Her dying declaration was recorded by Ramesh Chandra Srivastava Nayab Tehsildar after obtaining the certificate of medical fitness from the concerned doctor. This dying declaration was proved by PW5 Ramesh Chandra Srivastava, Nayab Tehshildar. These witnesses have absolutely independent witnesses. In the wake of aforesaid judgments of Lakhan (supra), dying declaration cannot be disbelieved, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in ***Krishan vs. State of Haryana*** [(2013) 3 Supreme Court Cases 280] that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

22. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat,*** [(2002) 7 SCC 56], the Hon'ble Apex Court held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

23. From the above case laws, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

24. In dying declaration of deceased (Ex.ka4/17), it is also important to note that it was recorded on 09.04.2010 and the deceased died on 13.04.2010 while the

incident took place on 09.04.2010. It means that she remained alive for 4 days after making dying declaration. Therefore, truthfulness of dying declaration can further be evaluated from the fact that she survived for 4 days after making it from which it can reasonably be inferred that she was in a fit mental condition to make the statement at the relevant time. Moreover, in the dying declaration, the deceased did not unnecessarily involved the other family members of the accused appellants. She only attributed the role of burning to her husband and father-in-law.

25. In such a situation, the hostility of witnesses of fact cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by prosecution in accordance with law and is a truthful version of the event that occurred and the circumstances leading to her death.

26. As already noticed, none of the witnesses or the authorities involved in recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution. The dying declaration is reliable, truthful and was voluntarily made by the deceased, hence, this dying declaration can be acted upon without corroboration and can be made the sole basis of conviction. Hence, learned trial court has committed no error on acting on the sole basis of dying declaration. Learned trial court was completely justified in placing reliance on dying declaration Ex. Ka-4 and convicting the accused-appellants on the basis of it.

27. Now we come to the point of argument raised by learned counsel for the appellants that deceased died due to septicaemia, hence this case falls within the ambit of Section 304 IPC and not under Section 302 IPC. In this regard, learned counsel has submitted that deceased died after 11 days of incident due to the poisonous infection developed in her burn injuries, which could be avoided by good treatment. There was no intention of the appellants to cause the death of his wife.

28. It is admitted fact that the deceased died after four days of burning and post mortem report goes to show that she died due to septicaemia shock. Dr. A.K. Srivastava has been examined as PW7, who had conducted the post mortem of the deceased. He has specifically written in the post mortem report and deposed before the learned trial court that the cause of death was septicaemia shock due to burn injuries. Hence, the death of the deceased was septicaemial death.

29. The finding of fact regarding the presence of witnesses at the place of occurrence cannot be faulted with. Death of deceased was a homicidal death. The fact that it was a homicidal death takes this Court to most vexed question whether it would fall within the four-corners of murder or culpable homicide not amounting to murder. Therefore, we are considering the question whether it would be a murder or culpable homicide not amounting to murder and punishable under Section 304 IPC. Accused is in jail for the last more than 14 years.

30. In ***State of Uttar Pradesh vs. Mohd. Iqram and another***, [(2011) 8 SCC 80], the Apex Court has made the following observations in paragraph 26, therein:

*"**26.** Once the prosecution has brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have*

brought-forth suggestions as to what could have brought them to the spot in the dead of night. The accused were apprehended and, therefore, they were under an obligation to rebut this burden discharged by the prosecution and having failed to do so, the trial-court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable."

31. In ***Bengai Mandal alias Begai Mandal vs. State of Bihar*** [(2010) 2 SCC 91], incident occurred on 14.7.1996, while the deceased died on 10.8.1996 due to septicaemia caused by burn injuries. The accused was convicted and sentenced for life imprisonment under Section 302 IPC, which was confirmed in appeal by the High Court, but Hon'ble The Apex Court converted the case under Section 304 Part-II IPC on the ground that the death ensued after twenty-six days of the incident as a result of septicaemia and not as a consequence of burn injuries and, accordingly, sentenced for seven years' rigorous imprisonment.

32. In ***Maniben vs. State of Gujarat*** [(2009) 8 SCC 796], the incident took place on 29.11.1984. The deceased died on 7.12.1984. Cause of death was the burn injuries. The deceased was admitted in the hospital with about 60 per cent burn injuries and during the course of treatment developed septicaemia, which was the main cause of death of the deceased. Trial-court convicted the accused under Section 304 Part-II IPC and sentenced for five years' imprisonment, but in appeal, High Court convicted the appellants under Section 302 IPC. Hon'ble The Apex Court has held that during the aforesaid period of eight days, the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries. Accordingly, judgment and order convicting the accused under Section 304 Part-II IPC by the trial-court was maintained and the judgment of the High Court was set aside.

33. In ***Chirra Shivraj vs. State of Andhra Pradesh*** [(2010) 14 SCC 444], incident took place on 21.4.1999. Deceased died on 1.8.1999. As per the prosecution version, kerosene oil was poured upon the deceased, who succumbed to the injuries. Cause of death was septicaemia. Accused was convicted under Section 304 Part-II IPC and sentenced for five years' simple imprisonment, which was confirmed by the High Court. Hon'ble The Apex Court dismissed the appeal holding that the deceased suffered from septicaemia, which was caused due to burn-injuries and as a result thereof, she expired on 1.8.1999.

34. We can safely rely upon the decision of the Gujarat High court in Criminal Appeal No.83 of 2008 (***Gautam Manubhai Makwana Vs. State of Gujarat***) decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of Krishan vs. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body,

then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that

his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

35. On the overall scrutiny of the facts and circumstances of the case coupled with medical evidence and the opinion of the Medical Officer and considering the principle laid down by the Courts in above referred case laws, we are of the considered opinion that in the case at hand, the offence would be punishable under Section 304 (Part-I) IPC.

36. From the upshot of the aforesaid discussions it appears that the death caused by the accused persons was not pre-meditated but they intentionally caused such bodily injuries which were likely to cause death. Hence the instant case falls under the exceptions (1) and (4) to Section 300 of IPC. While considering Section 299 IPC, offence committed will fall under Section 304 (Part-I) IPC.

37. In view of the aforesaid discussion, we are of the view that appeal has to be partly allowed. The conviction of the appellants under Section 302 IPC is converted into conviction under Section 304 (Part-I) IPC and the appellants are sentenced to undergo ten years of incarceration with fine of Rs. 10,000/- and in case of default of payment of fine, the appellants shall further undergo simple imprisonment for 1 year.

38. Accordingly, the appeal is **partly allowed.**

(2022)07ILR A188
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Crl. Appel. No. 1507 of 2015

Vinod & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri A.K. Tripathi, Sri Ashok Kumar Tripathi, Sri Namit Kumar Sharma

Counsel for the Respondents:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Sections 302 / 34, 201, 364 & 404 - The Code of Criminal Procedure, 1973 - Section 313 - circumstantial evidence - conviction can be based solely on circumstantial evidence - Court must bear in mind -while deciding the case involving the commission of a serious offence based on circumstantial evidence - prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. (Para -26)

Kidnapping - murder - no eyewitness account of incident - prosecution case based on circumstantial evidence - No evidence against accused - serious infirmities in prosecution evidence - statements of witnesses are highly inconsistent - major contradictions and discrepancies in it on material points - prosecution evidence not reliable **. (Para - 18,29)**

(B) Evidence Law - case based on circumstantial evidence - circumstances from which the conclusion of guilt is drawn, should be fully proved - such circumstances must be conclusive in

nature - all the circumstances should be complete and there should be no gap left in the chain of evidence - proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence - conviction can be based on circumstantial evidence, but those circumstances must be fully proved and must be conclusive in nature. (Para - 30)

HELD:-Prosecution evidence not of standard as to say that prosecution has succeeded in proving the charges beyond reasonable doubt. Not safe to rely on prosecution evidence. Just and proper to extend benefit of the doubt to accused. Appellant accused acquitted of charges for which they have been tried and convicted.**(Para -31,33)**

Appeal allowed. (E-7)

List of Cases cited:-

1. Sharad Birdhichand Sarda Vs St. of Mah., AIR 1984 SC 1622

2. Haresh Mohandas Rajput Vs St. of Mah., 2011 (12) SCC 56

3. S. K. Yusuf Vs St. of W.B., AIR 2011 SC 2283

4. C Chenga Reddy Vs St. of A.P., 1996 SCC (Crl.) 1205

5. Satni Bai Vs St. of M.P., (2010) 2 SCC 646

(Delivered by Syed Aftab Husain Rizvi,J.)

1. We have heard Sri Ashok Kumar Tripathi, learned counsel for the appellants, and Sri Pankaj Saxena learned AGA for the State.

2. This criminal appeal has been filed against the judgment and order dated 17.03.2015 passed by the Additional Sessions Judge, Court No.4, Mathura, in Sessions Trial No.254 of 2013, arising out of Case Crime No.522 of 2012, Police Station Kosikala, District Mathura, convicting and sentencing the accused-appellants Vinod and Karmveer as under:-

"Imprisonment for life and fine of Rs.10,000/- each, under section 302 read with section 34 IPC; 10 years rigorous imprisonment and fine of Rs.5,000/-each under section 364 IPC; 7 years rigorous imprisonment and fine of Rs.5,000/- each under section 201 IPC; and 3 years rigorous imprisonment and fine of Rs.5,000/- each under section 404 IPC.

INTRODUCTORY FACTS

3. The Factual matrix is as follows:-

(i) Complainant Nawal Singh (P.W.-1) gave a written information at the Police Station Kosikala, District Mathura on 19.08.2012, alleging therein that his uncle Narayan Singh(the deceased), aged 60 years, on receiving a phone call, left his house on 11.08.2012 at 1.30 PM taking Rs.70,000/- with him but did not return, thereafter; and that his phone number 8683094403 is not responding. The aforesaid information was entered in G.D. No.23 at 9.10 AM on 29.08.2012 as a missing report.

(ii) On the same date, the complainant Nawal Singh gave another application at Police Station Kosikala, alleging therein that on 11.08.2012 at about 1.30 PM Narayan Singh (the deceased), the uncle of the complainant had gone to Hodal with Karmveer, taking Rs.70,000/- with him; that neither he has returned nor his phone number 8683094403 is responding; that after a thorough search, he lodged a missing report on 19.08.2012; that Vijan and Prahlad had seen Narayan Singh with his servant Karmveer, going on a

motorcycle on the way to Hodal; that the complainant believes that Karmveer has kidnapped his uncle and committed murder in greed for money. On the aforesaid written information (Ex. Ka.-1) an FIR Crime No.522 of 2012, under sections 364, 302, 201 IPC, was registered at Police Station Kosikala, District Mathura on 19.08.2020 at 20.30 hours.

(iii) Santosh Singh(P.W.-10), SO, Police Station Kosikala, District Mathura, took up the investigation. He recorded the statement of the complainant. On the information received from the informer, he arrested the named accused Karmveer on 20.10.2012 at 12.05 noon from Korvan Tiraha. On interrogation, accused Karmveer confessed his crime and disclosed that he has committed the murder of Narayan Singh on 19.08.2012 with the help of his cousin Vinod for Rs.70,000/-; that he assaulted Narayan Singh with a spade causing his death and buried the body in his field; that, Rs.50,000/- which came in his share, had been kept by him at the house of his sister Lakshmi, resident of Balghadi, Police Station Kosikala; and that he could get recovered the dead body from the field as also the cash. The gist of the interrogation was entered in the G.D. on the same date at 12:45. PM The investigating officer accompanying other police personnel and Karamveer arrived at the field of the deceased Narayan Singh and at the pointing out of accused Karmveer the dead body of Narayan Singh was recovered after digging a pit. A spade was also recovered at the pointing out of accused Karmveer at about 15.30 PM from the bushes near the hut situated in the field of the deceased Narayan Singh. Its recovery memo was prepared. The investigating officer prepared the site plan of both places, took plain soil and blood-stained soil and sealed it, and prepared its memo. The body was sent for postmortem. Thereafter, the SO accompanying police personnel, Karamveer, and witnesses, namely, Bittan and Vijan, came to the village Balghadi at the house of Lakshmi, the sister of the accused Karamveer, and at his pointing out recovered Rs.50,000/- comprising 25 notes of Rs.1,000/- denomination and 50 notes of Rs.500/- denomination, kept in a purse inside a box. A recovery memo of this was prepared. The SO returned to the Police Station Kosikala and deposited the articles there and also added section 404 IPC, vide G.D. No.41 dated 20.08.2012. Thereafter, investigating officer recorded the statements of other witnesses, arrested the co-accused Vinod, and after completion of the investigation submitted the charge sheet.

4. The learned trial court framed charges under sections 364, 302 read with sections 34 IPC, 201, and 404 IPC against both the accused-appellants Vinod and Karmveer. They pleaded not guilty. The prosecution produced 10 witnesses who had proved 27 prosecution papers (Ex. Ka-1 to Ex. Ka-27).

The accused-appellants Vinod and Karmveer in their statements under section 313 Cr.P.C. had denied the prosecution story and incriminating circumstances against them and had also submitted that witnesses had given false evidence against them. The accused Karmveer had also said that the SO asked his father to pay Rs.50,000/- to release his son. Later on, he showed the recovery of aforesaid Rs.50,000/- from him to falsely implicate him. One defense witness Gopal(D.W.-1), the father of accused Karmveer, had also been produced.

The trial court found both the accused guilty and sentenced them as above.

5. According to the autopsy report, the postmortem was conducted on 20.08.2012 at 7.15 PM.

EXTERNAL EXAMINATION

The age of the deceased was about 47 years. The body was average built, and the sign of decomposition was present. Scrotum was swollen, hairs easily pulled out, teeth loose in sockets. Discoloration of iliac fossa, lower abdomen, peeling of skin at places, Rigor Mortis passed from the entire body. Following Antemortem injuries were found on the body:-

"1. Lacerated wound 8 CM X 4 CM on back of the head. The occipital bone was fractured.

2. Lacerated wound 4 CM X 2 CM on the left side of the head. The left parietal bone was fractured.

3. Lacerated wound 3 CM X 2 CM on the left side of the head. The temporal region was fractured.

4. Lacerated wound 8 CM X 2 CM on the lower side of the waist on the left side.

5. Lacerated wound 6 CM X 1 CM on the left elbow.

6. Lacerated wound 2 CM X 0.12 CM X .5 C.M. on the upper side of the left shoulder region.

7. Lacerated wound 3 CM X 2 CM on the left side of the back scapular region. 10 C.M. from scapular spine.

INTERNAL EXAMINATION

The occipital, left parietal, and left temporal bone were fractured and clotted blood was present. The brain was pale and brain material was coming out partially. The lungs were pale. Both the chambers of the heart were empty. Stomach was empty. The liver, Pancreas, Spleen, and both kidneys were pale. The gallbladder was half pale. The cause of death was haemorrhage due to antemortem injuries. The duration of death was about 3 days.

The aforesaid autopsy report has been proved by Doctor Lal Singh (P.W.-8) as Ex.Ka-6.

TESTIMONY OF PROSECUTION WITNESSES

6. Besides Dr. Lal Singh (P.W.-8) prosecution has produced nine other witnesses. Nawal Singh, P.W.-1 is the complainant and nephew of the deceased. In his examination-in-chief, the witness has said that his uncle Narayan Singh was kidnapped on 11.08.2012 at 1.30 Noon. Narayan Singh, Nepal Singh, Kailash, Tejvir, and his wife Kushwalwati were present at the house. Karmveer was employed as a servant of Narayan Singh and drove his tempo. Vinod is the cousin of Karmveer. His uncle Narayan Singh has gone with Karmveer and Vinod to purchase a tractor taking Rs.70,000/- cash. When his uncle did not come back in the evening, then he made a call on his phone. It was switched off. When the Witnesses Vijan and Prahlad Singh came to his house, then they told that they have seen Narayan Singh going with Karmveer and Vinod. He searched Narayan Singh, Karmveer, and Vinod in the village, but could not find them, then he lodged the FIR at the Police Station. The witness has proved the written information Ex. Ka-1. He has also said that on 20.08.2012 after getting the dead body of his uncle Narayan Singh, he gave an application to the District Magistrate, Mathura, and proved it as Ex. Ka-2. The witness has further said that the dead body of his uncle was recovered on 20.08.2012 at the pointing out of Karmveer from the

field of Narayan Singh after digging a pit. One spade was also recovered at his pointing out. Karamveer told that he and Vinod killed Narayan Singh by hitting his head with a spade. The spade was also recovered from the field of Narayan Singh. Karmveer and Vinod have committed the murder of Narayan Singh in greed of Rs.70,000/-. Witness also stated that he gave a missing report on 11.08.2012, which was proved as Ex. Ka.-3. He further stated that Rs.50,000/- was got recovered at the pointing out of Karamveer from the house of his sister in village Balgarhi, Police State Kosikala.

7. Prahlad Singh, P.W.-2 in his examination-in-chief has stated that the deceased Narayan Singh was his neighbour. On 11.08.2012 at 1-1:30 PM, Narayan Singh was going on a motorcycle with Karamveer. The motorcycle was driven by Karamveer. Narayan Singh was sitting on the pillion. Karamveer was employed at the house of Narayan Singh for the last 2-3 years. When he along with Vijan was grazing his buffalo, then he saw Karamveer and Narayan Singh, going on a motorcycle on the way leading to Hodal. On this way, the field of Narayan Singh is situated. He informed Nawal that he has seen Narayan Singh and Karamveer going on the way leading to Hodal. Witness has further said that the dead body of Narayan Singh was got recovered by Karamveer in front of him after digging a pit. Co-villagers and police personnel were also present there. Narayan Singh has gone with Karamveer to purchase a Tractor, taking Rs.70,000/- cash. Karamveer also got recovered Rs.50,000/- from the house of his sister. He has also told that Vinod was with him and the remaining amount has been given to Vinod. Vinod is also involved in the murder of Narayan Singh. Murder was committed with a spade, which was recovered at the instance of Karamveer from inside the hut. Witness has further said that after taking out the dead body from the pit, the inquest proceeding was conducted, and he signed on it. The witness identified his signature on the inquest report.

8. Vijan(P.W.-3) in his examination-in-chief has stated that the deceased Narayan Singh was his co-villager. He was murdered. On 11.08.2012 at 1.30 PM he was grazing his buffalo beside the way leading to Hodal. At that time Narayan Singh and his servant Karamveer were going towards Hodal on a motorcycle. Karamveer was driving the motorcycle while Narayan Singh was sitting on the pillion. When in the evening he returned back to the village he came to know that Narayan Singh is missing. Then he told Nawal Singh that he has seen Narayan Singh and Karamveer going on the way leading to Hodal. When Nawal Singh called Karamveer, he told him that he had left Narayan Singh at Hodal bypass and he does not know where he has gone. When he made a call to Narayan Singh, the phone did not respond. Then Karamveer was caught and he got the dead body of Narayan Singh recovered from a pit, situated in front of the hut. Witness has further said that Karamveer Singh accompanying police personnel got recovered Rs.50,000/- From a box kept inside the room of his sister's house at village Balgadhi. Karamveer also told that this is the cash that has come in his share. The cash was in a purse which was kept inside the box in between the clothes. The cash along with the purse was sealed and a memo was prepared and his signature was obtained on it. The witness has proved his signature on the recovery memo. Witness has further said that Karamveer told that he

along with Vinod have committed the murder of Narayan Singh in greed for money and had buried the dead body of Narayan Singh in his field in a pit in front of the hut. Witness has also said that he knew the accused Vinod because he used to come to the house of Narayan Singh and Karamveer.

9. Parmanand (P.W.-4) in his examination-in-chief has stated that the field of the deceased was beside his field. At about noon of 11.08.2012, he was present at his field when he saw Karamveer and Vinod going towards the field of Narayan Singh. Narayan Singh did not return in the evening. After a day or two, he came to know that Narayan Singh has been kidnapped or had died. After two days police came and interrogated the villagers. On 20.08.2012 the dead body of Narayan Singh was recovered at the pointing out of Karamveer from the field of Narayan Singh, near the hut. An inquest report was prepared and he signed it. The witness has proved his signature on the inquest report. The witness has further said that Karamveer in front of him and other villagers has confessed that he and Vinod have committed the murder of Narayan Singh.

10. Dharam Singh (P.W..-5) in his examination-in-chief has stated that the deceased Narayan Singh was his co-villager. Accused Karamveer was employed by Narayan Singh, to drive his tempo. On 11.08.2012 Narayan Singh has gone with Karamveer to purchase buffalo. Thereafter, Karamveer returned back but Narayan Singh did not return. When 8 to 9 days passed and Narayan Singh did not come back then they became worried. Police were informed and Karamveer was arrested by the police. On the next day on 20.08.2012 police brought Karamveer to the field of Narayan Singh, where Narayan Singh was killed. Karamveer told that he along with his cousin Vinod has committed the murder of Narayan Singh. He got recovered one spade from the bushes in the field of Narayan Singh and told that he and Vinod have killed Narayan Singh and concealed the dead body of Narayan Singh in a pit. Karamveer after digging the pit got recovered the dead body of Narayan Singh. The recovery memo was prepared by the sub-inspector and he signed it. The witness has identified his signature on the recovery memo as well as on the inquest report.

11. Bittan (P.W.-6) in his examination-in-chief has stated that deceased Narayan Singh was of his village. Karamveer was his servant and used to drive his tempo. P.W.-6, whose statement was recorded on 06.09.2014, stated that about two years ago police along with Karamveer came to the village. Thereafter, police with Vijan, Karamveer, and the witness including him went to village Balghadi at the house of Lakshmi, the sister of Karamveer. From there at the pointing out of Karamveer Rs.50,000/- cash was recovered from a box. Karamveer told that the money belongs to Narayan Singh. Police prepared a memo of it and got his signature on it.

12. Head Constable, Daya Sharan, P.W.-7 in his examination-in-chief has proved the chik report No.510 of 2012 dated 19.08.2012 at 20.30 PM registered on written information given by Nawal Singh. He has also proved G.D. Entry No.54, at 20.30 hours of the same. These documents were exhibited as Ex. Ka-4 and Ka-5.

13. Narendra Pal Singh, P.W.-9 in his examination-in-chief has stated that on

20.08.2012 he was posted as Sub-inspector at Police Station Kosikala. On that day with other police personnel including S.I. Santosh Kumar and the arrested accused Karamveer arrived at the field of Narayan Singh to recover the dead body of Narayan Singh. The dead body of the deceased Narayan Singh was recovered from a pit situated in front of a hut in the field of Narayan Singh. On the direction of S.I. Santosh Kumar, he prepared inquest report of the dead body. Witness proved the inquest report (Ex. Ka.-15).

14. Sub-Inspector Santosh Singh, P.W.-10, the investigating officer in his examination-in-chief has stated that Crime No.522 of 2012, under sections 364, 302, 201, IPC was registered at Police Station Kosikala, District Mathura. He started the investigation and recorded the statement of the complainant. On the information of the informer, he arrested the accused Karamveer from Korvan Tiraha at 12.05 Noon and lodged the accused at Police Station through G.D. Entry No.22 at 12.30 Noon. He interrogated the accused Karamveer, who confessed his crime and said that on 11.08.2012 he with the help of his cousin Vinod has committed the murder of Narayan Singh in greed of Rs.70,000/- and buried the dead body in the field of Narayan Singh. He also confessed that Narayan Singh was hit on the head by a spade, his dead body was buried by digging a pit with the spade. He confessed that Rs.50,000/- came in his share while Rs.20,000/- was taken by his cousin Vinod; and that Rs.50,000/- has been concealed and kept in the house of his sister Lakshmi, resident of Balghadi. The gist of the interrogation was entered in the G.D. No.23 at 12.45 Noon. Thereafter the police party along with Karamveer came to the field of Narayan Singh at Village Lalpur from where the accused Karamveer, after digging the pit, got the dead body of Narayan Sigh recovered. The inquest report of the dead body was prepared by Sub-inspector Narendra Singh. Accused Karamveer also got recovered the spade used in the murder of Narayan Singh from the bushes near the hut situated in the field of deceased Narayan Singh at about 15.30 PM. Its memo was prepared by him. Witness has proved it as Ex. Ka-16. At the instance of the complainant and the accused Karamveer, the site plan of the aforesaid place was prepared by him. He has proved it as Ex. Ka-17. He also collected plain soil and blood-stained soil and prepared its memo and has proved it as Ex. Ka-18. Thereafter, he along with witnesses Bittan and Vijan and the accompanying police force came to village Balghadi at the house of Lakshmi, the sister of the accused Karamveer, from where the accused got recovered Rs.50,000/- cash contained in a box and kept in a purse, comprising 50 notes of Rs.500/- denomination and 25 notes of Rs.1,000/- denomination. Its recovery memo was also prepared. Witness has proved it as Ex.Ka-19. He also prepared the site plan of this place Ex. Ka-20. Witness has further stated that he recorded the statement of other witnesses. Co-accused Vinod was arrested on 05.10.2012. After completion of the investigation, he submitted the charge sheet Ex. Ka-21. The witness also proved the forensic science laboratory report, Ex. Ka-27 and material exhibit, spade, blood-stained earth, and plain earth, a purse containing 25 notes of Rs.1,000/- denomination and 50 notes Rs.500/- denomination, as material Exhibits.1 to 71.

TESTIMONY OF DEFENCE WITNESS

15. One witness Gopal, D.W.-1 has also been produced by the defence. This witness in his examination-in-chief has stated that his son Karamveer was employed in the house of Narayan Singh and was paid Rs.3,000/- per month and was also provided food and lodging. Narayan Singh used to pay accumulated salary in lump sum. On 09.08.2012 his son Karamveer had given him Rs.50,000/-. After 9 to 10 days a policeman came to his house and said that his son Karamveer has been detained by the police. He asked him (D.W.-1) to bring some money so that his son may be released. On 19.08.2012 at 6.30 PM he came to Police Station Kosikala and negotiated with the police, then they asked him to pay Rs.50,000/- for the release of his son. He paid Rs.50,000/- to the SO who said that his son will be released in the morning. He went back after giving the cash but his son was not released. Later on, he came to know that this cash amount was planted and his son has been falsely implicated. The cash belongs to him.

SUBMISSIONS ON BEHALF OF APPELLANTS

16. The learned counsel for the applicant contended that there is no eyewitness of the incident. The prosecution has relied only on circumstantial evidence. The chain of circumstances as alleged by the prosecution is not complete. The FIR has been lodged on 19.08.2012 after a delay of 8 days and there is no plausible explanation for the delay. The conduct of the complainant is highly doubtful. There are major contradictions between the allegations of the FIR and the statement of the complainant. In the FIR only Karamveer, the accused has been named and it is alleged that Narayan Singh has left the house with Karamveer, but the complainant in his statement before the court has also implicated the other accused Vinod, and has said that Narayan Singh has left the house with Karamveer and Vinod and was seen by the witnesses going with them on a motorcycle. It is further contended that the arrest of the accused Karamveer has been shown in the record as on 20.08.2012 at 12.05 Noon, which is not supported by the public witnesses. According to public witnesses, the Karamveer was present in the village and was handed over to the police on 19.08.2012 or earlier. It also destroys the entire prosecution evidence of recovery of the dead body, spade, and cash at the pointing out of Karamveer. It is further contended that Karamveer never absconded and he remained present in the village itself, which shows his innocence. The recovery of the cash amount is also fabricated. The real fact is that Karamveer was detained by the police and the police demanded money to release him. The father of Karamveer paid Rs.50,000/- for that and the police planted it on Karamveer, showing the recovery of cash. The accused in his statement under section 313 Cr.P.C. has put up the above defence and has also produced his father, Gopal(D.W.-1) in support of it. Learned counsel for the applicant also contended that the investigating officer has not conducted the investigation in a fair and impartial manner and in collusion with the complainant has falsely implicated the appellant-accused. It is also contended that there is no evidence against the appellant Vinod. The evidence against the co-accused Karamveer is untrustworthy and unbelievable. The learned trial court has failed to appreciate the evidence and has ignored the major discrepancies and contradictions of the prosecution evidence. The finding of conviction recorded by the trial court is perverse and illegal.

SUBMISSIONS ON BEHALF OF THE STATE

17. Per contra, the learned AGA for the State submitted that the deceased was missing and the complainant after making a thorough search at his level has given a missing report at the police station and thereafter lodged the FIR. So there is a plausible explanation for the delay in lodging the FIR. Learned AGA for the State conceded that there is no sufficient evidence against the appellant-accused Vinod, but submitted that so far as the appellant-accused Karamveer is concerned there is sufficient and cogent evidence against him. There is a chain of evidence so complete that it conclusively points to the guilt of the appellant Karamveer by leaving no reasonable doubt for the conclusion that the accused Karamveer is guilty. It is proved from the evidence that the deceased has left the house with the accused Karamveer. It also stands proved that he was last seen by the public witnesses in the company of accused Karamveer going on a motorcycle towards Hodal. The dead body has been recovered, buried in the field of the deceased, at the pointing out of accused Karamveer. This fact can be in the knowledge of the culprit only. The spade used in committing the murder of the deceased has also been recovered at the pointing out of accused Karamveer from the bushes near the field. From the statements of public witnesses, it stands fully proved that the dead body and the spade have been recovered at the pointing out of accused Karamveer. The motive of the crime is also proved. The deceased was having Rs.70,000/- with him and in greed for that money, his murder has been committed. Out of this money, Rs.50,000/- has been recovered from the house of the Karamveer's sister at the pointing of the accused Karamveer. It is admitted by the defense witness Gopal DW-1 that this money belongs to the deceased. Merely because the accused Karamveer has not absconded after the incident does not indicate his innocence. He may not have done so to avoid any suspicion being raised against him. So from the prosecution evidence, a complete chain of circumstances is established, which clearly points toward the guilt of the accused. The finding of conviction of accused Karamveer recorded by the trial court is just and proper and there is no illegality in it.

A N A L Y S I S

18. There is no eyewitness account of the incident and the prosecution case is based on circumstantial evidence.

In **Sharad Birdhichand Sarda AIR 1984 SC 1622**, the Hon'ble Supreme Court has laid down the following five golden principles to prove 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 unerringly point towards the guilt of the accused.

(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."

In the case of **Haresh Mohandas Rajput v. State of Maharashtra 2011 (12) SCC 56** following its earlier decisions, the Hon'ble Apex Court held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:-

"(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing toward the guilt of the accused.

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

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

19. The prosecution has relied on the following chain of circumstances:-

(i) On 11.08.2012 the deceased, Narayan Singh went from his home accompanying Karamveer and Vinod taking Rs.70,000/- cash and since then he was missing.

(ii) Deceased Narayan Singh was last seen going with Karamveer and Vinod on the way leading to Hodal.

(iii) On 20.08.2012 at 12.05 Noon Karamveer was arrested by the police and on his interrogation, he confessed his crime and stated that he along with his cousin Vinod has committed the murder of Narayan Singh in greed of Rs.70,000/-.

(v) The dead body of the deceased Narayan Singh was recovered at the instance of accused Karamveer, buried in the field of deceased Narayan Singh at Village Lalpur.

(vi) The spade used in the crime was also got recovered at the instance of accused Karamveer.

(vii) Rs.50,000/- cash was also recovered at the instance of accused Karamveer from the house of his sister Lakshmi from the village Balghadi contained in a box and kept in a purse.

20. According to the prosecution case, Narayan Singh left his house on 11-08-2012 at 1:30 PM with his servant Karamveer for Hodal with rupees seventy thousand. He was seen by the witnesses Prahlad Singh and Vijan, going on a motorcycle with Karamveer and Vinod on way to Hodal at the noon of 11-08-2012. The first information that Narayan Singh is missing was given to the police by Naval Singh the nephew of the deceased on 19-08-2012 and it was entered in the G.D. at 09:10 AM In this report, it is mentioned that on 11-08-2012 at 01:30 PM after a phone call from someone Narayan Singh left the house with Rupees seventy thousand where after he did not return nor his phone responded. Later, on the same day, Naval Singh gave another application on the basis of which F.I.R. was registered at 20:30 hours. In this application, it was alleged that on 11-08-2012 at 01:30 P.M. Narayan Singh had gone to Hodal with Karamveer taking Rs.70,000/- with him. In this report it was alleged that his uncle was last seen by Vijan and Prahlad going on a motorcycle on the way to Hodal. In the first

missing report, the fact that Narayan Singh had left the house with Karamveer and that witnesses Vijan and Prahlad had seen them going on a motorcycle is not mentioned. It is established from the statements of witnesses that the aforesaid fact was well within the knowledge of complainant Naval Singh at the time when he gave the missing report to the police. Rather, the aforesaid fact was well within the knowledge of the complainant from the date of the incident itself. Naval Singh (P.W.-1) in his examination in chief has said that when his uncle did not return in the evening then he made a call on his mobile which was switched off. When Vijan and Prahlad came to his house, they told him that they have seen Narayan Singh, his uncle going with Kramveer and Vinod. Prahlad Singh P.W. 2 in his cross-examination has said that he grazed his cattle till 04:00 PM. At another place, the witness said that he met Naval at his house then he told that he had seen Narayan going with Karamveer. Quarter to an hour after reaching home he went to the house of Naval Singh. Vijan P.W. 3 in his examination in chief has said that when he came back to his village in the evening and heard that Narayan Singh is missing then he told Naval that he had seen Narayan Singh going with Karamveer on way to Hodal. So it is fully established from the prosecution evidence that the fact that Narayan Singh had left the house with Karamveer and was last seen by Prahlad and Vijan going on a motorcycle with Karamveer and Vinod on way to Hodal was well within the knowledge of the complainant from the very beginning but neither he gave any information to the police earlier nor he disclosed these facts in the missing report which was given on the morning of 19-08-2012. The aforesaid fact being in the knowledge of the complainant yet not finding a place in the missing report clearly reflect that the facts mentioned in the FIR later were an after thought may be in consultation with or at the behest of the police. There is no plausible explanation for informing the police or lodging the F.I.R. with so much delay i.e. after eight days of the incident. There are also major discrepancies in the statements of complainant Naval Singh and other witnesses in relation to the lodging of the missing report and the F.I.R. Complainant Naval Singh has given different versions. At one place he has said that he has lodged the missing report after 2-3 days. He has further said that he had lodged this report at about 4-4:30 pm while the missing report had been lodged after 8 days in the morning at 9:10 am. In his cross-examination, the witness has said that FIR was lodged on 11-08-2012. Correcting himself he has again said that FIR was lodged on 19-08-2012 but has further said that the two reports were not lodged on the same day while the missing report as well as FIR both have been lodged on the same day i.e. on 19-08-2012. He has further said that he had returned home at 5:30 pm after lodging the FIR, while, according to the record, the FIR was lodged on 19-08-2012 at 20:30 hours. Changing his statement the witness has further said that he met a police person on 18-08-2012 at the police station. Prahlad Singh PW-2 in his cross-examination has said that the missing report was lodged on the date when he last saw Narayan Singh going with Karamveer, so according to him, the missing report was lodged on 11-08-2012.

21. There are also other discrepancies in the statement of complainant Naval Singh. In his examination-in-chief, the witness reiterating the version of the FIR has said that his uncle Narayan Singh has left the house at 1:30 pm but in his cross-

examination, the witness has put a different version and has said that his uncle and Karamveer has left the house at 9-9:30 am. At one place in his cross-examination, the witness has said that he and his uncle lived in the same house and that Narayan Singh had left the house in front of him while at another place the witness has said that the house of his uncle is separate from his house and it is situated at some distance and in between the two houses, there are houses of others, namely, Ramphool, Vijan, Omi, and Ran Singh. In the FIR only the accused Karamveer is named and it is alleged that Narayan Singh had gone with Karamveer while in his statement the witness Naval Singh PW-1 has also implicated accused Vinod by saying that his uncle Narayan Singh had gone with Karamveer and Vinod. From the appreciation of the statement of complainant Naval Singh PW-1, it transpires that his oral testimony is very inconsistent. He has changed his statements according to his convenience and in doing so he has made contradictory statements. There are major discrepancies in his oral testimony.

22. According to the prosecution case accused Karamveer was arrested on 20-08-2012 at 12:05 noon from Korvan Tiraha by SO Santosh Singh and his companions. He was interrogated by SO Santosh Singh. He confessed his crime and told that on 11-08-2012 he along with his cousin Vinod had committed the murder of Narayan Singh in greed of Rupees 70,000 and buried his dead body in his field. The gist of this interrogation was entered in G.D No. 23 at 12:45 pm. Thereafter, SO Santosh Singh accompanying police personnel and accused Karamveer came to village Lalpur at the field of Narayan Singh and at the pointing out of the accused Karamveer the dead body of Narayan Singh was recovered after digging a pit in the field. One spade used in committing the murder was also recovered from the bushes. Sub-inspector Santosh Singh PW-10 in his examination-in-chief has supported the aforesaid prosecution version. From the statements of the public witnesses produced by the prosecution, the aforesaid prosecution story of arrest and recovery does not find support. There are major contradictions regarding the date and time of arrest and recovery. Prahlad Singh PW-2 in his cross-examination has said that after 11-08-2012 he had seen Karamveer in the morning of 19-08-2012 at 10:00 am. In the evening at 5:00 pm, he asked about Narayan Singh from Naval Singh. He and Naval Singh inquired about Narayan Singh from Karamveer and handed him over to the police. The police came to the village at 6:00 pm and stayed there for a while, made some inquiries, and then took away Karamveer. Parmanand PW-4 has said that he had seen Karamveer in the village when police came on 18-08-2012 at 12 o'clock. The police came at 12'o clock and in front of him took away Karamveer. Dharam Singh PW-5 has said that police arrested Karamveer in the evening of 19-08-2012 from the house. Vijan PW-3 has stated that he told Naval Singh that he had seen Narayan Singh going with Karamveer, then Naval Singh called Karamveer who told him that he had left Narayan Singh at Hodal bypass and he did not know where he had gone. When a phone call was made to Narayan Singh it was not received, then Karamveer was arrested. The statements of public witnesses clearly establish that Karamveer was not arrested on 20-08-2012 at 12:05 noon as alleged by the police but earlier.

23. No separate memo of the recovery of the dead body has been prepared. In the inquest report itself, the description of the recovery has been entered by S.I. Narendra

Pal Singh (PW-9) who has conducted the inquest proceedings. PW-9 in his examination-in-chief has said that on 20-08-2012 he along with SO Santosh Singh, accompanying police personnel and the arrested accused Karamveer arrived at the field of Narayan Singh, and at the pointing out of accused Karamveer, after digging a pit, the dead body of Narayan Singh was recovered. The witness has not disclosed the timing of recovery. So neither in the document nor in the oral evidence the time of recovery of the dead body has been revealed. In the inquest report time 13:30 hrs is mentioned as the time of commencement of inquest proceedings. So it appears that the dead body has been recovered on 20-08-2012 sometime before 1:30 PM. This also does not match with the date and time stated by the public witnesses in their oral testimony. Parmanand (PW-4), Prahlad Singh (PW-2), Dharam Singh (PW-5), and Vijan (PW-3) are the panch witnesses of the inquest. Prahlad Singh PW-2 in his cross-examination has said that he met the police at the hut built in the field of Narayan Singh on 20-08-2012 at 10:00 AM. Karamveer was accompanying the police. He located the place where the dead body was buried. Firstly, Karamveer took out a spade and then he exhumed the dead body. So according to this witness, the dead body was recovered at about 10:00 AM. Vijan PW-3 has said that in the morning of 20-08-2012 he was called to the police station. He reached the police station at 7:30 AM. Vittan was also there. After some minutes they proceeded to Balghari in a jeep and returned from there at 9:00 AM. Thereafter he did not return to his house and proceeded with police in a jeep and reached the field at 10:00 am and remained there for 2 hours. So according to this witness, the timing of the recovery is sometime after 10:00 AM. Dharam Singh PW-5 has said that Karamveer was arrested by police on 19-08-2012 after 4:00 PM. The witness has further said that on the next morning at about 10:00 AM the police with Karamveer came to the village and then proceeded to the field of Narayan Singh from where at the pointing out of Karamveer, the dead body of Narayan Singh was recovered. So the aforesaid oral statements of the public witnesses fully demolish the prosecution case that accused Karamveer was arrested at 12:05 noon and was lodged in the lock-up of the police station at 12:30 PM and on his confession and disclosure statement, which was entered into G.D. at 12:45 PM, the police party recovered the body at the pointing out of Karamaveer.

24. According to the prosecution case, the spade used in the crime was also recovered at the pointing out of accused Karamveer. Its recovery memo is Ext Ka 16. S.I. Santosh Singh PW-10 has said that after recovery of the dead body the spade used in committing the murder was recovered at the pointing out of Karamveer at 15:30 hours. Two public persons, namely, Ram Singh and Dharam Singh, are witnesses of this recovery memo. Dharam Singh has been produced as PW-5 but his statement is not in consonance with the oral statement of S.I. Santosh Singh PW-10 as well as the prosecution case. According to the statement of Dharam Singh PW-5 first, the spade was recovered, and thereafter the dead body was exhumed. Dharam Singh PW-5 in his cross-examination has said that police with Karamveer reached the field of Narayan Singh at 10:00 AM. There is a drain near the field of Narayan Singh, Karamveer took out a spade from its bushes. He dug the pit from the same spade and exhumed the dead body. So according to this witness, the recovery of the spade

was made at about 10:00 AM, and the dead body was recovered after the recovery of the spade, and the body was exhumed by the same spade which is again contradictory to the statement of S.I. Santosh Singh PW-10. Prahlad Singh PW-2 also in his cross-examination said that first Karamveer took out the spade and then he dug the pit to recover the dead body. While Dharam Singh PW-5 has stated that the spade was recovered from the bushes of the drain. The other witness Parmanand PW-4 in his cross-examination has said that the spade was recovered from the jowar field of Narayan Singh. On this issue, the statement of Prahlad Singh PW-2 is different. In his examination-in-chief, the witness has said that Karamveer got the spade recovered from the hut. The spade was kept in the hut. S.I. Narendra Pal Singh PW-9 has not said any fact about the recovery of the spade while according to the prosecution he was present on the spot at the relevant time. Although the presence of complainant Naval Singh PW-1 at the time of recovery of the dead body is not disclosed either in the documents or in the statement of S.I. Santosh Singh but the complainant Naval Singh PW-1 himself has said that he was present there at the relevant time but he has not made any statement about the recovery of the spade. From the analysis of the entire evidence on record, it transpires that the timing of arrest and recovery of the dead body and the spade as stated by the investigating officer S.I. Santosh Singh does not stand corroborated by the oral testimony of the public witnesses and there are major contradictions in this regard. According to public witnesses, the timing of recovery of the dead body and the spade is much before the arrest of the accused as disclosed in the documents which makes the recovery of the dead body and the spade at the pointing out of accused Karamveer highly doubtful.

25. The prosecution has also produced evidence of recovery of Rs.50,000/- cash at the pointing out of accused Karamveer from his sister's house at village Balghadi. Its recovery memo is Ex.Ka.-19. In the recovery memo, no time of recovery is mentioned. Investigating officer, Sub-Inspector Santosh Sinh(P.W.-10) has proved this recovery memo. His oral statement is also silent about the time of recovery. But from his statement, it appears that the said recovery has been made in the evening/night of 20.08.2012. According to Sub-Inspector Santosh Sinh(P.W.-10) after the recovery of the dead body and spade, the investigating officer prepared the recovery memo of the spade. He also prepared the site plan of the recovery place, collected blood-stained soil, and plain soil, sealed it in a container, and prepared its memo. He recorded the statements of inquest witnesses. Thereafter the investigating officer accompanying the police force, accused Karamveer, and witnesses Vittan and Vijan proceeded for Balghadi from where at the pointing out of accused Karamveer Rs.50,000/- cash was recovered from a purse kept in a box. Witness has further said that he prepared its memo on the spot, got it signed by the witnesses, provided a copy to the accused Karamveer, sealed the cash, and thereafter returned to the police station and deposited the cash and containers of blood-stained and plain earth in the Malkhana, vide G.D. entry No.41 at 20:10 hours. The aforesaid statement of Sub-Inspector Santosh Sinh(P.W.-10) is not supported by statements of witnesses of recovery memo Vittan and Vijan. Both the aforesaid witnesses have also not said about the time of recovery in their examination in chief.

From their statements during cross-examination, it is established that the said recovery is not of the evening of 20.08.2012, as stated by Sub-Inspector Santosh Sinh(P.W.-10). Vittan (P.W.-6) in his cross-examination has said that Karamveer was brought by police at 9.00 AM Changing his aforesaid statement the witness has further said that Karamveer was brought to the police station from the village by the police. He does not know the date. He also does not know for how many days the police detained him. On the same day in the morning, they proceeded to Balghadi from the police station in a police vehicle. He and Vijan went to Balghadi with the police. At another place the witness has said that immediately after recovery they returned to the police station, its memo was prepared at the police station and their signatures were obtained on it. The witness has further said that they returned to the police station at 9.00 AM So according to this witness the recovery of the cash was made in the morning and no recovery memo was prepared on the spot. It was prepared at the police station, where signatures of witnesses were obtained on it. On this point, Vijan P.W.-3 in his cross-examination has said that on 20.08.2012 he was called to the police station in the morning. He along with Vittan reached the police station at 7.30 AM, stayed for some time there, and thereafter proceeded for Balghadi by a Jeep, reached Balghadi at 8.00 AM, half an hour was spent at Balghadi and returned to the police station at 9.00 AM. So according to this witness also the recovery of cash was made in the morning of 20.08.2012 and they returned at the police station at 9.00 AM, whereas, as stated above, according to prosecution version the accused was arrested at 12.05 PM on 20.08.2012. If it was so, the timing of recovery of cash comes prior to arrest of the accused,which renders the recovery of cash completely doubtful.

26. There are also other discrepancies and contradictions in the evidence of prosecution in this respect. Vittan (P.W.-6) has failed to answer relevant questions on this point and has shown his ignorance. He has failed to tell the distance of the village Balghadi from his village. He has also failed to tell the time of reaching Balghadi. He has failed to disclose the direction in which village Balghadi is situated.

According to the prosecution at the time of recovery, only Vijan and Vittan public witnesses were present, but other witnesses produced by the prosecution have also given evidence about the recovery of cash in their statements. Nawal Singh (P.W.-1), the complainant in his cross-examination has said that police has taken him to Balghadi by a Jeep. They reached Balghadi at 4.30 PM on 19.08.2012. He, Praveen, Vijan, and 4-5 police personnel were present. Only these persons have gone there. So this witness has not taken the name of Vittan, the other witness of the recovery memo, and instead, he has disclosed the name of Praveen as a witness whose presence is not mentioned either in the recovery memo Ex. Ka-19 or in the statements of other witnesses. The witness has further said that the cash was given by the sister of Karamveer from a box. Witness has further said that after taking currency notes they came back and a memo was prepared and notes were sealed at Kosikala. He also got it signed. The signature of this witness is nowhere on the recovery memo. Witness has further said that thereafter police along with him came to his village at about 4.00 PM and arrested Karamveer. Karamveer was arrested from the house in front of the witness. The

aforesaid statement of the witness also demolishes the entire prosecution case of arrest of accused Karamveer and recovery of cash at his pointing out. Prahlad Singh(P.W.-2) in his cross-examination on this point has stated that Vijan and police have got recovered Rs.50,000/- from the house of Karamveer's sister at village Balghadi. Police have shown the cash and have not sealed it. So prosecution evidence regarding recovery of Rs.50,000/- cash at the pointing out of Karamveer from his sister's house at village Balghadi has major contradictions on material points and cannot be relied upon.

Gopal (D.W.-1) in his statement has only said that his son Karamveer was employed at the house of Narayan Singh on a monthly salary of Rs.3,000/- and Narayan Singh used to pay him accumulated salary in lump sum. He has further said that on 09.08.2012 his son Karamveer had given him Rs.50,000/-. After 9 to 10 days a policeman came to his house and said that his son has been detained so he should come with some money so that he may be released. On 19.08.2012 at 6.30 PM he came to Police Station, Kosikala, where the police settled for a sum of Rs.50,000/- to release his son. He paid Rs.50,000/- to the SO, Police Station, Kosikala who stated that his son will be released in the morning, but his son was not released. Later on, it came to his notice that the same currency notes were planted to show false recovery from his son. So the witness has not admitted the fact of recovery, he has only said that the money was paid by Narayan Singh (the deceased) to Karamveer in lieu of his salary. He has explained the entire facts about the payment of money and recovery.

The aforesaid statement cannot be treated as an admission of recovery of cash at the pointing out of accused Karamveer and it does not help the prosecution in any manner as from the evidence on record it is established that the alleged recovery of money is prior to the arrest of the accused and, therefore, insignificant. In the case of **S. K. Yusuf v. State of West Bengal, AIR 2011 SC 2283**, the Apex Court in paragraph no.26 has held:-

"Undoubtedly, a conviction can be based solely on circumstantial evidence. However, the Court must bear in mind while deciding the case involving the commission of a serious offence based on circumstantial evidence that the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the conclusion of guilt is to be drawn should be fully established."

27. According to the prosecution the incident occurred on 11.08.2012. The deceased left his house at 1.30 PM and he was last seen in the company of accused Karamveer and Vinod at about 01.30-02.00 PM According to post-mortem report (Ex.Ka.-6), the autopsy of the dead body of Narayan Singh was conducted on 20.08.2012 at 07.15 PM The Autopsy surgeon, doctor Lal Singh (P.W.-8), in this report has mentioned the duration of death, about three days. In his examination in chief, he has not disclosed the duration of death. Instead he stated that the cause of death was haemorrhage due to ante-mortem injuries, which may have come on 11.08.2012 from a spade. The opinion of the doctor that ante-mortem injuries may come on 11.08.2012 is not relevant because the autopsy surgeon cannot give any opinion about the time of infliction of ante-mortem injuries. He may give his opinion only about the time of death. In his cross-examination, doctor Lal Singh (P.W.-8) has

categorically stated that according to his report the death of the deceased might have occurred about three days earlier. He has further said that if the death had occurred four days earlier then he should not have written it about three days earlier. He also said that the duration of three days may be two days or two & a half-day. So according to the statement of the Autopsy surgeon the death of the deceased would not have occurred more than three days earlier. This does not match with the timing of death as alleged by the prosecution and there is a big difference between the two.

28. From the analysis of the statement of P.W.-1 Nawal Singh, it is clear that the statement of this witness is highly inconsistent. The witness has changed his version regularly and has made contradictory statements at different places as per his convenience. The two reports lodged by him are also doubtful. The witness being the complainant and nephew of the deceased is also an interested witness and hence a cautious approach is required while scrutinizing his testimony. His statement does not fulfill the standard of reliability. The statements of witnesses of last seen evidence are also inconsistent and there are major contradictions in it and they are also not reliable. The evidence of recovery of the dead body, spade, and Rs. 50,000/- cash at the pointing out of Karamveer also becomes doubtful from the statement of the investigating officer, Santosh Singh PW-10. The timing of recovery of the dead body and spade and Rs. 50,000/- cash precedes the timing of the arrest and disclosure statement, which demolishes the entire evidence of recovery of the dead body, spade, and cash at the pointing out of the accused Karamveer. The conduct of the complainant Nawal Singh is also not above board. It is established from the evidence that the deceased has only three female issues and a suggestion has been put to him that to grab the property of his uncle he has falsely implicated the accused. In the circumstances of the case, this possibility cannot be ruled out.

29. From the analysis of prosecution evidence, it is clear that there is no evidence against the accused Vinod. With regard to accused Karamveer, there are serious infirmities in prosecution evidence. The statements of witnesses are highly inconsistent and there are major contradictions and discrepancies in it on material points. Due to the above reasons, the prosecution evidence is not reliable.

30. In **C Chenga Reddy v. State of A.P., 1996 SCC (Crl.) 1205**, it has been held:-

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn, should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

In the case of **Satni Bai v. State of M.P., (2010) 2 SCC 646**, the Hon'ble Supreme Court observed, thus:-

"It has been consistently laid down by this court, that when a case rests only on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of

any other person. The circumstances from which an inference as to the guilt of the accused is drawn, have to be proved beyond reasonable done and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances."

Therefore, there are various judicial pronouncements of the Hon'ble Apex Court, and the law is settled that the conviction can be based on circumstantial evidence, but those circumstances must be fully proved and must be conclusive in nature.

31. Applying the aforesaid proposition of law on the present set of facts and evidence we are of the opinion that the prosecution evidence is not of the standard as to say that the prosecution has succeeded in proving the charges beyond reasonable doubt. In the given circumstances, it will not be safe to rely on the prosecution evidence and it will be just and proper to extend the benefit of the doubt to the accused Karamveer.

32. Before parting with the judgment it appears necessary to make some observations with regard to latches on part of the investigating officer. Very surprisingly he has not recorded the statement of the wife of the deceased, who is a natural witness, because the deceased had gone from his house with cash. The investigating officer has only recorded the statements of the complainant Nawal Singh, the nephew of the deceased, and others and proceeded. He has also not interrogated the complainant about the information given in the missing report, in which it is stated that after receipt of some phone call, the deceased had left his house. Neither the mobile of the deceased has been recovered nor its call details record has been collected by the investigating officer. Even the accused has not been interrogated about the mobile of the deceased, while it is established from the prosecution evidence that the deceased was in possession of a mobile at the time of the incident. Further, from the evidence on record, it is fully established that the arrest of the accused as shown in the record by the investigating officer is wholly manipulated and it has destroyed the whole prosecution case. So there are serious latches on the part of the investigating officer and it appears that he has not performed his duty diligently and honestly.

33. The appeal stands allowed. The judgment and order of conviction dated 17.03.2015, passed by the Additional Sessions Judge, Court No. 4, Mathura, in Sessions Trial No. 254 of 2013 Crime No. 522 of 2012, Police Station Kosikala, District Mathura is hereby set aside. The appellant accused Vinod and Karamveer are hereby acquitted of the charges for which they have been tried and convicted.

34. The appellant Vinod is on bail. His bail bonds are hereby canceled and sureties stand discharged. He need not surrender, subject to compliance of the provisions of section 437-A Cr.P.C. The appellant Karamveer is in jail. He shall be set at liberty forthwith, if not wanted in any other case, subject to compliance of the provisions of section 437-A, Cr.P.C. The order be communicated to all concerned for necessary compliance.

35. Copy of the judgment and lower court record be transmitted to the trial court immediately.

(2022)07ILR A206
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.06.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Crl. Appel. No. 1770 of 2017

Pawan ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Yogesh Kumar Srivastava, Sri Noor Muhammad

Counsel for the Respondents:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 299,300,302 & 307 - The Code of Criminal Procedure, 1973 - Section 313 - Evidence Act, 1872 - Section 32 - dying declaration and its evidentiary value - murder - culpable homicide - not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused - twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. (Para - 19,20)

Accused poured kerosene on deceased - set ablaze - dying declaration - poured water to save her - second dying declaration - accused was brother in law of deceased - demanded monies - gave him two slaps - in infuriation, set her ablaze - Death caused by accused - not premeditated - no intention to cause death - injuries were though sufficient in the ordinary course of nature to have caused death - no intention to do away with deceased. **(Para - 13,18)**

HELD:-Case falls under Exceptions 1 and 4 to Section 300 of IPC. Considering Section 299, offence committed will fall under Section 304 Part-I of IPC. Death due to septicemia. Offence not under Section 302 of I.P.C. but culpable homicide . Sentence of accused appellant reduced to the period eight years with remission. **(Para -18,22)**

Appeal partly allowed. (E-7)

List of Cases cited:-

1. Maniben Vs St. of Guj., 2009 (8) SCC 796

2. Chirra Shivraj Vs St. of A.P., 2010 (14) SCC 444

3. Rama Devi @ Ramakanti Vs St. of U.P. , Criminal Appeal No.1438 of 2010

4. Smt. Kanti & anr. Vs St. of U.P., Criminal Appeal No. 2558 of 2011

5. Govindappa & ors. Vs St. of Karn., (2010) 6 SCC 533

6. Tukaram & ors Vs St. of Mah., (2011) 4 SCC 250

7. B.N. Kavatakar & anr. Vs St. of Karn., 1994 SUPP (1) SCC 304

8. Veeran & ors. Vs St. of M.P. , (2011) 5 SCR 300

9. Gautam Manubhai Makwana Vs St. of Guj., Criminal Appeal No.83 of 2008

10. Khokan@ Khokhan Vishwas Vs St. of Chattisgarh, 2021 LawSuit (SC) 80

11. Anversinh Vs St. of Guj., (2021) 3 SCC 12

12. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529

13. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

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

1. This appeal challenges the judgment and order dated 9.3.2017 passed

by Additional Sessions Judge/Fast Track Court No.2, Firozabad in Sessions Trial No.616 of 2014 convicting accused-appellant under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo imprisonment for life with fine of Rs.10,000/- and in default of payment of fine, further to undergo imprisonment for six months.

2. Factual scenario as culled out from the record and the judgment of the Court below is that the accused-appellant is alleged to have set ablaze the deceased on 9.5.2014 when the accused went to the house of the deceased and demanded sum of Rs.10,000/- and when the deceased refused to give the said amount and requested him to come when her husband was in the house, the accused started abusing her and in his anger, poured kerosene on her and set her ablaze.

3. On the complaint of the husband of the deceased, First Information Report being No.387 of 2014 was registered under Section 307 of I.P.C. and thereafter, the investigation was moved into motion. After recording statements of various persons, the investigating officer submitted the charge-sheet against accused under Sections 302 & 307 of I.P.C.. The learned Chief Judicial Magistrate before whom charge sheet was laid put the same before the learned Sessions Judge. The learned Sessions Judge, on hearing the learned Government Advocate and learned counsel for the accused, framed charges under Section 302 & 307 of I.P.C..

4. On being read over the charges, the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined 12 witnesses who are as follows:

1	Deen Dayal	PW1
2	Gulab Singh	PW2
3	Smt. Rekha	PW3
4	Jawahar Singh	PW4
5	Rajesh	PW5
6	Dr. Shadab Alam	PW6
7	Raksha Pal	PW7
8	Laxmi Narayan	PW8
9	Sanjeev Ojha	PW9
10	Surendra Pal Singh	PW10
11	Lal Mani Dubey	PW 11
12	Umesh Chandra	PW 12

5. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.13
2	Written Report	Ex.Ka.1
3	Dying Declaration	Ex. Ka.8 & 12
4	Postmortem Report	Ex. Ka.2
5	Panchayatnama	Ex.Ka.3
6	Charge-sheet	Ex.Ka.11

6. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellant as mentioned above.

7. Heard Yogesh Kumar Srivastava, learned counsel for the appellant, Sri Vikas Goswami, learned A.G.A-I, assisted by Sri Nagendra Kumar Srivastava and Sri Janardan Prakash, learned A.G.As. for the State and perused the record.

8. It is submitted that the deceased in her first dying declaration mentioned that the accused poured kerosene and set her ablaze and then poured water on her, and that people started coming in and, her husband, after he came back from service, brought her to the hospital. Her statement was recorded at 7.12 p.m. on 9.5.2014 namely on the date of incident.

9. Learned counsel has thereafter taken us to the depositions of other witnesses who are hostile witnesses. Be that as it may, the main crux on which submission is made by Sri Yogesh Kr. Srivastava, learned counsel for the appellant are that the deceased died out of burn injuries after six days, there are multiple dying declarations which give different version. The medical evidence according to the counsel for the appellant shows that she died due to septicemic shock and, therefore, it is submitted that looking to the F.I.R. and the dying declarations, it cannot be said that the deceased was done to death and she was murdered. It is submitted that even if it is considered that it was culpable homicide, it would be culpable homicide not amounting to murder.

10. In support of the his submissions, learned counsel for the appellant has relied on the decisions in **Maniben vs. State of Gujarat, 2009 (8) SCC 796**, **Chirra Shivraj vs. State of Andhra Pradesh, 2010 (14) SCC 444**, Criminal Appeal No.1438 of 2010 **(Rama Devi alias Ramakanti vs. State of U.P.)** decided on 7.10.2017 & Criminal Appeal No. 2558 of 2011 (**Smt. Kanti and another vs. State of U.P.**) decided on 1.2.2021.

11. Learned A.G.A. for the state has vehemently submitted the death of the deceased was though due to septicemic shock, the burn injuries goes to show that it would not be an offence punishable under Section 304 part I or II of I.P.C.

12. While going through the evidence of the witnesses in light of the judgments of the Apex Court referred by both the learned Advocates, we would have to evaluate whether deceased was done to death with a premeditation. Just because death was due to septicemic shock will not take it out from the purview of Section 300 of I.P.C. The evidence of most of the witnesses which has been recorded goes to show that most of them have given go by of their statements before the police under Section 161 of Cr.P.C. But, the medical evidence and dying declaration which are multiple in number have to be evaluated.

13. Whether the F.I.R. corroborates the dying declaration of the deceased? It is an admitted position of fact that it was the accused who had poured kerosene on the deceased, however, in one of her dying declaration she mentioned that the accused had poured water so as to save her. But the second dying declaration which is latest in point of time is silent. Therefore, one fact is that the accused was the brother in law of the deceased and when he demanded monies she gave him two slaps and in infuriation, he set her ablaze. This fact is borne out in both the dying declarations and the doctor has also opined against the accused. Therefore, this dying declaration has not been challenged by the counsel for

the appellant and in the light of the decision in **Govindappa and others Vs. State of Karnataka, (2010) 6 SCC 533**, there is no reason for us not to accept the dying declaration and its evidentiary value under Section 32 of Evidence Act, 1872. However, it is submitted that looking to the facts, the accused-appellant had no intention to do away with his sister-in-law.

14. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant.

15. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

16. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that	(4) with the

the act is likely to cause death.

knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

17. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304,** we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

18. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

19. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280**, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.*

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and

the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of ***Maniben (supra),*** *the Apex Court has observed as under:*

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from

Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

20. In latest decision in **Khokan@ Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80** where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

21. All others judgments which were pressed into service by the learned counsel for the appellant are not discussed as that would be repetition of what we have decided.

22. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but is culpable homicide and, therefore, sentence of the accused appellant is reduced to the period eight years with remission. The fine is reduced to Rs.5000/- to be paid to the original complainant. The default sentence would be six month without remission and will run after completion of eight years of incarceration. The accused is in jail since long. At least he has suffered for eight years imprisonment and must have repented to his deed which was out of anger.

23. Appeal is partly allowed. Record and proceedings be sent back to the Court below forthwith.

24. This Court is thankful to learned Advocates for ably assisting the Court.

(2022)07ILR A213
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Crl. Appel. No. 2878 of 2013

Babu ...Appellant
Versus
The State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri A.P. Tewari, Sri R.S. Tripathi

Counsel for the Opp. Party:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Section 304 Part I read with Section 34 IPC - Arms Act, 1959 - Section 4/25 - The Code of Criminal Procedure, 1973 - Section 313 - Rehabilitary & Reformative - Crime is a pathological aberration - criminal can ordinarily be redeemed - state has to rehabilitate rather than avenge - brutal incarceration of the person merely produces laceration of his mind - to punish a man retributively - must injure him - to reform him - must improve him - men are not improved by injuries .(Para - 14,20)

Deceased stabbed by accused-appellant - in her abdomen - occurrence took place in public place - appellant not pressing appeal on merit - prays only for reduction of sentence - sentence of life imprisonment awarded to appellant by trial court - harsh – recovery of knife - ocular version of eye-witness PW2 - corroborated by medical evidence .**(Para - 9,11)**

(B) Criminal Law - The Code of Criminal Procedure, 1973 - Punishment - 'Proper Sentence' - quantum of sentence - 'principle of proportionality' - 'reformative theory of punishment' - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically - operating the sentencing system - law should adopt corrective machinery or deterrence based on factual matrix - undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system. (Para - 15,16)

HELD:-Accused-appellant convicted under Section 304 Part I read with Section 34 IPC . Sentence awarded to appellant modified. Default sentence maintained. Fine and imprisonment for default under Section 4/25 Arms Act maintained**. (Para -21,22)**

Appeal partly allowed. (E-7)

List of Cases cited:-

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

2. Deo Narain Mandal Vs St. of U.P. , (2004) 7 SCC 257

3. Ravada Sasikala Vs St. of A.P. , AIR 2017 SC 1166

4. Jameel Vs St. of UP , (2010) 12 SCC 532

5. Guru Basavraj Vs St. of Karn., (2012) 8 SCC 734

6. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

7. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

8. Raj Bala Vs St. of Har., (2016) 1 SCC 463

(Delivered by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the appellant-Babu has challenged the Judgment and order dated 02.05.2013 passed by Court of Additional Session

Judge, Court No.5 Badaun in Session Trial No.147 of 2011 arising out of Case Crime No.1002 of 2010 under Section 304 Part I read with Section 34 IPC along with joint trial of Session Trial No.148 of 2011 arising out of Case Crime No.1012 of 2012 (State Vs. Babu) under Section 4/25 of Arms Act, Police Station- Kotwali Badaun, whereby the accused-appellant was convicted under Section 304(i) read with Section 34 IPC and under Section 4/25 Arms. The accused was sentenced for life imprisonment and fine of Rs.20,000/- for offence under Section 304 Part I IPC and three months imprisonment in default of payment of fine under Section 304 Part I IPC. The accused was sentenced for three years with fine of Rs.2,000/- and one month imprisonment for default of payment of fine under Section 4/25 Arms Act.

2. The brief facts of the case as culled out from the record and proceedings and the FIR are that a first information report was lodged by complainant Kamlesh averring that on 20.04.2010 she was returning home with her mother Rani after purchasing the vegetables and when they reached near Balmiki Pulia at about 6:00 pm, Babu son of Amar Singh and Munna Son of Kanhai came from behind. Babu put his hand on the shoulder of her mother, her mother gave a jerk and moved ahead, which annoyed Babu and he drove out a knife from his clothes and stabbed her mother in the abdomen. Both the accused ran away. There were other persons who are named in the FIR who are present. Along with other persons she took her mother to the hospital but she breathed her last.

3. S.I. Ram Kishore Singh tookup the investigation into motion, visited the spot, prepared site plan, recorded statements of the prosecutrix and witnesses and after completing investigation submitted charge sheet against the accused.

4. The matter being triable by court of sessions the learned Magistrate committed the case to court of sessions.

5. The learned trial court summoned the accused and framed charge under Section 304(i) read with Section 34 IPC, which was read over to the accused. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charge, examined five witnesses, who are as under:-

1	Vikas	P.W.1
2.	Kamlesh	P.W.2
3.	Dr. Ajay Kumar Verma	P.W.3
4.	Constable Rajendra Kumar	P.W. 4
5.	S.I. Ram Kishore Singh	P.W. 5

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-4
2.	Written report	Ext. Ka-1
3.	Post mortem report	Ext. Ka-3
4.	Copy of G.D.	Ext. Ka-5
5.	Site-plan	Ext. Ka-6
6.	Inquest report	Ext. Ka-7
7.	Charge Sheet	Ext. Ka-13

7. After completion of prosecution evidence, the accused was examined under

Section 313 Cr.P.C. The accused did not examine any witness in defence.

8. Heard Shri A.P. Tewari, learned counsel for the appellant, learned AGA for the State and also perused the record.

9. Perusal of record shows that occurrence of this case took place at 6:00 pm when the deceased was returning with her daughter complainant- Kamlesh after purchasing vegetables. The deceased was stabbed by the accused-appellant Babu in her abdomen. The occurrence took place in the public place. The post mortem of the deceased was conducted in which following ante mortem injuries were found:-

(i) Swelling on the right forehead and eye size 5cmx 3cm

(ii) Incised wound size 1.5cmx1.5cm muscle deep on the right side of the chest, 11cm below the right nipple. Margins inverted at the position of 5 o'clock lever was cut.

(iii) incised wound size 2cmx1cm skin deep on the back side of the chest, 20 cm below the left shoulder at 4 o'clock position.

10. Learned counsel for the appellant has submitted that PW1-Vikas is said to be the eye-witness of the occurrence but he has not supported the prosecution case and has turned hostile. He was cross-examined by prosecution but nothing has come out from his statement which can prove the charge levelled against the appellant. It is further submitted by learned counsel for the appellant that PW2-Kamlesh is daughter of the deceased, therefore, she is interested witness and conviction cannot be based on the sole testimony of interested witness. Rest of the witnesses are formal in nature.

11. After some arguments, learned counsel for the appellant submitted that he is not pressing this appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is in jail for the past more than 9 years.

12. Although the PW1 has not supported the prosecution case but the testimony of PW2- Kamlesh cannot be brushed aside only on the basis of that she was daughter of the deceased. The testimony of interested witness cannot be ignored on this ground alone but the testimony of interested witness should be scrutinized cautiously and carefully. As per the prosecution version PW2 was with the deceased at the time of occurrence and it is very natural that the daughter goes with her mother to purchase the vegetables. There is nothing unusual in it. PW2 is complainant of this case also. She has lodged first information report just after one and half hours of the occurrence, which is not delayed. Hence, there was no opportunity to falsely implicate the accused. Moreover, the testimony of PW2, who is eye-witness, supports the prosecution case completely in her cross-examination. Nothing has come out, which could give any benefit to the appellant. The knife, used in the commission of crime, recovered by the investigating officer on the pointing out of the accused-appellant Babu. This fact of recovery is proved by investigating officer as PW5.

13. Medical evidence also goes to show that injury No.2 in ante mortem injuries, mentioned in post mortem report, is the injury which could be inflicted by the weapon like knife. Hence, the ocular

version of eye-witness PW2 is corroborated by medical evidence also.

14. While coming to the conclusion that the accused is the perpetrator of the offence, whether sentence of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters. This Court would refer to the following precedents, namely, ***Mohd. Giasuddin Vs. State of AP,*** [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

15. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

16. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak***, [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh***, [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana***, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the

society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

17. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

18. While going through the record and the testimony of the witnesses specially the FIR and the medical version, the guilt of the accused is proved to the hilt and we are unable to disagree that the learned court below in recording the finding of guilt of the accused-Babu as the knife was found from the possession of the accused. The evidence of PW1 though has turned hostile. The evidence of Kamlesh who has categorically mentioned that Babu is the person who has inflicted the knife blow to the deceased on the abdomen. It was a single blow. They had even intimidated her.

19. The evidence of Dr. Dinesh Kumar who had performed the post mortem as narrated herein-above also testified this effect that the injuries were possible by the knife. Hence, we hold that it was the accused and the accused alone who was perpetrator of the offence.

20. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

21. Learned AGA also admitted the fact that appellant is languishing in jail for the last more than 9 years. The accused-appellant convicted under Section 304 Part I read with Section 34 IPC, which is a major offence and is sentenced for life imprisonment along with fine. In our opinion, ends of justice would be met if sentence is reduced to the period of 10 years imprisonment for the aforesaid offence.

22. Hence, the sentence awarded to the appellant-Babu by the learned trial-court is modified as sentence of 10 years rigorous imprisonment under Section 304 Part I read with Section 34 IPC and fine of Rs.10,000/-. Default sentence is

maintained. Period of sentence for three years rigorous imprisonment under Section 4/25 of Arms Act and default sentence for the said punishment has already been undergone by the appellant. Fine and imprisonment for default under Section 4/25 Arms Act is maintained.

23. Accordingly, the appeal is **partly allowed** with the modification of the sentence, as above.

24. The Jailer to release the accused on completing tenure of his rigorous imprisonment as per jail record with remission.

25. Record be sent back to the court below.

(2022)07ILR A218
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.06.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Crl. Appel. No. 3882 of 2010

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

Counsel for the Appellants:
Sri Vivek Mishra, Sri Anil Kumar Pandey, Sri Mohd. Kalim, Sri Sunil Kumar Srivastava

Counsel for the Respondents:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Sections 302/34,299, 300,304B & 498A - Dowry prohibition Act,1961- Section3/4 - The Code of criminal procedure, 1973 - Section 313 - power to examine accused murder - culpable homicide not amounting to murder - not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused - twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused.(Para -19,20)

Accused-appellants - poured kerosene - set ablaze the deceased - death caused by accused - not premeditated - no intention to cause death of deceased - injuries were though sufficient in the ordinary course of nature to have caused death - no intention to do away with deceased .**(Para - 2,8,18)**

HELD:- Case falls under Exceptions 1 and 4 to Section 300 of IPC. Considering Section 299, offence committed fall under Section 304 Part-I of IPC .Death due to septicemia. Offence not under Section 302 of I.P.C. butculpable homicide. Sentence of accused appellant reduced to period eight years with remission.**(Para -18,22)**

Appeal partly allowed. (E-7)

List of Cases cited:-

1. Maniben Vs St. of Guj., 2009 (8) SCC 796

2. Chirra Shivraj Vs St. of A.P., 2010 (14) SCC 444

3. Rama Devi @ Ramakanti Vs St. of U.P., Criminal Appeal No.1438 of 2010

4. Smt. Kanti & anr. Vs St. of U.P., Criminal Appeal No. 2558 of 2011

5. Govindappa & ors. Vs St. of Karn., (2010) 6 SCC 533

6. Tukaram & ors. Vs St. of Mah., (2011) 4 SCC 250

7. B.N. Kavatakar & anr .Vs St. of Karn., 1994 SUPP (1) SCC 304

8. Veeran & ors. Vs St. of M.P., (2011) 5 SCR 300

9. Gautam Manubhai Makwana Vs St. of Guj., Criminal Appeal No.83 of 2008

10. Khokan@ Khokhan Vishwas Vs St. of Chattisgarh, 2021 LawSuit (SC) 80

11. Anversinh Vs St. of Guj., (2021) 3 SCC 12

12. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529

13. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

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

1. This appeal challenges the judgment and order dated 24.5.2010 passed by Additional Sessions Judge/Fast Track Court No.2, Saharanpur in Sessions Trial No. 06 of 2010 convicting accused-appellants under Section 302 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced them to undergo imprisonment for life with fine of Rs.5,000/- and in default of payment of fine, further to undergo imprisonment for six months.

2. Factual scenario as culled out from the record and the judgment of the Court below is that the accused-appellants are alleged to have set ablaze the deceased on 16.10.2009.

3. On the complaint of the brother of the deceased, First Information Report being No.434 of 2009 was registered under Section 498A, 304B IPC and Section 3/4 Dowry Prohibition Act and thereafter, the investigation was moved into motion. After recording statements of various persons, the investigating officer submitted the charge-sheet against accused under Sections 498A, 304B I.P.C. and Section 3/4 Dowry Prohibition Act. The learned Chief Judicial Magistrate before whom charge sheet was laid committed the same to the learned Sessions Judge. The learned Sessions Judge, on hearing the learned Government Advocate and learned counsel for the accused, framed charges under Section 498A, 304 of I.P.C. and Section 3/4 of Dowry Prohibition Act.

4. On being read over the charges, the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined 12 witnesses who are as follows:

1	Safdar	PW1 (hostile)
2	Jubeda	PW2 (hostile)
3	Abdul Gafur	PW3 (hostile)
4	Mahamood	PW4 (hostile)
5	Rajesh Chandra	PW5
6	Vivek Kumar Tripathi	PW6
7	Dr. Naresh Chandra	PW7
8	Raj Kumar Singh	PW8
9	Deepka Garg	PW9
10	Dr. M. R. Singh	PW10
11	Chandra Shekhar	PW 11
12	Dr. Namrata Pahuja	PW 12
13	Dr. Sunil Kumar	PW 13

5. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.15
2	Written Report	Ex.Ka.1
3	Dying Declaration	Ex. Ka.2
4	Injury Report	Ex. Ka-13
5	Postmortem Report	Ex. Ka. 19
6	Charge-sheet	Ex.Ka-12
7	Recovery Memo of Burnt Sandal Match Box, Plastic Botte	Ex. Ka-10
8	Recovery Memo of Electric Watch, Foam Gadda	Ex. Ka-11
9	Injury report	Ex. Ka-13
10	Death Report	Ex. Ka. 5
11	Post mortem report	Ex. Ka. 19
12	Report of Forensic Medicine and Toxicology	Ex. Ka. 21
13	Statement of Bhuri	Ex. Ka. 4

6. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellant as mentioned above.

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

8. It is submitted that the deceased in her dying declaration mentioned that the accused poured kerosene and set her ablaze. Her statement was recorded at 8.00 a.m. on 18.10.2009.

9. Learned counsel has thereafter taken us to the depositions of other witnesses who are hostile witnesses. Be that as it may, the main crux on which submission is made by learned counsel for the appellant are that the deceased died out of burn injuries after two days. The medical evidence according to the counsel for the appellant shows that she died due to septicemic shock and, therefore, it is submitted that looking to the F.I.R. and the dying declarations, it cannot be said that the deceased was done to death and she was murdered. It is submitted that even if it is considered that it was culpable homicide, it would be culpable homicide not amounting to murder.

10. In support of the his submissions, learned counsel for the appellant has relied on the decisions in **Maniben vs. State of Gujarat, 2009 (8) SCC 796, Chirra Shivraj vs. State of Andhra Pradesh, 2010 (14) SCC 444**, Criminal Appeal No.1438 of 2010 (**Rama Devi alias Ramakanti vs. State of U.P.**) decided on 7.10.2017 & Criminal Appeal No. 2558 of 2011 (**Smt. Kanti and another vs. State of U.P.)** decided on 1.2.2021.

11. Learned A.G.A. for the state has vehemently submitted the death of the deceased was though due to septicemic shock, the burn injuries goes to show that it would not be an offence punishable under Section 304 part I or II of I.P.C.

12. While going through the evidence of the witnesses in light of the judgments of the Apex Court referred by both the learned Advocates, we would have to evaluate whether deceased was done to death with a premeditation. Just because death was due to septicemic shock will not take it out from the purview of Section 300 of I.P.C. The evidence of most of the witnesses

which has been recorded goes to show that most of them have given go by of their statements before the police under Section 161 of Cr.P.C. But, the medical evidence and dying declaration which are multiple in number have to be evaluated.

13. The evidence of P.W. 5 and P.W. 6 who recorded the so called statement of deceased on 16.10.2009 and 18.10.2009. Both have their oral testimony that the deceased was in hr senses. Dying declaration recorded as Ext. 2 is by the Tehsildar that her sister-in-law Najo and other accused had pored kerosene on her. The statement 9/3 by witness six is also important for us and, therefore, the evidence of witnesses goes to show that the accused had set the deceased on ablaze. The dying declaration has not been challenged by the counsel for the appellant and in the light of the decision in **Govindappa and others Vs. State of Karnataka, (2010) 6 SCC 533**, there is no reason for us not to accept the dying declaration and its evidentiary value under Section 32 of Evidence Act, 1872. However, it is submitted that looking to the facts, the accused-appellant had no intention to do away with the deceased. The reason the D.W. 1, 2 and 3 have also opined and the statement in 313 Cr.P.C. is also to serve extet a rebuttal of the charges and she is a mother. She has been wrongly roped and she tried to on the contrary douse the girl with water. They have taken her to the hospital. Baseem who is D.W.-1 who is husband of the deceased has also opined to the said defect. All these facts go to show punishment under Section 302 IPC is unwarranted.

14. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants.

15. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

16. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is	Subject to certain exceptions culpable homicide is murder if the act by which

done-	the death is caused is done.

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

17. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

18. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

19. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280**, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court*

to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days

and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

20. In latest decision in **Khokan@ Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80** where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

21. All others judgments which were pressed into service by the learned counsel for the appellant are not discussed as that would be repetition of what we have decided.

22. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but is culpable homicide and, therefore, sentence of the a**ccused appellant is reduced to period eight years with remission. The fine is reduced to Rs.5000/- to be paid to the**

original complainant. The default sentence would be six month without remission and will run after completion of eight years of incarceration. The accused is in jail since long. At least he has suffered for eight years imprisonment and must have repented to his deed which was out of anger.

23. Appeal is partly allowed. Record and proceedings be sent back to the Court below forthwith.

24. This Court is thankful to learned Advocates for ably assisting the Court.

(2022)07ILR A225
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.07.2022

BEFORE

THE HON'BLE JASPREET SINGH, J.

Election Petition No. 1 of 2020

Prakash Bajaj ...Petitioner
Versus
Sri Arun Singh & Ors. ...Respondents

Counsel for the Petitioner:
In Person, Jitendra Saxena, Narendra Kumar Pandey, Vivek Kumar

Counsel for the Respondents:
Anurag Kumar Singh, Gaurav Mehrotra, H.P. Singh, Kuldeep Vidyarthi, Sunil Chaudhary, Surya Prakash Singh, Vinod Kumar Shukla

(A) Election Law - The Representation of People Act, 1951(RPA) - Sections 33 , 36 , 79 , 79(b) , 81 , 82 , 83 , 86 , 100(c) , 100(d)(i) , 123 & 152 - The Conduct of Election Rules, 1961 - Rule 4, 4-A , 94-A - Code of Civil Procedure ,1908 - Order VII, Rule 11 CPC - Rejection of Plaint , Order 6 Rule 16 CPC – Striking out pleadings - "candidate" - distinction between material particulars and cause of action - litigant not entitled to create an illusion of a cause of action by resorting to clever drafting - cause of action must be clearly stated with material particulars.(Para -179)

Biennial elections of Members of Council of State - ground of challenge - results of election - illegal rejection of nomination of the petitioner - illegal acceptance of nomination of the returned candidate - under Order VII, Rule 11 CPC - under Section 81 read with Sections 83 and 86 of RPA . **(Para -173)**

(B) Civil Law - Code of Civil Procedure ,1908 - Dismissal of petition under Order VII Rule 11 CPC read with Section 33 of RPA - petitioner not duly nominated candidate - nomination did not have requisite number of valid proposers - "misnomer" - giving an incorrect or wrong name to a person even in a legal document - **held -** election petition cannot be dismissed at this stage on the ground of incorrect mention of name of one proposer - in order to ascertain the proper and full effect of the proviso appended to Section 33(4) of RPA and whether it can save the petition would require evidence - cannot be a ground to dismiss the petition at this stage in exercise of powers under Order VII Rule 11 CPC. **(Para - 95,119)**

(C) Election Law - The Representation of People Act, 1951 - Dismissal of petition – Section 123 -'corrupt practice' - issue of corrupt practice requires evidence to be established - cannot be adjudicated at preliminary stage without the written statement, issues and evidence - lacks material particulars regarding allegations of corrupt practice - want of Affidavit in Form-25 in compliance of Section 83(1) of RPA - **held –** no merit to treat the averments in the petition to be allegations of corrupt practice**. (Para -126,128)**

(D) Election Law- The Representation of People Act, 1951 - Dismissal of petition - want of material particulars, cause of action - want of filing a revised/fresh affidavit in Form-26 in compliance of Sections 33, 83 of RPA read with Rule 4-A of Rules of 1961 - held -

Conspicuous absence of material facts in respect of the cause of action relating to the fact of filing of a valid affidavit in Form-26 - revised affidavit annexed to election petition not as per norms - initial affidavit defective which rendered the nomination of the petitioner invalid. **(Para - 180,181)**

HELD:- Election petitioner not being a duly nominated candidate is not entitled to maintain the election petition. Election petition dismissed in exercise of powers under Order VII Rule 11 CPC.**(Para - 182)**

Election petition dismissed. (E-7)

List of Cases cited:-

1. Resurgence India Vs Election Commission of India, (2014) 14 SCC 189

2. Jyoti Basu Vs Debi Ghoshal, (1982) 1 SCC 691

3. U.S. Sasidharan Vs K. Kaarunakaran, (1989) 4 SCC 482

4. Dr. Shipra (Smt.) Vs Shankti Lal Khoiwal, (1996) 5 SCC 181

5. T.M. Jacob Vs C. Poulose, (1999) 4 SCC 274

6. V. Narayanswami Vs C.P. Thirunavukkarasu, (2000) 2 SCC 294

7. Rakesh Agarwal Vs Santosh Kumar Gangwar, 2020 (5) ALJ 59

8. Mithilesh Kumar Pandey Vs Baidyanath Yadav, (1984) 2 SCC 1

9. Purushottam Vs Returning Officer, Amravati & Ors., AIR 1992 Bom 227

10. Baban Yadav Vs Abdul Kadir, AIR 1998 Bom 60

11. Mulayam Singh Yadav Vs Dharampal Yadav & Ors., (2001) 7 SCC 98

12. Hari Krishna Lal Vs Atal Bihari Bajpai, 2002 SCC Online All 40

13. Devendra Patel Vs Rampal Singh & Ors., (2013) 10 SCC 801

14. Mithlesh Kumar Sinha Vs Returning Officer for Presidential Election & Ors., 1993 Suppl. (4) SCC 386

15. Charan Lal Sahu Vs Neelam Sanjeeva Reddy, (1978) 2 SCC 500

16. Charan Lal Sahu Vs Giani Zail Singh & Anr., (1984) 1 SCC 390

17. Charan Lal Sahu Vs Dr. APJ Abdul Kalam & Ors., (2003) 1 SCC 609

18. Tej Bahadur Vs Narendra Modi, 2019 SCC Online All 4780

19. Tej Bahadur Vs Narendra Modi, 2020 SCC Online SC 951

20. Brij Mohan Vs Satpal, (1985) 2 SCC 652

21. Rattan Anmol Singh & Ram Prakash Vs Ch. Atma Ram, (1955) 1 SCR 1077

22. S. Ratnamma Vs S. Shiv Prasad, 2001 SCC Online AP 1077

23. Jogya Vs Beti Joga, 1973 ELR 1050

24. Smt. Hema Purohit Vs Trivendra Singh Rawat & Ors., 2018 SCC OnLine Utt. 649

25. Nandiesha Reddy Vs Kavita Mahesh, (2011) 7 SCC 721

26. Chandra Narain Tripathi Vs Kapil Muni Karwariya, (2011) 4 All LJ 235

27. Chandra Narain Tripathi Vs Kapil Muni Karwariya, Election Petition No.1 of 2009,

28. Azhar Hussain Vs Rajiv Gandhi, 1986 Supp SCC 315

29. M. Karunanidhi Vs H.V. Hande, (1983) 2 SCC 473

30. Mayar (H.K.) Ltd. & Ors. Vs Owners & Parties, Vessel M.V. Fortune Express and others, (2006) 3 SCC 100

31. Sopan Sukhdeo Sable & Ors. Vs Assistant Charity Commissioner & Ors., (2004) 3 SCC 137

32. D. Ramachandran Vs R.V. Janakiraman & Ors., JT 1999 (2) 94

33. H.D. Revanna Vs G. Puttaswamy Gowda & Ors., JT 1999 (1) 126

34. Madiraju Venkata Ramana Raju Vs Peddireddigari Ramachandra Reddy & Ors., AIR 2018 SC 3012

35. A. Manju Vs Prajwal Revanna, (2022) 2 SCC 269

36. Resurgence India Vs Election Commission of India & Anr., AIR 2014 SC 344

37. Sri Mairembam Prithviraj @ Prithviraj Singh Vs Sri Pukhrem Sharatchandra Singh, AIR 2016 SC 5087

38. Mohan Rawale Vs Damodar Tatyaba @ Dadasaheb & Ors. (1994) 2 SCC 392

39. Samant N. Balakrishna etc. Vs George Fernandez & Ors., AIR 1969 SC 1201

40. Shri Udhav Singh Vs Madhav Rao Scindia, (1977) 1 SCC 511

41. T.M. Jacob Vs C. Poulose & Ors., (1994) 4 SCC 274

42. Dharam Yadav @ D.P. Yadav Vs Dharmendra Yadav & Ors., Election Petition No.18 of 2009, MANU/UP/2055/2010

43. Ponnala Lakshmaiah Vs Kommuri Pratap Reddy & Ors., (2012) 7 SCC 788

44. Bhagwan Rambhau Karankal Vs Chandrakant Batesingh Raghuwanshi & Ors., 2001 (6) Supreme 101

45. Ram Bhual Vs Ambika Singh, AIR 2005 SC 4233

46. Ambika Vs Ram Bhual, 2004 SCC OnLine All 1476

47. G. Mallikarjunappa & Anr. Vs Shamanur Shivashankarappa & Ors., (2001) 4 SCC 428

48. Nandiesha Reddy Vs Kavitha Mahesh, (2011) 7 SCC 721

49. Ashraf Kokkur Vs K.VS Abdul Khader & Ors., (2015) 1 SCC 129

50. Kailash Vs Nanhku & Ors., AIR 2005 SC 2441

51. Kuldeep Singh Pathania Vs Bikram Singh Jaryal, AIR 2017 SC 593

52. Kapil Muni Karwariya Vs Chandra Narayan Tripathi, Civil Appeal No.2122 of 2012

53. T. Arivandandam Vs T.V. Satyapal & anr., (1977) 4 SCC 467

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

This judgment has been divided into segments to facilitate analysis. These are:-

A. <u>GENESIS:-</u>

1. This election petition has been preferred by the petitioner calling in question the biennial elections of the Members of Council of State by the Elected Members of Uttar Pradesh, Legislative Assembly, 2020 (Rajya Sabha - 2020) dated 02.11.2020 wherein the respondents No.1 to 10 have been declared successful by the Returning Officer and it has been prayed that the election of duly elected respondents be declared null and void.

2. The primary ground of challenge as per the petitioner is that the results of the election insofar as it concerns the returned candidates has been materially affected by improper acceptance of their nomination and the improper rejection of the nomination of the petitioner.

3. Certain dates relevant for adjudication of the controversy are being noticed hereinafter.

(i) **20th October, 2020**:- The notification was issued for biennial election to the Council of the State by the elected Members of the Uttar Pradesh Legislative Assembly 2020 to be held for 10 Members to the Council of the State by the Elected Members of the Uttar Pradesh Legislative Assembly.

(ii) **27th October, 2020**:- The last date for filing nomination.

(iii) **28th October, 2020**:- The scrutiny of the nomination forms.

(iv) **2nd November, 2020**:- The last date for withdrawal of candidature.

(v) **9th November, 2020**:- Date of polling.

(vi) **9th November, 2020**:- The counting was also scheduled on 9th November, 2020 and the election was to be completed before 11th November, 2020.

4. The ten respondents of this petition along with the election petitioner had filed their respective nominations. During scrutiny of the nominations, objections were raised regarding nomination of the election petitioner and after due consideration, the Returning Officer by means of his order dated 28.10.2020 rejected the nomination of the election petitioner.

5. The election petitioner had moved a complaint/representation against the rejection of his nomination before the Election Commission of India and failing to get a response, the election petitioner preferred a writ petition before the Supreme Court of India under Article 32 of the Constitution of India which was withdrawn with liberty to avail the alternative statutory remedy and thereafter the petitioner has instituted the instant election petition.

6. This Court by means of the order dated 18.12.2020 had issued notices to the respondents. The respondents were duly served and they have put in appearance through their respective counsel. Each of the respondents have filed an application under Order VII, Rule 11 CPC. Few of the respondents namely the respondents No.1, 6 and 10 have also moved separate applications under Section 81 read with Section 86 of the Representation of People Act, 1951 (hereinafter referred to as "RPA", in short). In response to the aforesaid applications under Order VII, Rule 11 CPC as well as applications under Section 81 read with Sections 83 and 86 of RPA, the election petitioner has filed his reply and it is these applications which are under consideration of this Court.

7. The details of the said applications and its response which are being considered are mentioned hereinafter:-

I Applications under Order VII Rule 11 CPC

(a) by respondent No.1 :- Civil Misc. Application No.32 of 2022 and its response by the petitioner :- Civil Misc. Application No.108818 of 2021;

(b) by respondent No.2 :- Civil Misc. Application No.117348 of 2021 and its response by the petitioner :- Civil Misc. Application No.121589 of 2021;

(c) by respondent No.3 :- Civil Misc. Application No.37 of 2022 and its response by the petitioner :- Civil Misc. Application No.34 of 2022;

(d) by respondent No.4 :- Civil Misc. Application No.36949 of 2021 and its response by the petitioner :- Civil Misc. Application No.35of 2022;

(e) by respondent No.5 :- Civil Misc. Application No.118163 of 2021 and its response by the petitioner :- Civil Misc. Application No.121591 of 2021;

(f) by respondent No.6 :- Civil Misc. Application No.51007 of 2021 and its response by the petitioner :- Civil Misc. Application No.103989 of 2021;

(g) by respondent No.7 :- Civil Misc. Application No.117586 of 2021 and its response by the petitioner :- Civil Misc. Application No.121592 of 2021;

(h) by respondent No.8 :- Civil Misc. Application No.117337 of 2021 and its response by the petitioner:- Civil Misc. Application No.121590 of 2021;

(i) by respondent No.9 :- Civil Misc. Application No.36771 of 2021 and its response by the petitioner:- Civil Misc. Application No.36 of 2022;

(j) by respondent No.10 :- Civil Misc. Application No.33 of 2022.

II Applications under Section 81 read with 83, 86(1) of RPA

(a) by respondent No.1 :- Civil Misc. Application No.30 of 2022 and its response by the petitioner :- Civil Misc. Application No.38 of 2022;

(b) by respondent No.6 :- Civil Misc. Application No.51338 of 2021 and its response by the petitioner :- Civil Misc. Application No.103987of 2021;

(c) by respondent No.10 :- Civil Misc. Application No.31 of 2022 and its response by the petitioner :- Civil Misc. Application No.105867 of 2021.

8. It will be worthwhile to notice that the application under Order VII Rule 11 CPC as preferred by the respondent No.3 was not found on the record, however, the reply filed by the petitioner was on record.

9. In this view of the matter, a report was called from the computer section as

well as from the Registry of this Court, who informed that no loose application relating to the aforesaid election petition is available either in defective mode or otherwise. The Court requested the learned counsel for the respondent No.3 to provide an attested copy of their application which has been taken on record.

10. The respondent No.10 had filed separate application under Section 81 read with Section 83 of RPA raising objections that the respondents No.1 and 10 had not received true attested copy of the election petition and had also made submissions in this regard during the course of hearing.

11. Learned counsel for the petitioner also responded to the said arguments, however, later, it revealed that the petitioner had not filed his response in writing and accordingly a request was made that through a separate application a response has been filed by the petitioner to the application filed by the respondents No.1 and 10 and as the said grounds are common also in reply to the application of similar nature filed by the respondent No.6, accordingly, the learned counsel for the petitioner sought leave that his formal written response to the application under Section 81 read with Section 83 of RPA moved by the respondents No.1 and 10 be taken on record and considered.

12. This Court in its order dated 06.05.2022 while reserving the matter on the applications as aforesaid had noticed the aforesaid submissions and finds that since both the parties have argued exhaustively and the ground raised by all the respondents either in their application under Order VII Rule 11 C.P.C., or in the separate applications under Sections 81 and 86 of the RPA where the point and ground of challenge being common to all the respondents and much time has been devoted on the said applications hearing all the parties, accordingly, the said applications and the response shall be treated to be the part of record and the Court while deciding the said plea shall consider the same and moreso no prejudice is likely to be caused to any party as all have been given adequate opportunity to make their detailed submissions, both oral and in writing which is also on record. Thus, this order/judgment shall decide all the aforesaid applications.

B. SUBMISSIONS OF COUNSEL FOR THE RESPONDENTS:-

13. Shri Raghvendra Singh, learned Senior Counsel assisted by Shri Mohd. Altaf Mansoor and Shri Anurag Kumar Singh, Advocates opened the arguments on behalf of the respondents No.1 and 10. It was followed and taken forward by Shri S.C. Misra, learned Senior Counsel along with Shri Sunil Kumar Chaudhary for the respondent No.6. Shri Kuldeep Pati Tripathi, learned counsel made his submissions on behalf of the respondents No.2, 3, 4 and 7 while Shri Gaurav Mehrotra and Nadeem Murtaza, learned counsel made submissions on behalf of the respondents No.5. Shri Surya Prakash Singh, learned counsel made submissions on behalf of the respondents No.8 and 9. The submissions of Shri Raghvendra Singh and Shri S.C. Misra, learned Senior Counsel had set the tone for the respondents which has been supplemented and reiterated by the other counsel.

14. The submissions raised by the learned counsel for the respondents in tandem can be structured as under:-

(I) The primary contention of the respondents is that the petitioner is not a duly nominated candidate and the petition is not maintainable at his behest for the following reasons:-

(a) The nomination form of the election petitioner suffered from inherent defects inasmuch as it was not a valid nomination in terms of Section 33 of RPA since it did not have the requisite ten valid proposers.

(b) The affidavit filed along with nomination in Form No.26 as provided under Rule 4-A of the Conduct of Election Rules, 1961 (hereinafter referred to as "Rules of 1961") was also defective and despite time having been granted, the same was not rectified. Consequently, the nomination was rendered bad and the petitioner cannot claim himself to be a duly nominated candidate.

(II) The election petition as preferred and filed before this Court is also not in accordance with Section 81 of RPA which relates to the presentation of the election petition so also the election petition does not adhere to the provisions of Section 83 of RPA. The petition lacks specific details and in absence of material facts and particulars which in turn indicates that there is no valid and subsisting cause of action, it renders the petition liable for rejection under Order VII Rule 11 CPC.

(III) The petitioner has leveled allegations of corrupt practice in the petition, but he has failed to give material particulars in respect thereto nor has he filed an affidavit in Form No.25 as required in terms of Rule 94-A of the Rules of 1961, being another flaw for which the petition is liable to be dismissed.

15. Thus, for all the above reasons, the petition at the behest of the election petitioner is not maintainable and is liable to be rejected at the preliminary stage under Order VII Rule 11 CPC.

16. Elaborating the submissions, learned counsel for the respondents have taken the Court through relevant provisions as contained in Part-V of RPA especially Chapter-I which relates to nomination of candidates, more particularly Sections 33 and 36. The attention of the Court has been drawn to Part-VI of RPA more particularly Sections 79, 81, 82, 83 and 86. Reference has also been made to the Rules of 1961 more particularly in context with Rule 4-A and Rule 94-A, also the prescribed Form No.2-C, Form No.25 and Form No.26 respectively.

17. The thrust of the submission of learned counsel for the respective respondents is that the election of returned candidates i.e. respondents cannot be called in question except by an election petition presented in accordance with the provisions of Part-VI of RPA. It is submitted that Section 79(b) of RPA defines the word 'candidate' to mean a person who has been or claims to have been a duly nominated candidate at any election.

18. It is submitted that in terms of Section 81 of RPA, an election petition can be filed by any candidate at such election or an elector. However, in the instant case, the election petitioner is not an elector. He also cannot be treated as a candidate since his nomination was duly rejected by the Returning Officer on 28.10.2020. Now, even if, the election petitioner claims himself to be a 'duly nominated candidate' at an election, even then it will not enure to his benefit since the nomination form filed by the petitioner was inherently defective. It is not in accordance with Section 33 of

the RPA which relates to presentation of nomination paper and requirement for a valid nomination, consequently, the petitioner cannot even claims himself to be a duly nominated candidate, hence, the petition is not maintainable.

19. It was further explained that Section 33 of RPA provides that nomination paper must be delivered to the Returning Officer at the place and time specified in the notification, complete in all respects and in the prescribed form signed by the candidate and by the proposers. It is urged that since the petitioner has not been duly nominated by any recognized political party and he intended to contest the elections as an independent candidate, hence, in his case, in terms of proviso appended to Section 33 of RPA, the nomination form ought to be subscribed by ten valid proposers being the electors of the Constituency.

20. In the instant case, one of the proposer as mentioned in the nomination form namely Nawab Shah was not a valid elector of the Constituency, accordingly, he could not be treated as a proposer as a result the nomination form of the petitioner would be subscribed only by nine proposers and hence against the mandate of Section 33 of RPA, rendering the nomination form invalid.

21. It is also submitted that each nomination form in order to be valid and considered must also be accompanied with an affidavit required in Form No.26 in terms of Rule 4-A of the Rules of 1961 and in the instant case, the affidavit filed by the election petitioner in prescribed format of Form No.26 was defective as it did not have Clause 8(viii) as prescribed in the format of Form No.26.

22. It is urged that this aspect was brought to the notice of the election petitioner by the Returning Officer while receiving the nomination form on 27.10.2020 as also evident from the check-list, a copy of which has been brought on record by the election petitioner along with the election petition. However, there is nothing on record to indicate that the said defect was cured by the election petitioner. In absence of any rectification/revised affidavit filed with the returning officer, the nomination form of the petitioner could not be treated to be valid and accordingly, noticing the aforesaid, the Returning Officer rejected the nomination form of the election petitioner during scrutiny on 28.10.2020.

23. It is also pointed out that the right to contest the elections is not a right available under the common law. It is governed by the provisions of RPA and thus, if any election is to be called in question then the same is governed by the provisions of RPA. It is also submitted that the Apex Court has consistently held that the provisions of RPA are to be strictly construed and in case if there is a breach or non-compliance of the provisions of RPA then the person liable for such breach and non-compliance must bear the brunt and no equity or liberal approach can be taken in context of such a person.

24. It is, thus, argued that the nomination form of the petitioner was not valid so he could not be treated to be a candidate and at the same time he cannot claim himself to be a duly nominated candidate, hence, the petition was not maintainable at his behest and is liable to be dismissed.

25. Taking the submissions forward, it is urged that considering the mandate of Section 83 of RPA which provides that an election petition must contain concise but material fact on which the petitioner relies.

The petitioner is required to set forth full particular of any corrupt practice that he alleges including a full statement, as possible, relating to the names of the parties alleged to have committed such corrupt practice and date and place of the commission of such practice. The petition must be signed and verified, coupled with the fact, that where the petitioner has alleged any corrupt practice then the election petition must be accompanied by an affidavit in the prescribed format in support of allegation of such corrupt practice and particulars thereof as provided in Form No.25 which is relatable to Rule 94-A of the Rules of 1961. It is also urged that any schedule or any annexure to the petition shall also be signed by the petitioner and verified in the same manner as the election petition itself.

26. It is urged that the entire contents of the election petition targets the Returning Officer and various allegations have been leveled against him indicating that he is involved in corrupt practice with intent to benefit the other candidates, who are none other than the respondents and neither the details of the corrupt practice have been mentioned nor the election petition is accompanied by an affidavit in Form No.25 and even the copies of the election petition which have been received by the respondents No.1 and 10 are not duly verified including its annexure, schedule annexed with the petition and it is in gross violation of Sections 81, 83 and 86 of RPA and in absence of material particulars, the petition does not discloses a subsisting cause of action. Hence, the election petition is worthy of dismissal.

27. <u>DECISIONS CITED BY THE COUNSEL FOR RESPONDENTS:-</u>

(a) Resurgence India v. Election Commission of India, (2014) 14 SCC 189;

(b) Jyoti Basu v. Debi Ghoshal, (1982) 1 SCC 691;

(c) U.S. Sasidharan v. K. Kaarunakaran, (1989) 4 SCC 482;

(d) Dr. Shipra (Smt.) v. Shankti Lal Khoiwal, (1996) 5 SCC 181;

(e) T.M. Jacob v. C. Poulose, (1999) 4 SCC 274;

(f) V. Narayanswami v. C.P. Thirunavukkarasu, (2000) 2 SCC 294;

(g) Rakesh Agarwal v. Santosh Kumar Gangwar, 2020 (5) ALJ 59;

(h) Mithilesh Kumar Pandey v. Baidyanath Yadav, (1984) 2 SCC 1;

(i) Purushottam v. Returning Officer, Amravati & Ors., AIR 1992 Bom 227;

(j) Baban Yadav v. Abdul Kadir, AIR 1998 Bom 60;

(k) Mulayam Singh Yadav v. Dharampal Yadav & Ors., (2001) 7 SCC 98;

(l) Hari Krishna Lal v. Atal Bihari Bajpai, 2002 SCC Online All 40;

(m) Devendra Patel v. Rampal Singh & Ors., (2013) 10 SCC 801;

(n) Mithlesh Kumar Sinha v. Returning Officer for Presidential Election & Ors., 1993 Suppl. (4) SCC 386;

(o) Charan Lal Sahu v. Neelam Sanjeeva Reddy, (1978) 2 SCC 500;

(p) Charan Lal Sahu v. Giani Zail Singh & Anr., (1984) 1 SCC 390;

(q) Charan Lal Sahu v. Dr. APJ Abdul Kalam & Ors., (2003) 1 SCC 609;

(r) Tej Bahadur v. Narendra Modi, 2019 SCC Online All 4780;

(s) Tej Bahadur v. Narendra Modi, 2020 SCC Online SC 951;

(t) Brij Mohan v. Satpal, (1985) 2 SCC 652;

(u) Rattan Anmol Singh & Ram Prakash v. Ch. Atma Ram; (1955) 1 SCR 1077;

(v) S. Ratnamma v. S. Shiv Prasad, 2001 SCC Online AP 1077;

(w) Jogya v. Beti Joga, 1973 ELR 1050;

(x) Smt. Hema Purohit v. Trivendra Singh Rawat & Ors., 2018 SCC OnLine Utt. 649;

(y) Nandiesha Reddy v. Kavita Mahesh, (2011) 7 SCC 721;

(z) Chandra Narain Tripathi v. Kapil Muni Karwariya; (2011) 4 All LJ 235;

(aa) Chandra Narain Tripathi v. Kapil Muni Karwariya, Election Petition No.1 of 2009, decided on 20.12.2013; unreported judgment of the Allahabad High Court;

(ab) Azhar Hussain v. Rajiv Gandhi, 1986 Supp SCC 315;

(ac) M. Karunanidhi v. H.V. Hande, (1983) 2 SCC 473.

C. **SUBMISSIONS OF COUNSEL FOR THE ELECTION PETITIONER:-**

28. Shri Narendra Kumar Pandey, learned counsel assisted by Shri Vivek Kumar and Shri Jitendra Saksena, Advocates have refuted the submissions made by the learned counsel for the respondents and has urged that first and foremost the scope of Order VII Rule 11 CPC must be noticed. It is urged that the Apex Court has consistently held that while considering the applications under Order VII Rule 11 CPC, it is only and only the averments contained in the petition along with the documents filed by the petitioner is to be seen, the way they are, treating it to be true and without adding or subtracting any sentence or compartmentalizing any part of the petition. The entire petition must be read in a meaningful manner without culling out sentence in isolation and only then if the Court comes to the conclusion that the petition does not disclose any cause of action or that the petition is barred by any law for the time being in force, then the Court may exercise its powers to reject the petition.

29. Moving forward, learned counsel for the election petitioner has argued that insofar as the present petition is concerned, it is his specific case that he had filed two sets of nomination papers at around 02:50 PM on 27.10.2020. One set was in English on green colour paper while the other set was in Hindi on pink colour paper. It is urged that in terms of Section 33(4) of RPA, the Returning Officer while receiving a nomination paper must satisfy himself in respect of names and the electoral roll, numbers of the candidate and his proposers, as entered in the nomination paper are the same as those entered in the electoral rolls.

30. It is submitted that while two sets of nomination papers were filed, the petitioner was handed over the check-list which only indicated that the affidavit filed along with the nomination paper in Form No.26 was not correct and time was granted to the petitioner to furnish a revised and a fresh affidavit. It is also the specific case that the petitioner was given Serial No.22 in respect of the nomination form filed in English on green paper but not for the other form on pink colour paper which in seratum ought to be at S.No.23 and the said form was also complete in all respects but no number was given and the second nomination was also not considered by the Returning Officer.

31. It is also submitted that the alleged discrepancy which was raised at the time of scrutiny relating to the name of one of the proposers as mentioned in the nomination form filled in English on green colour paper related to the name of the

proposer at S.No.3 as Nawab Shah, however, his correct name was Nawabjaan. It is urged that the serial number at which the name of Shri Nawab Shah (read Nawabjaan) as mentioned in the list prepared under Section 152 of RPA was correctly mentioned in the nomination form so also the signatures of Nawabjaan was also present. Hence, this inadvertent error, if any, was nothing but a misnomer and an inaccurate description and merely a technical & clerical error in the nomination paper which in terms of the proviso appended to Section 33(4) of RPA was liable to be ignored.

32. It is also urged that even in terms of Section 33(6) of RPA, a candidate is entitled to file maximum upto four sets of nomination papers and in the instant case, the election petitioner had submitted two sets of nomination papers one in English on green colour paper and one in Hindi on pink colour paper. The nomination form in pink colour paper was complete in all respects. Even if at all there was any discrepancy in the other set filled in English on green colour paper, nevertheless the Returning Officer ought to have considered the nomination paper filed by the petitioner on pink colour paper and in failing to consider it, the Returning Officer erred and illegally rejected the nomination paper of the election petitioner with an oblique motive.

33. It is further argued that even during the scrutiny of the nomination, two sets of objections were filed against the nomination of the election petitioner, one by Haridwar Dubey and the other by Shri Lalji Verma. The petitioner had also filed his response thereto and had clearly stated that the clerical error in the name of one of the proposers is liable to be overlooked being a misnomer in terms the proviso appended to Section 33(4) of RPA and it was also stated that though the Returning Officer had the complete list which is maintained in terms of Section 152 of RPA and the details of Nawabjaan could be easily verified. Moreover, the petitioner was willing to produce Nawabjaan in person, to verify the fact of proposing the name of the election petitioner by him within twelve hours, if permitted. The Returning Officer had ample power and jurisdiction vested in him to adjourn the hearing on the objections raised on the nomination form during scrutiny to the following day to provide the petitioner time and to enable him to rebut the objections, but no such opportunity was granted to the election petitioner thereby with a deliberate intent the nomination form of the petitioner was rejected to help the other candidates.

34. It is also urged that insofar as the affidavit in Form No.26 is concerned, though one column 8(viii) in the prescribed format Form No.26 was missing and the same had been informed by the Returning Officer as indicated in the check-list provided to the petitioner. However, the petitioner got a fresh/revised affidavit prepared which was submitted to the Returning Officer prior to commencement of scrutiny on 28.10.2020. The petitioner was not provided any receipt of the said affidavit nor any receipt was given regarding filing of second set of nomination form on pink colour paper, thus, the rejection of the nomination form of the petitioner was illegal, deliberate and bad.

35. Learned counsel for the petitioner has further urged that the petitioner has primarily structured his petition in two parts. One relates to the facts and details

including material particulars relating to illegal rejection of the nomination form of the election petitioner and the other relates to the details, facts and material particulars relating to the issue of illegal acceptance of nomination form and affidavits of returned candidates.

36. It is urged that reference in certain paragraphs in the petition is to the manner in which the Returning Officer has acted and this is referred to by the learned counsel for the respondents, during their course of arguments, as allegations of corrupt practice. On the contrary, the said paragraphs actually indicate the sequence of event as they unfolded and the attitude/reaction of the Returning Officer which led to the illegal rejection of the nomination of the petitioner by taking recourse to immaterial, technical deficiencies which were of unsubstantial character. However, the same Returning Officer for the same/similar deficiencies and treating them to be of unsubstantial character, had accepted the nomination form of the returned candidates, reflecting dual standards adopted and this has materially affected the results of the election.

37. It is in this context that the facts have been detailed along with relevant schedule appended with the petition. The election petitioner has even brought on record certain photographs indicating that at the time of presentation of the nomination form, one form filled in English on green colour paper and the other form filled in Hindi on pink colour was presented before the Returning Officer. The election petitioner has also brought on record a copy of the revised affidavit in Form No.26 which was filed before the Returning Officer prior to the commencement of scrutiny of the nomination form and in this context if the contents of the election petition is read as a whole it will indicate the entire bundle of facts with material particulars have been clearly and categorically stated. Accordingly, it cannot be said that the petitioner has not disclosed a valid cause of action or that material particulars have not been indicated.

38. It is also urged that while dealing with the application under Order VII Rule 11 CPC, the Court is required to see the complete averment in the petition and treating the same to be true. The error/deficiencies as pointed out by the respondents are nothing but contentions which can form part of their defence and in any case such contentions being contestable questions are to be made subject matter of issues and only after permitting the parties to lead evidence, can the matter be decided. However, it cannot be said that the election petition is not in accordance with the provisions of Section 81 and Section 83 or Section 86 of RPA and that no valid and subsisting cause of action has been indicated in the election petition. No provision of any law has been pointed out which prohibits or bars the election petition. Hence, the applications moved by the respondents are frivolous and deserve to be rejected.

39. It is further submitted that the fact whether the petitioner had filed the second set of nomination on pink colour paper is a question of fact which can only be decided after leading of evidence. Prima-facie the pleadings are quite specific and even the photographs and schedules compliment the pleadings and the success of the said averments can only be tested after trial and not at this preliminary stage.

40. It is also submitted that the petitioner had sought the true copies available with the Returning Officer relating to the Form No.2-C i.e. nomination form of the returned candidates as well as their respective affidavits in Form No.26. Also, the petitioner had sought the CCTV Footage as the process of presentation of the nomination form was duly videographed to enable the petitioner to prove his plea regarding furnishing and presentation of second set of nomination filed by the election petitioner on pink colour paper but the same has not been provided to the petitioner in its entirety.

41. It is further urged that the petitioner had to seek judicial intervention by filing a writ petition before this Court at Prayagraj wherein an order was passed and in furtherance thereof only part compliance of the order of the Writ Court was made and the petitioner was provided with the Form No.2-C filed by the returned candidates. The petitioner was neither provided with the copy of the second set of nomination on pink paper nor all the affidavits of the returned candidates was provided. Even the CCTV Footage as required was not provided indicating that the Returning Officer was shielding an important piece of relevant evidence.

42. Learned counsel for the petitioner has also submitted that since the averments made in the election petition are primarily focused on the two issues relating to illegal rejection of the nomination of the petitioner and illegal acceptance of the nomination of the respondents and no allegation of corrupt practice has been alleged, hence, there was no requirement of filing an affidavit in terms of Rule 94-A of the Rules of 1961. Accordingly, the election petition cannot be said to be bad for want of affidavit in Form No.25 and in absence thereof the petition is not rendered non-maintainable.

43. It is also alternatively submitted by the learned counsel for the petitioner that even if, at all by any stretch of imagination, the averment as contained in the election petition are taken to be allegation of corrupt practice and there being no affidavit in terms of Form No.25 even then the petition is not liable to be rejected rather the Court should be magnanimous enough to permit the petitioner to furnish the affidavit within such day and time to be fixed and if in case, thereafter, the petitioner does not comply or furnish such an affidavit only then the Court may exercise its powers to reject the election petition and not before that.

44. Learned counsel for the petitioner has also drawn the attention of the Court to the Hand Book Of Returning Officers for Elections to the Council of State and State Legislative Council, issued by the Election Commission of India (hereinafter referred to as 'Handbook') and has urged that the same has statutory force. The said Handbook contains various clauses relating to the manner in which the nomination forms are to be treated at the time of presentation and scrutiny and instructions are imparted to the Returning Officers to adopt a liberal approach rather than to take a strict view as by adopting any hyper-technical or strict view it may result in rejection of a nomination form on technical grounds which causes irreparable injury. Such rejections are subjected to election petitions where the Court if sets aside the rejection order then elections of various returned candidate is declared null and void which in fact results in colossal waste of time, money and labour for all concerned and such a situation must be avoided.

45. The petitioner is a validly nominated candidate as per the RPA and is entitled to maintain the petition and even otherwise there is no error in presentation which may cast a cloud over the election petition, hence, all the applications moved by the respondents under Order VII Rule 11 CPC and under Sections 81 and 86 of RPA are liable to be dismissed.

46. DECISIONS CITED BY THE COUNSEL FOR PETITIONER:-

(a) Mayar (H.K.) Ltd. & Ors. v. Owners & Parties, Vessel M.V. Fortune Express and others, (2006) 3 SCC 100;

(b) Sopan Sukhdeo Sable & Ors. v. Assistant Charity Commissioner & Ors.,

(2004) 3 SCC 137;

(c) D. Ramachandran v. R.V. Janakiraman & Ors., JT 1999 (2) 94;

(d) H.D. Revanna v. G. Puttaswamy Gowda & Ors., JT 1999 (1) 126;

(e) Madiraju Venkata Ramana Raju v. Peddireddigari Ramachandra Reddy & Ors., AIR 2018 SC 3012;

(f) A. Manju v. Prajwal Revanna, (2022) 2 SCC 269;

(g) Resurgence India v. Election Commission of India & Anr., AIR 2014 SC 344;

(h) Sri Mairembam Prithviraj alias Prithviraj Singh v. Sri Pukhrem Sharatchandra Singh, AIR 2016 SC 5087;

(i) Mohan Rawale v. Damodar Tatyaba alias Dadasaheb & Ors. (1994) 2 SCC 392;

(j) Samant N. Balakrishna etc. v. George Fernandez & Ors., AIR 1969 SC 1201;

(k) Shri Udhav Singh v. Madhav Rao Scindia, (1977) 1 SCC 511;

(l) T.M. Jacob v. C. Poulose & Ors., (1994) 4 SCC 274;

(m) Dharam Yadav alias D.P. Yadav v. Dharmendra Yadav & Ors., Election Petition No.18 of 2009, MANU/UP/2055/2010;

(n) Ponnala Lakshmaiah v. Kommuri Pratap Reddy & Ors., (2012) 7 SCC 788;

(o) Bhagwan Rambhau Karankal v. Chandrakant Batesingh Raghuwanshi & Ors., 2001 (6) Supreme 101;

(p) Ram Bhual v. Ambika Singh, AIR 2005 SC 4233;

(q) Ambika v. Ram Bhual, 2004 SCC OnLine All 1476;

(r) G. Mallikarjunappa & Anr. v. Shamanur Shivashankarappa & Ors. (2001) 4 SCC 428;

(s) Nandiesha Reddy v. Kavitha Mahesh, (2011) 7 SCC 721;

(t) Ashraf Kokkur v. K.V. Abdul Khader & Ors., (2015) 1 SCC 129;

(u) Kailash v. Nanhku & Ors., AIR 2005 SC 2441.

(v) Kuldeep Singh Pathania v. Bikram Singh Jaryal, AIR 2017 SC 593;

D. LEGAL ANALYSIS AND DISCUSSIONS:-

47. The Court has heard the learned counsel for the respective parties at length over several dates and has also meticulously perused the record.

48. In order to appreciate the contention of the respective parties, this Court deems appropriate that it will be gainful to first have a glance at the relevant legal provisions of the RPA and the Rules of 1961.

49. The RPA in Part-V deals with the conduct of election. Chapter-I relates to nomination of candidates and for the present controversy Section 33 and Section

36 is relevant and the same is being reproduced for ready reference:-

*"[33. **Presentation of nomination paper and requirements for a valid nomination.--(1)** On or before the date appointed under clause (a) of section 30 each candidate shall, either in person or by his proposer, between the hours of eleven O'clock in the forenoon and three O'clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer:*

[Provided that a candidate not set up by a recognised political party, shall not be deemed to be duly nominated for election from a constituency unless the nomination paper is subscribed by ten proposers being electors of the constituency:

Provided further that no nomination paper shall be delivered to the returning officer on a day which is a public holiday:

Provided also that in the case of a local authorities' constituency, graduates' constituency or teachers' constituency, the reference to "an elector of the constituency as proposer" shall be construed as a reference to ten per cent. of the electors of the constituency or ten such electors, whichever is less, as proposers.]

[(1A) Notwithstanding anything contained in sub-section (1), for election to the Legislative Assembly of Sikkim (deemed to be the Legislative Assembly of that State only constituted under the Constitution), the nomination paper to be delivered to the returning officer shall be in such form and manner as may be prescribed:

Provided that the said nomination paper shall be subscribed by the candidate as assenting to the nomination, and--

(a) in the case of a seat reserved for Sikkimese of Bhutia-Lepcha origin, also by at least twenty electors of the constituency as proposers and twenty electors of the constituency as seconders;

(b) in the case of a seat reserved for Sanghas, also by at least twenty electors of the constituency as proposers and at least twenty electors of the constituency as seconders;

(c) in the case of a seat reserved for Sikkimese of Nepali origin, by an elector of the constituency as proposer:

Provided further that no nomination paper shall be delivered to the returning officer on a day which is a public holiday.]

(2) In a constituency where any seat is reserved, a candidate shall not be deemed to be qualified to be chosen to fill that seat unless his nomination paper contains a declaration by him specifying the particular caste or tribe of which he is a member and the area in relation to which that caste or tribe is a Scheduled Caste or, as the case may be, a Scheduled Tribe of the State.

(3) Where the candidate is a person who, having held any office referred to in 4[section 9] has been dismissed and a period of five years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls:

[Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.]

(5) Where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny.

[(6) Nothing in this section shall prevent any candidate from being nominated by more than one nomination paper:

Provided that not more than four nomination papers shall be presented by or on behalf of any candidate or accepted by the returning officer for election in the same constituency.]]

[(7) Notwithstanding anything contained in sub-section (6) or in any other provisions of this Act, a person shall not be nominated as a candidate for election,--

(a) in the case of a general election to the House of the People (whether or not held simultaneously from all Parliamentary constituencies), from more than two Parliamentary constituencies;

(b) in the case of a general election to the Legislative Assembly of a State (whether or not held simultaneously from all Assembly constituencies), from more than two Assembly constituencies in that State;

(c) in the case of a biennial election to the Legislative Council of a State having such Council, from more than two Council constituencies in the State;

(d) in the case of a biennial election to the Council of States for filling two or more seats allotted to a State, for filling more than two such seats;

(e) in the case of bye-elections to the House of the People from two or more Parliamentary constituencies which are held simultaneously, from more than two such Parliamentary constituencies;

(f) in the case of bye-elections to the Legislative Assembly of a State from two or more Assembly constituencies which are held simultaneously, from more than two such Assembly constituencies;

(g) in the case of bye-elections to the Council of States for filling two or more seats allotted to a State, which are held simultaneously, for filling more than two such seats;

(h) in the case of bye-elections to the Legislative Council of a State having such Council from two or more Council constituencies which are held simultaneously, from more than two such Council constituencies.

Explanation.--For the purposes of this sub-section, two or more bye-elections shall be deemed to be held simultaneously where the notification calling such bye-elections are issued by the Election

Commission under sections 147, 149, 150 or, as the case may be, 151 on the same date.]

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***Scrutiny of nomination.*--*(1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer 1[***] of each candidate, and one other person duly authorised in writing by each candidate but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.*

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, [reject] any nomination on any of the following grounds:--

[(a) [that on the date fixed for the scrutiny of nominations the candidate] either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely:--

Articles 84, 102, 173 and 191, [***].

[Part II of this Act, and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963)] [***]; or

(b) that there has been a failure to comply with any of the provisions of section 33 or section 34; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.]

(3) Nothing contained in 8[clause (b) or clause (c)] of sub-section (2) shall be deemed to authorise the 9[rejection] of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

(4) The returning officer shall not reject any nomination paper on the ground of any [***] defect which is not of a substantial character.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:

Provided that in case [an objection is raised by the returning officer or is made by any other person] the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection.

[(7) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in

section 16 of the Representation of the People Act, 1950 (43 of 1950)].
(8) Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board.]"

50. The next relevant provision regarding the election is contained in Part-VI of the RPA where Section 79(b) defines the word "candidate" which reads as under:-

"79 (b) "Candidate" means a person who has been or claims to have been duly nominated as a candidate at any election;"

51. In the same Part-VI, Chapter-II of RPA provides for presentation of election petitions. Sections 80, 80-A, 81 and 83 relates to the election petitions, its presentations and its contents and the said sections read as under:-

"80. Election petitions.--No election shall be called in question except by an election petition presented in accordance with the provisions of this Part.

[80A. High Court to try election petitions.--(1) The Court having jurisdiction to try an election petition shall be the High Court.

(2) Such jurisdiction shall be exercised ordinarily by a single Judge of the High Court and the Chief Justice, shall, from time to time, assign one or more Judges for that purpose:

Provided that where the High Court consists only of one Judge, he shall try all election petitions presented to that Court.

(3) The High Court in its discretion may, in the interests of justice or convenience, try an election petition, wholly or partly, at a place other than the place of seat of the High Court.

81. Presentation of petitions.--(1) An election petition calling in question any election may be presented on one or more of the grounds specified in 1[sub-section (1)] of section 100 and section 101 to the 2[High Court] by any candidate at such election or any elector 3[within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates].

Explanation.--In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

1[***]

2[(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition 3[***] and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.]

[83. Contents of petition.--(1) An election petition--

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]
(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.]"

52. While Part VI, Chapter-III deals with trial of elections petitions and Section 86 reads as under:-

*"**[86. Trial of election petitions.**--(1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.*

Explanation.--An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80A.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation.--For the purposes of this sub-section and of section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial.]"

53. The Rules of 1961 in Part-II under the head General Provisions, in Rule 4 provides for nomination papers and the format of such forms has also been prescribed in the said Rules.

54. Rule 4 of Rules of 1961 reads as under:-

*"**4. Nomination paper**.--Every nomination paper presented under sub-section (1) of section 33 shall be completed*

in such one of the Forms 2A to 2E as may be appropriate:

Provided that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2A or Form 2B shall not be deemed to be a defect of a substantial character within the meaning of sub-section (4) of section 36."

55. For the present purposes, Form 2-C as prescribed in the Rules of 1961 is relevant. Similarly Rule 4-A which relates to the form of the affidavit to be filed at the time of delivering nomination papers was incorporated with the effect from 03.09.2002 in the Rules of 1961. Form-26 as prescribed in the Rules of 1961 relateable to Rule 4-A is relevant for the present controversy and it reads as under:-

***"4A. Form of affidavit to be filed at the time of delivering nomination paper.**--The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under subsection (1) of section 33 of the Act, also deliver to him an affidavit sworn by the candidate before a Magistrate of the first class or a Notary in Form 26."*

56. Rule 94-A of Rules of 1961 relates to the affidavit which is required to be filed in terms of proviso to Sub-section (1) of Section 83 of RPA and relatable to Form-25 of Rules of 1961 and is also relevant for the instant controversy and it reads as under:-

"94A. Form of affidavit to be filed with election petition.--The affidavit referred to in the proviso to subsection (1) of section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25."

57. Before proceeding further, it will also be relevant, at first, to take a glance at the decisions cited by the learned counsel for the respondents and then to the decisions cited by the learned counsel for the petitioner, in support of their respective contentions.

58. Learned counsel for the respondents have primarily relied upon the decision of the Apex Court in **Resurgence India (supra)** wherein the issue before the Apex Court was noticed in paragraph 9 and 11 and the writ petitioner before the Apex Court sought a direction for making it compulsory for the Returning Officer to ensure that the affidavits filed by the candidates are complete in all respects and to reject those nomination papers which are accompanied by affidavits containing blank. It is in this context, the Apex Court after considering the submissions in para-22, 23 and 29 held as under:-

"22. Let us now test whether the filing of affidavit stating that the information given in the affidavit is correct but leaving the contents blank would fulfil the objective behind filing the same. The reply to this question is a clear denial. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizen under Article 19(1)(a) of the Constitution of India. The citizens are required to have the necessary information at the time of filing of the nomination paper in order to make a choice of their voting. When a candidate files an affidavit with blank particulars, it renders the affidavit itself nugatory.

23. For that purpose, the Returning Officer can very well compel a candidate to furnish information relevant on the date of scrutiny. We were appraised that the Election Commission already has a

standard draft format for reminding the candidates to file an affidavit as stipulated. We are of the opinion that along with the above, another clause may be inserted for reminding the candidates to fill the blanks with the relevant information thereby conveying the message that no affidavit with blank particulars will be entertained. We reiterate that it is the duty of the Returning Officer to check whatever the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the "right to know" of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of the Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced."

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"29.What emerges from the above discussion can be summarised in the form of the following directions:

29.1. The voter has the elementary right to know full particulars of a candidate who is to represent him in Parliament/Assemblies and such right to get information is universally recognised. Thus, it is held that right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution.

29.2. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Article 19(1)(a) of the Constitution of India. The citizens are supposed to have the necessary information at the time of filing of nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information.

29.3. Filing of affidavit with blank particulars will render the affidavit nugatory.

29.4. It is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the "right to know" of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of the Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

29.5. We clarify to the extent that para 73 of People's Union for Civil Liberties case [People's Union for Civil Liberties v. Union of India, (2003) 4 SCC 399] will not come in the way of the Returning Officer to reject the nomination paper when the affidavit is filed with blank particulars.

29.6. The candidate must take the minimum effort to explicitly remark as "NIL" or "Not Applicable" or "Not known" in the columns and not to leave the particulars blank.

29.7. Filing of affidavit with blanks will be directly hit by Section 125-A(i) of the RP Act. However, as the nomination paper itself is rejected by the Returning Officer, we find no reason why the candidate must be again penalised for the same act by prosecuting him/her."

59. Learned counsel for the respondents have then relied upon the decision of the Apex Court in **Jyoti Basu (supra)** to buttress their submissions that a right to elect is fundamental though it is to democracy, is, anomalously enough,

neither a fundamental right nor a common law right. It is pure and a simple statutory right. Since, the proceeding under the RPA are governed by the statute therefore neither the principles of common law nor the principles of equity apply. The proceedings have to be strictly construed and since the election petitioner has not complied with the various provisions contained in Sections 81, 83 read with Section 86 of the RPA which require strict compliance, hence the election petition is bad. Paragraphs 8 and 9 of the aforesaid decision is relevant which reads as under:-

"8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, court is put in a strait-jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any rights claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the scheme of the Act. We have noticed the necessity to rid ourselves of notions based on common law or equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say?

9. Section 81 prescribes who may present an election petition. It may be any candidate at such election; it may be any elector of the constituency; it may be none else. Section 82 is headed "Parties to the petition" and clause (a) provides that the petitioner shall join as respondents to the petition the returned candidates if the relief claimed is confined to a declaration that the election of all or any of the returned candidates is void and all the contesting candidates if a further declaration is sought that he himself or any other candidate has been duly elected. Clause (b) of Section 82 requires the petitioner to join as respondent any other candidate against whom allegations of any corrupt practice are made in the petition. Section 86(4)

enables any candidate not already a respondent to be joined as a respondent. There is no other provision dealing with the question as to who may be joined as respondents. It is significant that while clause (b) of Section 82 obliges the petitioner to join as a respondent any candidate against whom allegations of any corrupt practice are made in the petition, it does not oblige the petitioner to join as a respondent any other person against whom allegations of any corrupt practice are made. It is equally significant that while any candidate not already a respondent may seek and, if he so seeks, is entitled to be joined as a respondent under Section 86(4), any other person cannot, under that provision seek to be joined as a respondent, even if allegations of any corrupt practice are made against him. It is clear that the contest of the election petition is designed to be confined to the candidates at the election. All others are excluded. The ring is closed to all except the petitioner and the candidates at the election. If such is the design of the staturte, how can the notion of "proper parties" enter the picture at all? We think that the concept of "proper parties" is and must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in Section 82 and Section 86(4) and no others. However desirable and expedient it may appear to be, none else shall be joined as respondents."

60. The next decision relied upon by the respondents is the case of **U.S. Sasidharan (supra)** which was in context with the allegation and material particulars in the election petition vis-a-vis a video cassette which was though filed in the Court but a copy thereof was not served on the respondents. The issue before the Apex Court has been noticed in paragraph-7 of the said decision and thereafter in paragraph 12 and 13 it was held that from a perusal of Section 83(1)(a)(b) it is *sine qua non* for an election petition to contain concise statement of material facts and also to set forth full particulars of corrupt practice. It has also been held that the procedure prescribed in the RPA for challenging an election much be strictly followed. So if there be any deviation for non compliance with the provision of Section 81(3), the courts have no other alternate but to dismiss the election petition. Paragraph 15 and 16 are relevant and relates to the differentiation between material facts or particulars and how they are to be construed in context with an election petition.

The relevant paras 15 and 16 reads as under:-

"15. We have already referred to Section 83 relating to the contents of an election petition. The election petition shall contain a concise statement of material facts and also set forth full particulars of any corrupt practice. The material facts or particulars relating to any corrupt practice may be contained in a document and the election petitioner, without pleading the material facts or particulars of corrupt practice, may refer to the document. When such a reference is made in the election petition, a copy of the document must be supplied inasmuch as by making a reference to the document and without pleading its contents in the election petition, the document becomes incorporated in the election petition by reference. In other words, it forms an integral part of the election petition. Section 81(3) provides for giving a true

copy of the election petition. When a document forms an integral part of the election petition and a copy of such document is not furnished to the respondent along with a copy of the election petition, the copy of the election petition will not be a true copy within the meaning of Section 81(3) and, as such, the court has to dismiss the election petition under Section 86(1) for non-compliance with Section 81(3).

16. On the other hand, if the contents of the document in question are pleaded in the election petition, the document does not form an integral part of the election petition. In such a case, a copy of the document need not be served on the respondent and that will not be non-compliance with the provision of Section 81(3). The document may be relied upon as an evidence in the proceedings. In other words, when the document does not form an integral part of the election petition, but has been either referred to in the petition or filed in the proceedings as evidence of any fact, a copy of such a document need not be served on the respondent along with a copy of the election petition."

61. Learned counsel for the respondents on the aforesaid point has also relied on a decision of the Apex Court in **Dr. Shipra (supra)** and **T. M. Jacob (supra)** to buttress their submissions regarding material particulars and concept of a true copy.

62. From the perusal of the aforesaid decisions, it transpires that the case of **Dr. Shipra (supra)** came to be referred to a Larger Bench of the Apex Court in the case of **T. M. Jacob (supra).** It is the Constitution Bench of **T. M. Jacob (supra)** where the issue regarding the legislative intent and the object of serving a true copy of an election petition and the affidavit filed in support of the allegation of corrupt practice came to be considered. The relevant paragraphs of the said report are 22, 24, 28, 35, 36, 37, 39 and 40 which reads as under:-

"22. The defect found in the present case is almost identical to the defect which had been found in the copy of the affidavit supplied to the first respondent in Anil R. Deshmukh case [(1999) 2 SCC 205 : JT (1999) 1 SC 135] . The defect is materially different from the defect found in Dr Shipra case [(1996) 5 SCC 181] where the true copy of the election petition furnished by the election petitioner to the successful candidate did not show that the affidavit filed in support of the allegation of corrupt practices had been duly sworn or affirmed and verified by the election petitioner before a Notary, whose attestation was also found missing."

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"24. Reliance on the above observations in Dr Shipra case [(1996) 5 SCC 181] divorced from the context in which that judgment had been rendered, is neither fair nor proper."

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"28. Thus, our answer to the reference is that the judgment in Dr Shipra case[(1996) 5 SCC 181] is confined to the "fact situation" as existing in that case and has no application to the established facts of the present case and the wide observations made therein were made in the context of the facts of that case only."

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"35. The object of serving a "true copy" of an election petition and the affidavit filed in support of the allegations of corrupt practice on the respondent in the

election petition is to enable the respondent to understand the charge against him so that he can effectively meet the same in the written statement and prepare his defence. The requirement is, thus, of substance and not of form.

36. The expression "copy" in Section 81(3) of the Act, in our opinion, means a copy which is substantially so and which does not contain any material or substantial variation of a vital nature as could possibly mislead a reasonable person to understand and meet the charges/allegations made against him in the election petition. Indeed a copy which differs in material particulars from the original cannot be treated as a true copy of the original within the meaning of Section 81(3) of the Act and the vital defect cannot be permitted to be cured after the expiry of the period of limitation.

37. We have already referred to the defect which has been found in the copy of the affidavit served on the appellant in the present case. There is no dispute that the copy of the affidavit served on the appellant contained the endorsement to the effect that the affidavit had been duly signed, verified and affirmed by the election petitioner before a Notary. Below the endorsement of attestation, it was also mentioned:

sd/

Notary

There, however, was an omission to mention the name and particulars of the Notary and the stamp and seal of the Notary in the copy of the affidavit served on the appellant. There was no other defect pointed out either in the memo of objection or in CMP No. 2903 of 1996 or even during the course of arguments in the High Court or before us. Could this omission be treated as an omission of a vital or material nature which could possibly mislead or prejudice the appellant in formulating his defence? In our opinion: No. The omission was inconsequential. By no stretch of imagination can it be said that the appellant could have been misled by the absence of the name and seal or stamp of the Notary on the copy of the affidavit, when endorsement of attestation was present in the copy which showed that the same had been signed by the Notary. It is not denied that the copies of the election petition and the affidavit served on the appellant bore the signatures of Respondent 1 on every page and the original affidavit filed in support of the election petition had been properly signed, verified and affirmed by the election petitioner and attested by the Notary. There has, thus, been a substantial compliance with the requirements of Section 81(3) read with the proviso to Section 83(1)(c) of the Act. Defects in the supply of true copy under Section 81 of the Act may be considered to be fatal, where the party has been misled by the copy on account of variation of a material nature in the original and the copy supplied to the respondent. The prejudice caused to the respondent in such cases would attract the provisions of Section 81(3) read with Section 86(1) of the Act. The same consequence would not follow from non-compliance with Section 83 of the Act."

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"39. Applying the test as laid down in Murarka Radhey Shyam Ram Kumar case[AIR 1964 SC 1545 : (1964) 3 SCR 573] to the fact situation of the present case, we come to the conclusion that the defects complained of in the present case were not such as could have misled the appellant at all. The non-mention of the name of the Notary or the absence of the stamp and seal of the Notary in the otherwise true copy supplied to the appellant could not be construed to be an

omission or variation of a vital nature and thus the defect, if at all it could be construed as a defect, was not a defect of any vital nature attracting the consequences of Section 86(1) of the Act. Under the circumstances, it must be held that there was no failure on the part of the election petitioner to comply with the last part of sub-section (3) of Section 81 of the Act and, under the circumstances, Section 86(1) of the Act was not attracted and the election petition could not have been dismissed by reason of the alleged failure to comply with the provisions of Section 81 of the Act. In this connection, it is also relevant to note that the appellant, neither in the memo of objections nor in the written objections or in CMP No. 2903 of 1996 has alleged that he had beenmisled by the absence of the name, rubber stamp and seal of the Notary on the copy of the affidavit supplied to him or that he had been prejudiced to formulate his defence. Even during the arguments, learned counsel for the appellant was not able to point out as to how the appellant could have been prejudiced by the alleged omissions on the copy of the affidavit served on him.

40. In our opinion it is not every minor variation in form but only a vital defect in substance which can lead to a finding of non-compliance with the provisions of Section 81(3) of the Act with the consequences under Section 86(1) to follow. The weight of authority clearly indicates that a certain amount of flexibility is envisaged. While an impermissible deviation from the original may entail the dismissal of an election petition under Section 86(1) of the Act, an insignificant variation in the true copy cannot be construed as a fatal defect. It is, however, neither desirable nor possible to catalogue the defects which may be classified as of a vital nature or those which are not so. It would depend upon the facts and circumstances of each case and no hard and fast formula can be prescribed. The tests suggested in Murarka Radhey Shyam case [AIR 1964 SC 1545 : (1964) 3 SCR 573] are sound tests and are now well settled. We agree with the same and need not repeat those tests. Considered in this background, we are of the opinion that the alleged defect in the true copy of the affidavit in the present case did not attract the provisions of Section 86(1) of the Act for alleged non-compliance with the last part of Section 81(3) of the Act and that there had been substantial compliance with the requirements of Section 81(3) of the Act in supplying "true copy" of the affidavit to the appellant by the respondent."

63. From the aforesaid, it would be clear that the Constitution Bench in **T. M. Jacob (supra)** held that the proposition as held in **Dr. Shipra (supra)** was on its own facts as pertaining to the said case. However, the dictum which came to be noticed and laid down has been noticed in paragraphs 37, 39 and 40 as noted above.

64. The next decision relied upon by the learned counsel for the respondent is of **V. Narayanswami (supra)** which also relates to the issue of the disclosure of cause of action, the contents regarding material facts and material particulars, the distinction between the two and importance of the affidavit and its verification. The relevant paragraphs 23, 26, and 30 of the said decision reads as under:-

"23. It will be thus seen that an election petition is based on the rights, which are purely the creature of a statute, and if the statute renders any particular requirement mandatory, the court cannot

exercise dispensing powers to waive non-compliance. For the purpose of considering a preliminary objection as to the maintainability of the election petition the averments in the petition should be assumed to be true and the court has to find out whether these averments disclose a cause of action or a triable issue as such. Sections 81, 83(1)(c) and 86 read with Rule 94-A of the rules and Form 25 are to be read conjointly as an integral scheme. When so read if the court finds non-compliance it has to uphold the preliminary objection and has no option except to dismiss the petition. There is difference between "material facts" and "material particulars". While the failure to plead material facts is fatal to the election petition the absence of material particulars can be cured at a later stage by an appropriate amendment. "Material facts" mean the entire bundle of facts, which would constitute a complete cause of action and these must be concisely stated in the election petition, i.e., clause (a) of sub-section (1) of Section 83. Then under clause (b) of sub-section (1) of Section 83 the election petition must contain full particulars of any corrupt practice. These particulars are obviously different from material facts on which the petition is founded. A petition levelling a charge of corrupt practice is required by law to be supported by an affidavit and the election petitioner is obliged to disclose his source of information in respect of the commission of corrupt practice. He must state which of the allegations are true to his knowledge and which to his belief on information received and believed by him to be true. It is not the form of the affidavit but its substance that matters. To plead corrupt practice as contemplated by law it has to be specifically alleged that the corrupt practices were committed with the consent of the candidate and that a particular electoral right of a person was affected. It cannot be left to time, chance or conjecture for the court to draw inference by adopting an involved process of reasoning. Where the alleged corrupt practice is open to two equal possible inferences the pleadings of corrupt practice must fail. Where several paragraphs of the election petition alleging corrupt practices remain unaffirmed under the verification clause as well as the affidavit, the unsworn allegation could have no legal existence and the court could not take cognizance thereof. Charge of corrupt practice being quasi-criminal in nature the court must always insist on strict compliance with the provisions of law. In such a case it is equally essential that the particulars of the charge of allegations are clearly and precisely stated in the petition. It is the violation of the provisions of Section 81 of the Act which can attract the application of the doctrine of substantial compliance. The defect of the type provided in Section 83 of the Act on the other hand can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure. Non-compliance with the provisions of Section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6 Rule 16 and Order 7 Rule 11 of the Code of Civil Procedure. Where neither the verification in the petition nor the affidavit gives any indication of the sources of information of the petitioner as to the facts stated in the petition which are not to his knowledge and the petitioner persists that the verification is correct and the affidavit in the form prescribed does not suffer from any defect the allegations of corrupt practices cannot be inquired and tried at all. In such a case the petition has to be rejected on the threshold for non-compliance with the mandatory provisions

of law as to pleadings. It is no part of the duty of the court suo motu even to direct furnishing of better particulars when objection is raised by the other side. Where the petition does not disclose any cause of action it has to be rejected. The court, however, cannot dissect the pleadings into several parts and consider whether each one of them discloses a cause of action. The petition has to be considered as a whole. There cannot be a partial rejection of the petition."

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"26. Material facts and material particulars certainly connote two different things. Material facts are those facts which constitute the cause of action. In a petition on the allegation of corrupt practices the cause of action cannot be equated with the cause of action as is normally understood because of the consequences that follow in a petition based on the allegations of corrupt practices. An election petition seeking a challenge to the election of a candidate on the allegation of corrupt practices is a serious matter; if proved, not only does the candidate suffer ignominy, he also suffers disqualification from standing for election for a period that may extend to six years. Reference in this connection may be made to Section 8-A [-A. Disqualification on ground of corrupt practices.--(1) The case of every person found guilty of a corrupt practice by an order under Section 99 shall be submitted, as soon as may be, after such order takes effect, by such authority as the Central Government may specify in this behalf, to the President for determination of the question as to whether such person shall be disqualified and if so, for what period:Provided that the period for which any person may be disqualified under this sub-section shall in no case exceed six years from the date on which the order made in relation to him under Section 99 takes effect.(2) Any person who stands disqualified under Section 8-A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), may, if the period of such disqualification has not expired, submit a petition to the President for the removal of such disqualification for the unexpired portion of the said period.(3) Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under sub-section (2), the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion."] of the Act. It was for this purpose that the proviso to sub-section (1) of Section 83 was inserted by Act 40 of 1961 (w.e.f. 20-9-1961) requiring filing of the affidavit in the prescribed form where there are allegations of corrupt practice in the election petition. Filing of the affidavit as required is not a mere formality. By naming a document as an affidavit it does not become an affidavit. To be an affidavit it has to conform not only to the form prescribed in substance but has also to contain particulars as required by the rules."

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"30. It will thus be seen that the election petition not only lacked the material facts, it lacked material particulars, defective verification and the affidavit filed was not in the form prescribed. Moreover, the ingredients of corrupt practices, as defined in Section 123(1)(B) and 123(2) of the Act are also lacking. It is also not the case of the appellant that any MLA whom the appellant could not meet, received any

gratification, as defined, whether as a motive or a reward for voting or refraining from voting, or there was any inducement or attempt to induce any such MLA to vote or refrain from voting. Also it is not the case of the appellant that any undue influence was exercised with the free exercise of any electoral right of any MLA which right, as noted above, has been defined in clause (d) of Section 79 of the Act. There is no allegation if any particular MLA was induced to vote or not to vote in a particular way because he was entertained or otherwise. The allegation is that the appellant himself could not meet the MLAs and he believed that if he had been given a chance to meet them he would have influenced their vote in his favour and against their party of affiliations. There is no allegation that the MLAs were prevented or influenced from freely exercising their electoral right. As stated earlier the appellant did not show as to why he could not meet the MLAs on 2-10-1997 when they were available in Pondicherry. The material fact must be that the appellant was prevented from meeting the MLAs which he did not allege and as to how he was so prevented would constitute material particulars."

65. Learned counsel for the respondents has also relied upon the case of **Mithilesh Kumar Pandey (supra)** which has already been noticed in the case of **Dr. Shipra (supra)** as well as **T. M. Jacob (supra)**. However, in the case of Mithilesh Kumar Pandey (supra) the issue before the Apex Court was in respect of the mistake in the copies supplied to the returned candidates and thereafter considering the provisions of the law, the Apex Court in paragraph 15 laid down as under:-

"15. On a careful consideration and scrutiny of the law on the subject, the following principles are well established:

"(1) that where the copy of the election petition served on the returned candidate contains only clerical or typographical mistakes which are of no consequence, the petition cannot be dismissed straightaway under Section 86 of the Act,

(2) a true copy means a copy which is wholly and substantially the same as the original and where there are insignificant or minimal mistakes, the court may not take notice thereof,

(3) where the copy contains important omissions or discrepancies of a vital nature, which are likely to cause prejudice to the defence of the returned candidate, it cannot be said that there has been a substantial compliance with the provisions of Section 81(3) of the Act,

(4) prima facie, the statute uses the words ''true copy' and the concept of substantial compliance cannot be extended too far to include serious or vital mistakes which shed the character of a true copy so that the copy furnished to the returned candidate cannot be said to be a true copy within the meaning of Section 81(3) of the Act, and

(5) as Section 81(3) is meant to protect and safeguard the sacrosanct electoral process so as not to disturb the verdict of the voters, there is no room for giving a liberal or broad interpretation of the provisions of the said section."

66. Learned counsel for the respondents have also relied upon two decisions of the learned Single Judge of the Bombay High Court in **Purushottam (supra)** and **Baban Yadav (supra)** which also takes into account and follow the

aforesaid reasoning as noticed in the preceding paragraphs.

67. The next decision upon which reliance has been placed by the respondents is that of **Mulayam Singh Yadav (supra)** wherein the issue before the Apex Court was whether or not schedule 14 which was part of the election petition could be treated as a integral part of the election petition. Answering the aforesaid issue, the Apex Court in paragraphs 11 to 14 of the said report held as under:-

"11. Whether or not Schedule 14 is an integral part of the election petition does not depend on whether or not the draftsman of the election petition has so averred. It has to be decided objectively, taking into account all relevant facts and circumstances. Schedule 14 is one of 25 schedules which is, as a matter of fact, part of the bound election petition. In respect of each of these schedules, except Schedule 14, it is averred that it is a part of the election petition. Each of these schedules, other than Schedule 14, mentions, verifies and contains some paper or document which can be placed between the leaves of paper that comprise that schedule and be bound with the election petition. Schedule 14 mentions and verifies a video cassette which cannot be placed between two leaves and be bound with the election petition. This is the explanation for the difference in the manner in which the averments relating to Schedule 14 and the other schedules are made in the election petition. Clearly, the video cassette mentioned and verified in Schedule 14 is as much an integral part of the election petition as the papers and documents mentioned and verified in the other schedules. Further, that the video cassette mentioned and verified in Schedule 14 is a part of the election petition and was intended to be such is evident from the affidavit of the first respondent verifying the allegations of corrupt practice made in the election petition. Therein, the first respondent has verified the correctness of what is stated in para 83 of the election petition, which refers to Schedule 14 and which has been quoted above, and to Schedule 14 itself. Yet again, that the video cassette mentioned and verified in Schedule 14 is and was intended to be a part of the election petition is shown by the fact that 15 video cassettes which were copies of the video cassette mentioned and verified in Schedule 14 were filed in the High Court along with the election petition for being served upon the respondents thereto.

12. Ordinarily, what is shown upon the video cassette that is mentioned and verified in Schedule 14 would have been set out in the election petition and then that video cassette could have been said to be evidence of the allegations made in the election petition. As this election petition is drafted, there is no description of what is shown on this video cassette except to say that it shows booth-capturing, violence and arson. As to booth-capturing, there are particulars contained in the other schedules but even in that regard the later paragraphs of the election petition make reference to Schedule 14 so that even in regard to booth-capturing the particulars shown in the video cassette mentioned and verified in Schedule 14 are relied upon. So far as the allegations of violence and arson are concerned, there are no particulars in the election petition absent the video cassette mentioned and verified in Schedule 14.

13. We are, therefore, satisfied that the video cassette mentioned and verified in Schedule 14 is an integral part of the election petition and that it should have been filed in court along with copies

thereof for service upon the respondents to the election petition. Whereas 15 copies thereof were filed for service upon the respondents, the video cassette itself was not filed. The election petition as filed was, therefore, not complete.

14. Section 81 contemplates the presentation of an election petition that is complete and satisfies the requirements of Section 83. An election petition that is not complete must, having due regard to the imperative mandate of Section 86, be dismissed. The present election petition must, therefore, be dismissed."

68. In the aforesaid decision, it concluded that the video cassette which was mentioned and verified in schedule 14 was an integral part of the election petition and ought to have been filed in the court alongwith the copies thereof for service upon the respondents. Since 15 copies were filed for service upon the respondents but the video cassette itself was not filed, therefore, it held that the election petition was not complete and it violated the mandate of Sections 81 and 83 of RPA and thus, election petition was dismissed.

69. To buttress the submissions on the point regarding the election petitioner not being a duly nominated candidate learned counsel for the respondents have relied upon the case of **Devendra Patel (supra)**. However, with due respect this Court finds that the said case has no applicability in the instant fact scenario; inasmuch as in the case of **Devendra Patel (supra)** the candidate was actually disqualified and this admitted position led the Supreme Court to hold that the election petitioner was not a duly nominated candidate. However, the facts of the instant case are quite different and there is no issue regarding disqualification of the election petitioner.

70. Learned counsel for the respondents has also relied upon a decision of a Co-ordinate Bench of this Court in **Hari Krishna Lal (supra)** and the issue therein was almost identical to the one involved in the instant case where the affidavit as required to be filed by the election petitioner was not filed despite the petitioner being put to notice. The Court concluded that the election petitioner was not a duly nominated candidate and had no locus to file the election petition.

71. Learned counsel for the respondents have also relied upon the case of **Mithilesh Kumar Sinha (supra), Neelam Sanjeeva Reddy (supra), Giani Zail Singh (supra), K. R. Narayanan (supra) and Dr. APJ Abdul Kalam (supra)** to submit that though the aforesaid cases related to the elections of the presidential candidates but even in the said case it was held that where the nomination form required certain number of proposers and that was not fulfilled then the nomination itself was bad and petition was not maintainable.

72. The learned counsel for the respondents have also relied upon the decision of the Apex Court in **Brij Mohan (supra), S. Ratnamma (supra)** of the Andra Pradesh High Court and the case of **Beti Joga (supra)** of the Madhya Pradesh High Court.

73. The Apex Court in **Brij Mohan (supra)** and the Andra Pradesh High Court in **S. Ratnamma (supra)** as well as the M. P. High Court in **Beti Joga (supra)**, were dealing with the issue of misnomer. However, this Court finds that in all the three cases the issue regarding misnomer was considered in light of the issue framed and finding have been returned after

leading evidence at trial. In the instant case at hand, the issue is different since, the matter is not ripe for trial as the written statement has not been filed and only applications under Order VII Rule 11 are under consideration. Whereas, in the cases cited by the learned counsel for the respondents the Court had the benefit of seeing the respective pleadings as well as the evidence led by the parties to come to its conclusion, thus, in the humble opinion of this Court, the aforesaid three decisions may not have much relevance to decide the issue of misnomer at this preliminary stage.

74. Learned counsel for the respondents have thereafter relied upon the decision of the Apex Court in the case of **Tej Bahadur (supra)**, and **Smt. Hem Purohit (supra)** and a decision of the Single Judge of the Uttrakhand High Court in **Chandra Narain Tripathi (supra)**.

75. Upon noticing the aforesaid three cases, it reveals that in the case of Tej Bahadur (supra) the issue before the Apex Court was whether an application under Order 6 Rule 16 CPC of the respondents seeking expunging of certain paragraphs of the election petition as well as the application moved under Order VII Rule 11 CPC had been rightly considered and the election petition was rightly dismissed.

76. This Court finds that the case of **Tej Bahadur (supra)** cannot be pressed into service; inasmuch as in the said case the nomination paper was required to be accompanied by a certificate indicating that the candidate who was dismissed from service was not dismissed for corruption or for disloyalty while holding office under the government. Since in the said case, it was admitted that Tej Bahadur had been dismissed from service but his nomination paper was not accompanied by a certificate to the aforesaid effect, hence in this context the Apex Court found that the nomination paper of the election petitioner Tej Bahadur did not have the said certificate and it was in violation of Section 33 of RPA and held that the petition was rightly rejected. The facts of that case are at variance to the facts of the instant case diluting the applicability of the precedential value of the decision in **Tej Bahadur (supra)**.

77. Regarding the case relied upon by the respondents in **Chandra Narayan Tripathi (supra)**, this Court finds that in the said case, initially, an application under Order VII Rule 11 CPC was filed by the respondents which came to be rejected by the High Court. The said rejection order was affirmed by the Apex Court in **Civil Appeal No.2122 of 2012 (Kapil Muni Karwariya v. Chandra Narayan Tripathi)** by means of judgment of the Apex Court dated 15.02.2012. Later, the said election petition ultimately came to be dismissed after trial by means of judgment of the High Court dated 20.12.2013. Again, the aforesaid decision has been rendered on merits after the parties were permitted to lead evidence, hence, its ratio would not be applicable while considering the applications under Order VII Rule 11 CPC.

78. Lastly, learned counsel for the respondents have relied upon the decision of the Apex Court in **Azhar Hussain (supra)** and the issue before the Apex Court in the said case was in respect of the challenge raised to the elections of the returned candidates on the ground of alleged corrupt practice. Paragraphs 27 and 28 of the said report reads as under:-

"27. The High Court held:

"It appears to me that if an averment of fact is an essential part of the pleading, it must be considered to be an integral part

of the petition. If such an averment is not actually put in the election petition, the petition suffers from the lack of material facts and therefore, the statement of cause of action would be incomplete. If it is stated in the election petition, either in the body of the petition itself or by way of annexure, but its copy is not furnished to the respondent, the election petition would be hit by the mischief of Section 81(3) read with Section 86(1) of the Act. In my opinion, the reference to the poster and its proposed translation in the election petition, which was never incorporated into it, are material facts under Section 83(1)(a) of the Act and their absence cannot now be made good by means of an amendment. The pleading as it stands, and even if it were permitted to be amended would suffer from lack of cause of action on this material fact and, therefore, is liable to be struck out. The newspaper cuttings are not used by the petition as containing fact, but only as evidence to that extent amendment is allowed."

Whether the High Court was right in taking the aforesaid view?

***28**. It will be noticed that in the election petition it has been mentioned that a copy of the poster would be subsequently filed, and the cuttings of some newspaper reports would also be filed later on. The election petitioner sought an amendment to delete the averments on both these aspects. The High Court rejected the prayer in regard to poster (Ex. B), but granted the prayer in respect of the cuttings. The High Court has taken the view that the poster was claimed to be an integral part of the election petition and since it was not filed (much less its copy furnished to the respondent) the pleading suffered from infirmity and non-compliance with Section 83(1) read with Section 86(1) of the Act. Non-filing of the poster is fatal to the election petition as in the absence thereof the petition suffers from lack of material facts and therefore the statement of cause of action would be incomplete. Nothing turns on the fact whether or not the words "a copy of the said poster would be filed as Ex. B" are allowed to be retained in the election petition or are deleted as prayed for by the appellant. The fact remains that no copy of the poster was produced. It must also be realized that the election petitioner did not seek to produce the copy of the poster, but only wanted a reference to it deleted so that it cannot be said that the accompaniments were not produced along with the election petition. The fact remains that without the production of the poster, the cause of action would not be complete and it would be fatal to the election petition inasmuch as the material facts and particulars would be missing. So also it could not enable the respondent to meet the case. Apart from that the most important aspect of the matter is that in the absence of the names of the respondent's workers, or material facts spelling out the knowledge and consent of the respondent or his election agent, the cause of action would be incomplete. So much so that the principle enunciated by this Court in Nihal Singh case [(1970) 3 SCC 239] would be attracted. And the court would not even have permitted the election petitioner to lead evidence on this point. The High Court was therefore fully justified in taking the view that it has taken."*

79. Now the Court shall examine and notice the decisions cited by the learned counsel for the petitioner in support of his contentions.

80. The cases which have been cited by the learned counsel for the petitioner can be grouped into two sets. The first set

relates to those decisions where the concept of Order VII Rule 11 CPC has been explained so also the distinction between the material particulars and cause of action. The other set of decisions are relating to the issue as to what can be considered to be an error of substantial character which may give rise to the rejection of nomination and what kind of errors, clerical or otherwise, which may not have a substantial bearing and thus can be ignored and cannot entail the dismissal of the election petition *in limine.*

81. In the first set, learned counsel for the petitioner has relied upon the decision of the Apex Court in **Sopan Sukhdeo Sable (supra)** wherein the Apex Court in paragraphs 10 to 14 of the said opinion by relying upon the earlier decisions have explained the extent and width of the powers and the manner in which Order VII Rule 11 CPC is to be considered. In the same opinion in paragraphs 18 to 20 the distinction of material facts and what will constitute material facts for a cause of action has been explained.

82. The other decision on the said point is of **Mayar (H.K.) Ltd (supra)** wherein the scope of Order VII Rule 11 CPC has been explained in paragraphs 11 and 12 while what will constitute material facts vis-a-vis cause of action has been explained in paragraph-18.

83. In string of the aforesaid decision, learned counsel for the petitioner has relied upon **D. Ramachandran (supra)** (relevant paragraphs 8 and 10) as well as H. D. Revanna (supra) (relevant paragraph 27). In both the aforesaid decisions, the Apex Court has considered the manner in which a preliminary issue is to be considered by the Court and what are the parameters to be noted by it.

84. The petitioner has also relied upon the decision of the Apex Court in **Kuldeep Singh Pathania (supra)** wherein again the scope of Order VII and Rule 11 CPC has been explained in paragraphs 8 to 11 of the said opinion. See also **Mohan Rawale (supra)** wherein in paragraph 10 the issue of material facts vis-a-vis the scope of Order VII Rule 11 has been considered.

85. The second set of decisions which have been relied upon by the counsel for the petitioner is of **Madiraju Venkata Ramana Raju (supra)** wherein the issue regarding the proper disclosure of cause of action vis-a-vis the facts relating to corrupt practice have been noticed by the Apex Court in paragraphs 22, 25, 29 and 33.

86. The petitioner has also relied upon the case of **Samant N. Balakrishna etc. (supra)** wherein in paragraphs 29 and 30 the interplay between the Sections 81, 83 and 86 of the RPA has been discussed and how the same is to be considered in context with material facts leading to a cause of action for challenging an election petition in respect of allegation of corrupt practice.

87. The petitioner has also relied upon Paragraphs 25 and 26 of the decision of the **Ponnala Lakshmaiah (supra)** wherein the issue regarding facts of corrupt practice, the affidavit not being in prescribed format as provided under Form-25 also containing defect in verification has been held to be curable and for the said reason the petition was not liable to be rejected. The other decision is of **Nandiesha Reddy (supra)** wherein similar issue has been considered in paragraphs 24 to 26.

88. Learned counsel for the petitioner has relied upon the decision of the Apex Court in **Hira Singh Pal (supra)** to buttress the submission that for clerical errors of unsubstantial character, the nomination cannot be rejected and reliance has been placed on paragraph 7 of the said decision.

89. Similarly, learned counsel for the petitioner has relied upon the decision of the Apex Court in **Uttamrao Shidas Jankar (supra)** (relevant paragraphs 26 to 31) and **Rakesh Kumar (supra)** (relevant paragraphs 19 to 21) wherein the Apex Court has taken note of the Election Hand Book for the Returning Officer and held the said Hand Book has statutory force. The powers of the Returning Officer has been considered and it has been held that as far as possible either suo moto or in light of the objections raised regarding the nomination of the candidates during scrutiny, as far as possible an opportunity must be given to the candidate to rebut the objections and only if the said objections cannot be rebutted or the clerical error or misnomer or technical error which cannot be cured despite providing opportunity only then the nomination may be rejected.

90. Learned counsel for the petitioner has further relied upon the decision of the Apex Court in **Ram Awadesh Singh (supra)** to urge what kind of defects can be considered to be of a substantial nature and unless so established, it is not open for the Returning Officer to reject the nomination on clerical errors which do not assume the character of substantial nature. In the same string, he also relies upon the decision of Madhya Pradesh High Court in **Chandra Shekhar Chaturvedi (supra)** wherein in paragraphs 20 and 24, the powers of the Returning Officer to correct/ignore misnomer and clerical error which do not partake the nature of substantial character has been considered.

91. Learned counsel for the petitioner has then relied upon the decision of **Syed Dastagir (supra)** where in paragraph 9, it has been explained as to how a plea in pleadings is to be construed.

92. Learned counsel for the petitioner has relied upon a recent decision of the Apex Court in **A. Manju (supra)**, where the issue before the Apex Court was whether an election petition can be thrown out at the threshold on a plea of that the petition is not supported by an affidavit in Form-25 as prescribed under Rule-94 A of the Rules of 1961. The Apex Court held that it was not in sound discretion to reject the election-petition at threshold rather it was a curable defect and permit the election-petitioner to file an affidavit in support of the petition in Form-25 within time to be granted by the Court.

93. In the aforesaid context, this Court finds that since the affidavit in Form-25 is relatable to Rule 94-A of the Rules of 1961 and to Section 83 (1) of the RPA and is to be filed before the Court, hence, the Apex Court in the case of **A. Manju (supra)** found that instead of dismissing the petition at the threshold the Court may grant time to the petitioner to file the affidavit in Form-25.

However, the decision of the Apex Court **A. Manju (supra)** does not relate to an affidavit contained in Form-26 which is relatable to Rule 4-A of Rules of 1961 which is to be filed alongwith the Nomination Form in terms of Section 33 of the RPA. Thus, the said decision of A. Manju (supra) can be distinguished on the

facts and controversy involved in the instant case.

94. Having noticed the relevant statutory provisions and the gamut of the decisions cited by the respective parties, now the stage is set to notice the merits of their respective contentions.

95. This Court shall proceed to deal with the submissions of the parties under the following subheadings:-

D(i) Should the petition be dismissed under Order VII Rule 11 CPC read with Section 33 of RPA, as the petitioner is not a duly nominated candidate since his nomination did not have the requisite number of valid proposers.

96. The submission of learned counsel for the respondents is that the word "candidate" as defined in Section 79(b) of RPA means a person who has been or claims to have been a duly nominated candidate at any election. It is urged that since the nomination of the petitioner was rejected, therefore, he was not a candidate and the only other way the petitioner can maintain the petition is if he claims and proves to be a duly nominated candidate.

97. It is urged that the nomination paper of the petitioner suffered from two inherent defects: (a) it did not have the required number of valid proposers; (b) the affidavit in Form-26 required to be filed in pursuance of Rule 4-A of Rules of 1961 was also defective and despite having been put to notice, the petitioner did not rectify the same, consequently, it rendered his nomination invalid.

98. In order to test the aforesaid submission, the Court has perused the nomination paper filed by the petitioner as Schedule-8 with the election petition which indicates that the petitioner's nomination form was given Serial No.22 and was presented at 02:50 PM on 27.10.2020. The said nomination form, under the heading of the particulars of proposers and signatures, mentions 10 names.

99. In terms of Section 33 and the first proviso appended thereto, any candidate who is not nominated by a recognized political party or in other words is contesting the elections as an independent candidate, his nomination paper must be subscribed by 10 proposers being electors of the constituency.

100. Apparently, the nomination paper of the petitioner as noticed above has 10 proposers and the serial number of the said proposers has also been mentioned as per the list prepared in terms of Section 152 of RPA, i.e. list of the members of the State Legislative Assemblies and Electoral College to be maintained by the Returning Officer.

101. The record would further indicate that the petitioner had filed a photocopy of the check list of the documents which was issued by the Returning Officer, as Schedule 10 to the petition, where in respect of the documents particularly affidavit in Form-26, it had been mentioned that all the columns in Form-26 have not been filled and that column 8(viii) is blank. The said check list also states that the candidate can submit the affidavit complete in all respect latest by the time fixed for commencement of scrutiny of nominations.

102. It is the averment of the petitioner that prior to the commencement

of scrutiny, he had furnished a fresh/revised affidavit in Form-26 complete in all respect to the Returning Officer.

103. At the time of scrutiny of the nomination form of the petitioner, two sets of objections were filed, one by Sri Haridwar Dubey who is the respondent no. 9 and the other by Sri Lal Ji Verma who is the proposer of Sri Ramji, the respondent no. 6.

104. Both the said objectors raised a ground of challenge that the nomination form of the petitioner did not have ten proposers, since, the person named as third proposer in the form namely 'Nawab Shah' was not a member of the legislative assembly. The name of the person mentioned at serial no.26 as entered in the list maintained under Section 152 of the RPA is of 'Nawabjaan', who is not the proposer. Accordingly, Nawab Shah is not an electorate and if his name is excluded then there are only 9 proposers which is in direct breach of first proviso of Section 33 of the RPA, hence, the nomination being invalid was liable to be rejected.

105. The other objection being that the election petitioner had not furnished a complete affidavit in Form-26 as it contained blanks which could not be treated to be a proper compliance, rendering the nomination bad.

106. The petitioner responded to the said objections in writing and stated that the third proposer of his form, serial no. is 26 in the list maintained under Section 152 of the RPA is Nawabjaan. Inadvertently, his name was mentioned as Nawab Shah. The mention of incorrect name is a clerical error and is purely technical. Even otherwise, it being a misnomer is saved in terms of proviso appended to Sub-section (4) of Section 33 of RPA and deserved to be overlooked. The petitioner also sought leave of the Returning Officer that if permitted, he could produce Nawabjaan/the third proposer in person within 12 hours to satisfy the Returning Officer.

107. The controversy became alive as the Returning Officer by means of his order dated 28.10.2020 rejected the nomination form of the petitioner on the ground that it was accompanied by an affidavit in Form-26 with blanks and with some cutting over the contents and the said affidavit could not be accepted in light of the decision of Apex Court in **Resurgence India (supra)** resulting in rejection of the nomination.

108. It can be noticed that the issue raised by the respondents regarding the nomination paper being invalid on account of name of the third proposer being incorrect and from perusal of the order dated 28.02.02020, a copy of which has been brought on record as Schedule 18, indicates that the Returning Officer rejected the nomination form on the aforesaid ground.

109. This court finds that in so far as the issue of misnomer or giving the benefit of the proviso to Section 33(4) of RPA is concerned it primarily revolves around the objective satisfaction formed by the Returning Officer while screening the nomination form at the time of its presentation.

110. The word "misnomer" has been duly defined in the P. Ramanatha Aiyar "The Major Law Lexicon", 4th Edition, 2010, to mean as under:-.

"The using one name for another, a misnaming; mistake in a name, the giving an incorrect name to a person in a pleading, deed, will or other document.

A description by initials only instead of by the full name would be a 'Misnomer'.

Misnomer-means giving an incorrect or wrong name to a person even in a legal document."

111. In the instant case against the name of the third proposer where the serial number of the constituency being 26 was mentioned against the name of Nawab Shah and the Returning Officer upon verification from the list maintained under Section 152 of RPA could and ought to have satisfied himself regarding the correctness of the name of the third proposer whether it was Nawab Shah or Nawabjaan.

112. The issue whether the clerical error in the name of the third proposer is a misnomer or not and whether it was of substantial character or not can be considered only after the parties lead evidence as it also entails questions of fact whether the incorrect name of Nawab Shah could relate to the correct name of Nawabjann as commonly understood and whether was liable to be overlooked.

113. Another aspect which requires consideration is that the record reveals that similar objection was raised in respect of nomination form of another candidate namely Shri Ramji and it was raised by Shri Aslam Chaudhary, Shri Mohd. Aslam Rainee and Shri Hakim Lal.

114. The objections were considered by the Returning Officer, who after due verification of the signatures available with him as well as in light of the list available with him as per Section 152 of RPA found the objections to be frivolous and rejected the same. The copy of the order passed by the Returning Officer is on record as Schedule 13 with the election petition.

115. However, *prima-facie*, this Court finds that the Returning Officer did not undertake the exercise to verify the correctness of the name of third proposer in respect of the error pointed in the nomination form of the petitioner as was done by him while dealing with the objections against the nomination of Shri Ramji as evident from the order passed by Returning Officer, a copy of which has been brought on record as Schedule-13.

116. Insofar as the nomination form of the petitioner is concerned, the Returning Officer ought to have complied with the instructions as mentioned in Chapter-VI, Clause 4 to 7, 9.1 to 9.3 of Handbook for Returning Officers for Election to the Council of States and State Legislative Council.

117. Even though prima-facie the Returning Officer did not carry out the necessary exercise of verification regarding correctness of the name of the third proposer but even then it must be understood that this Court is not exercising any appellate powers or sitting in appeal over the order dated 28.10.2020 of the Returning Officer.

118. The issue of misnomer in context with the third proposer cannot be considered at the stage of Order VII Rule 11 CPC especially noticing the averments in the petition in this regard and also for the reason that this alleged error was not considered by the Returning Officer in light of the provisions of the proviso appended to Section 33(4) of RPA to give any finding

whether the benefit of the said proviso could be extended to the petitioner and also in light of the instructions contained in the Handbook while passing the order dated 28.10.2020.

119. Hence, this Court is of the clear opinion that the election petition cannot be dismissed at this stage on the ground of incorrect mention of name of one proposer and in order to ascertain the proper and full effect of the proviso appended to Section 33(4) of RPA and whether it can save the petition would require evidence and cannot be a ground to dismiss the petition at this stage in exercise of powers under Order VII Rule 11 CPC.

D-(ii) Should the petition be dismissed as it lacks material particulars regarding allegations of corrupt practice and for want of Affidavit in Form-25 in compliance of Section 83(1) of RPA.

120. Another ground urged by the learned counsel for the respondents is that from the bare perusal of the pleadings, it would indicate that the issue raised by the petitioners is in context with the corrupt practices for which the petitioner has not filed the appropriate affidavit in Form-25, hence, the petition itself is not maintainable and is liable to be rejected.

121. It is also urged by the learned counsel for the respondents that in case the averments in the petition are not relating to corrupt practices as alleged by the counsel for the petitioner, then the said allegations as contained in the petition are scandalous and are liable to be expunged. In case if such allegations are expunged then again no cause of action will subsist and even then the petition is liable to fail.

122. On the other hand, learned counsel for the petitioner has stated that the allegations in the petition against the Returning Officer are not of corrupt practice but is a narrative of the events which transpired and indicative of the highhandedness of the Returning Officer in dealing with the nomination form of the petitioner which lead to the illegal rejection of his nomination and illegal acceptance of the nomination form of the returned candidates which is a ground available to the petitioner to challenge the election of the respondents in terms of Section 100(c) and (d)(i) of RPA.

123. Giving anxious consideration to this submission and also noticing the various decisions cited by the parties in context of pleadings of corrupt practice and non-filing of an affidavit in Form-25, the Court finds that in paragraph 15 of the election petition an allegation has been levelled against the Returning Officer that he shut his eyes and overlooked the specific provisions of Section 33 (4) and its proviso and Section 36 (5) along with its proviso willfully and deliberately to help the other candidates in the election in question and arbitrarily rejected the nomination paper of the petitioner.

124. In paragraph 16 of the election petition, again it has been alleged that the Returning Officer had adopted dual standards in the scrutiny of the nomination papers and rejected the nomination papers of the election petitioner on such frivolous, trivial, technical and clerical grounds. However, for similar errors in the nomination form of the respondents the

Returning Officer accepted their nomination papers and affidavit in Form-26 for the candidates setup by the BJP namely, the respondents no. 8, 3, 4, 7, 9 and 10.

125. The petitioner has thereafter in paragraphs 28 to 45 of the election petition has pointed out the defects in the nomination forms as well as in the Affidavit in Form-26 of the returned candidates to urge that for the very same defects the nomination form of the petitioner has been rejected but for the returned candidates, the same defects have been ignored which is an arbitrary exercise of discretion and power by the Returning Officer clearly attracting Section 100(1)(d)(i) of RPA.

126. The word 'corrupt practice' is defined in Section 123 of RPA. If the same is noticed in context with the averments contained in the petition for the purposes of examining the respective contents at this preliminary stage, this Court finds that the contents of the petition suggests the manner in which the presentation of nomination form and its further processing was dealt with by the Returning Officer and how the petitioner felt discriminated and his expression of anguish. However that be so, it is still not an expression of any corrupt practice as strictly defined in the Act as the ingredients thereof which includes the involvement of a candidate or his agent and some officer or person for the commission of such corrupt practice which includes establishment of consent of the candidate and/or his agent and such vital ingredients are especially absent. The issue of corrupt practice requires evidence to be established and the same cannot be adjudicated at this preliminary stage without the written statement, issues and evidence.

127. Having noticed the aforesaid paragraphs of the election petition as detailed in the preceding paragraphs, it would be seen that the averments in the petition appears to be in context and consonance with the grounds for challenging the election of the returned candidates on account of illegal acceptance of their nomination and the illegal rejection of the nomination of the election petitioner.

128. Thus, for the reason that the matter at the moment is at preliminary stage and parties are yet to exchange pleadings and lead evidence, and as of now the pleadings have to be taken as it is without any addition and also taking it to be correct. Accordingly, at this stage, this Court does not find merit to treat the averments in the petition to be allegations of corrupt practice.

129. Moreover, even if on merits, the said averments may constitute corrupt practice, yet it cannot be made a ground to dismiss a petition at this nascent stage. The decision of the Apex Court in **A. Manju (supra)** helps the petitioner and this Court for the aforesaid reason is not inclined to reject the petition for non-filing of an affidavit in Form-25. Thus, the submission of the respondents in this regard is turned down.

D-(iii) Should the petition be dismissed for want of material particulars, cause of action and for want of filing a revised/fresh affidavit in Form-26 in compliance of Sections 33, 83 of RPA read with Rule 4-A of Rules of 1961.

130. Now, the issue which requires consideration is whether the nomination form of the petitioner was invalid for want of complete and proper affidavit in Form-26 filed by the petitioner and for the said reason the petitioner would not be a duly nominated candidate and not entitled to maintain the petition.

131. As per the petitioner, after he had received the check list on 27.10.2020 and was granted time to furnish the fresh/revised affidavit by the next day prior to the commencement of scrutiny proceedings, the petitioner had furnished the revised affidavit before the Returning Officer within the time so stipulated.

132. This aspect is refuted by the learned counsel for the respondents on two grounds (a) there is no document or material on record to establish that the said revised affidavit was ever filed before the Returning Officer (b) that there is no material particulars regarding the same in the petition and in absence of material particulars, the cause of action of the petitioner is not complete and the alleged copy which has been brought on record by the petitioner also is bereft of necessary details and again in absence of proper and material facts and pleadings the said document alone filed as Schedule 12 does not reveal any subsisting cause of action.

133. The contention raised by the respective parties will be considered within the following two folds: (i) the effect of the alleged second nomination form on pink colour paper said to be complete in all respect and (ii) the effect of the plea of filing or non-filing of revised affidavit in Form-26.

134. At the outset, it may be noted that a candidate is required and can file maximum 4 sets of nomination forms in terms of the provisio to Section 33(6) of RPA. Insofar as the affidavit in terms of Rule 4-A of Rules of 1961 in Form-26 is concerned, the same is to be filed in one original copy and does not require as many affidavits as the number of nomination forms filed.

135. From the perusal of paragraphs 60, 61 and 62 of the petition, the petitioner has set up his case that on 27.10.2020 he was made to wait in the nomination hall and though he was given the receipt only for one set of nomination paper but he was asked to wait and later informed that he will get the receipt in respect of the other set of nomination form filed in pink colour, tomorrow i.e. 28.10.2020. The petitioner has also mentioned in paragraph 61 that he had received a phone call by Mohd. Mushahid from the office of the returning officer and also categorically mentioned the mobile number from which he has received the aforesaid call. In paragraphs 65, 66 and 67, the petitioner has reiterated his stand regarding the filing of the second set of nomination form on pink colour paper.

136. From a complete and meaningful reading of the election petition, this Court finds that there is no reason pleaded why the Returning Officer would accept and give receipt for only one set of nomination paper to the petitioner and not the other set whereas insofar as the other candidates are concerned, they got the receipt and numbers for their nomination forms as all of them had filed two or more sets of nomination paper.

137. The petitioner also does not state with particularity why the petitioner did not raise the issue immediately of not having received the serial number/slip for the

second set of nomination. The petitioner has also not filed any copy of the second nomination form in pink colour nor any explanation has been pleaded of not retaining any copy of the nomination from on pink paper though a copy of the nomination paper in English was retained by the petitioner.

138. The election petition also does not state when the petitioner procured the two sets of nomination forms since in the notice of the election which was duly published on 20.10.2020, it was clearly provided that the form of the nomination paper could be obtained at the place and time as mentioned in the notice of the election so published. This assumes significance where the existence of the second nomination is an issue and without any concrete pleadings and in absence of any supporting document or material the aforesaid plea becomes bald and fanciful.

139. Thus, even though the petitioner may have filed two sets of nomination but only one set of affidavit in Form-26 was filed with the nomination form on 27.10.2020 and admittedly it was defective and this defect was as informed to the petitioner through the check-list.

140. It is also to be seen that the nomination form of the petitioner was rejected because of the form in itself being defective and non-compliance of filing of revised affidavit in Form-26 in terms of Rule 4-A of Rules of 1961. Hence, even if the plea of the second nomination form in pink colour paper as alleged, being complete in all respect is accepted for the sake of arguments, however, in absence of the revised affidavit filed in Form-26, it will not render the nomination valid.

141. Accordingly, this Court for the aforesaid reasons is not inclined to return any finding on the issue of second set of nomination on pink paper. However, the Court shall look into the controversy from the perspective of filing or non-filing of the revised affidavit in Form-26 and the material particulars in respect thereof and its effect on the cause of action as pleaded.

142. To examine the effect of filing or non-filing of revised affidavit in Form-26, it will be relevant to examine the pleadings in Paragraph 70 and the copy of the said affidavit which has been brought on record as Schedule-12.

143. It would be seen that initially in Paragraph 13 of the election petition, it is stated that the petitioner had filed his revised/fresh affidavit before the Returning Officer on 28.10.2020 before the commencement of scrutiny proceedings by removing the defects as mentioned in the check-list dated 27.10.2020.

144. In paragraph 70 of the election petition, the petitioner has made averments regarding the filing of the fresh/revised affidavit in Form-26. Paragraph 70 of the election petition is being reproduced hereinafter for ready reference:-

"70. That the election petitioner pursuant to the direction given in the check-list dated 27.10.2020 filed a fresh Affidavit in Form-26 before Returning Officer on the 28.10.2020 i.e. before the scrutiny wherein all the columns of the Affidavit was properly filled up and no columns was left blank and the information which are not related to election petitioner, the election petitioner is specifically filled up the column by writing "not applicable". The photocopy of the Fresh/Revise

Affidavit in Form-26 of election petitioner filed before Returning Officer dated 28.10.2020 before scrutiny of the nominations is being filed herewith and marked as ***SCHEDULE No. 12*** to this election petition. It is made clear that the election petitioner after properly filling the each and every columns of the Fresh/Revise Affidavit dated 28.10.2020 (and no column has been left blank) and after getting it notarized by the Notary Officer on 28.10.2020 then submited before Returning Officer on 28.10.2020 before the start of the scrutiny of the nomination paper i.e. before 11:00 A.M. on 28.10.2020."

145 . From the perusal of aforesaid paragraph 70, all that can be discerned is that the election petitioner filed a fresh affidavit in Form-26 before the Returning Officer on 28.10.2020 prior to the commencement of scrutiny with complete filled up columns of the affidavit and no columns was left blank. It has also been mentioned that the photocopy of the fresh/revised affidavit in Form-26 filed before the Returning Officer before commencement of scrutiny of the nomination has been filed and marked as Schedule 12. It has further been clarified that the election petitioner after filling up each and every column of the fresh/revised affidavit leaving no column blank and after getting it notarized by the Notary Officer on 28.10.2020 submitted the same before the Returning Officer before the commencement of scrutiny.

146. At this stage, it will be worthwhile to glance at Schedule 12 which has been filed along with the election petition and it would indicate that the affidavit in Form-26 running in 13 pages is on pages 162 to 174 of the paper-book. The first page of the affidavit is at page 162 of the election petition and it reveals that the affidavit has been transcribed on an E-stamp worth of Rs.100/- which was issued at about 08:41 AM on 28.10.2020.

147. However, what is relevant to notice is that on all the 13 pages right from pages 162 to 174 of the paper-book, there is no signature of the election petitioner on the alleged copy of the revised affidavit. Even on page 13 of the affidavit, at running page 174 of the paper-book, the election petitioner has put his signatures in original but this signature in original has been affixed in election petition and not to the copy of the affidavit in Schedule 12 which does not bear the signatures of the election petitioner.

148. From the perusal of all the 13 pages of the alleged revised affidavit at pages 162 to 174 of the paper-book, it would reveal that (i) it does not contain the signature of the election petitioner, (ii) it does not contain the seal, stamp and signatures of notary, (iii) it also does not indicate that the petitioner had sworn the affidavit before the notary, (iv) who was the said notary before whom it was sworn as neither any notarial stamp nor the seal/stamp of the notary nor his name, signatures or his licence number is present, (v) there is also no mention of any time or place of swearing the affidavit, (vi) The photograph affixed has not been attested by the notary.

149. In absence of the aforesaid relevant requisite details, all that can be seen and noticed from Schedule 12 is that merely the language of affidavit as prescribed for Form-26 with details relating to the petitioner has been reduced on an E-stamp affixing a photograph of the election petitioner.

150. It will be worthwhile to notice that Rule 4-A of the Rules of 1961 specifically states that candidate or his proposers as the case may be shall at the time of delivering to the the Returning Officer, the nomination paper under Sub-section (1) of Section 33 of RPA also deliver to him an affidavit sworn by the candidate before a Magistrate of a first class or a notary in Form-26. If the condition as prescribed in Rule 4-A of the Rules of 1961 are perceived, it will prima facie be evident that the said affidavit falls short of the legal requirements.

151. This Court finds that if the case of the petitioner is taken at its face value, without any addition, subtraction and deletion, it would indicate that the petitioner has allegedly submitted two sets of nomination papers at 02:50 PM on 27.10.2020 i.e. the last date for filing of the nomination and that too, 10 minutes prior to the close of time for acceptance of nomination papers. A check list was issued to the petitioner on 27.10.2020 indicating that only one set of nomination paper has been received. The check-list also indicates that the affidavit in form-26 was not complete as the column 8(viii) of the said affidavit was completely missing.

152. In the aforesaid factual backdrop, categorical pleadings and averments regarding the details of the revised affidavit and its filing assumes great significance as in absence of the valid affidavit, the nomination of the petitioner looses its weight.

153. Thus it would be seen that actually it is the issue relating to the filing or non-filing of the revised affidavit in Form-26 prior to commencement of scrutiny is the heart and soul of the entire controversy at this stage.

154. The importance of a valid affidavit in Form-26 cannot be undermined. An affidavit in Form-26 is to be filed along with the nomination form and in case if such an affidavit is not correct or suffers from certain defects, the same can be cured only upto the time of the commencement of scrutiny and not thereafter. There is a distinction between an affidavit in Form-25, which is filed in support of allegations of corrupt practice which is furnished before the Court trying the election petition whereas the affidavit in Form-26 is to accompany the nomination form which is to be filed at the time of presentation of the nomination form before the Returning Officer.

155. Thus, there is a stark distinction between the two affidavits. Since, the affidavit in Form-25 is to be filed before the Court, hence, in appropriate circumstances, the Court has discretion to grant or not to grant time but no such discretion is vested with either the Returning Officer or the Court in respect of an affidavit in Form-26. Accordingly, the standard of pleadings, material particulars in respect of signing, verification, notarization and filing of the revised affidavit in Form-26 assumes prime importance.

156. If the pleadings in respect of such a important and imperative aspect intricately connected with a valid nomination is examined as mentioned in paragraphs 13 and 70 in juxtaposition with Schedule 12 as available on record indicates that it is extremely casual especially in context of an election petition where the pleadings, material facts and documents are to be properly scrutinized and any deviation from the requisites as

provided in Sections 81 and 83 of RPA are to be strictly construed.

157. The petitioner having been bitten on 27.10.2020 in the sense that he did not get any receipt of the alleged second set of nomination yet he did not exercise caution and did not retain the duly filled, notarized copy of the revised affidavit nor insisted on the receipt of filing of the revised affidavit before the Returning Officer on 28.10.2020.

158. Moreover, even if, allegedly the said revised affidavit was filed before the Returning Officer prior to the commencement of scrutiny without obtaining a receipt and also knowing that the petitioner did not have a duly authenticated copy of the revised affidavit with him and yet the petitioner continued to participate in the scrutiny process on 28.10.2020 without raising any objection at the relevant and appropriate time was doing so at his own peril.

159. It will also be relevant to note that according to the petitioner, the scrutiny of his nomination paper was to be taken up last but in the interregnum the petitioner did not raise any objection in writing in respect of the non receipt of the second nomination or the revised affidavit and not even in respect of the deficiencies which were present in the affidavit of the other candidates in Form-26 and were illegally ignored and accepted by the Returning Officer.

160. Another aspect which can be discerned from the election petition is that the Returning Officer had passed the order rejecting the nomination form of the petitioner at about 07:49 PM on 28.10.2020 and the petitioner had escalated the matter by writing a letter to the Chief Election Commissioner on 30th of October, 2020 at New Delhi, a copy of which has been brought on record as Schedule-19 to the petition.

161. From the perusal of the said complaint, it would indicate that the subject has been mentioned as criminal conspiracy by the Returning Officer with a motive to help candidature of BSP in connivance with the other officials and a request to hold an inquiry in the criminal acts as well as hold the declaration of election outcome till completion of inquiry.

162. The said complaint as contained in Schedule 19 runs from Page 207 to 211 of the paper-book wherein much has been said regarding the conduct of the Returning Officer and allegations have been levelled indicating criminal conspiracy between the Returning Officer to help the BSP candidate.

163. From a perusal of the said complaint, it indicates that there is reference to certain enclosures, which is alleged to be attached with the said complaint as Annexure No. A to H. However, the said annexures have not been filed on record of this election petition along with the said complaint as contained in Schedule-19.

164. Apparently for the aforesaid reason, the said complaint cannot be said to be a true and a complete copy filed on record. It will also be relevant to point out that the contents of the said complaint as contained in Schedule-19 are at variance with the averments made in the election petition.

165. The relevant portion as contained in the complaint which has been brought on record as Schedule-19 are being reproduced hereinafter for ready reference:-

"It is to bring to your knowledge that after filling the two sets of nomination forms being S.N. 22 and 23 along with the affidavit with prescribed security money, receipts of the nomination forms and deposited amount of security money was not been provided by the RO in failure of his legal duties, in spite of repeated request at the time of submission. The subsequent facts proved that it was the deliberate act on part of the Returning Officer to cause actual predice to my right to contest elections and was a part of criminal conspiracy to affect the outcome of election.

On my forceful insistence to provide the receipt, the Returning Officer and his officials have asked me to sit back and told that they will provide after some time and and gave excuse that today is the last day of nomination and let the time limit be over to provide the receipt. As I did not have any other option, I waited for the same.

While I was waiting at Nomination Hall, the Returning Officer along with his associates stepped out from the nomination hall without either intimating me anything or giving me the receipt which, I was entitled to receive. I kept waiting in the nomination hall but no one has come with the copy of the receipts.

Thereafter I went to the office of the Principal Secretary of Vidhaan Sabha, where the Returning Officer with his associates were also sitting. Again I have asked to provide the receipts and then they assure that they will provide the receipt. I further waited for approximately an hour and left the Vidhan Sabha.

On the same day in the evening approximately between 7-7:15 p.m. I have received the call from the office of the Returning Officer. He asked me to meet at PATAL KARYALAYA of VIDHAN SABHA on the first floor. Approximately 7:30 pm when visited the Patal Karyalaya, the assistant of the Returning Officer provided me the copy of the receipt of the security deposit, certificate for receipt of oath receipt of green nomination paper and one checklist, but did not provide me the receipt of pink nomination paper in an attempt to defeat my right to contest election. On being asked about the receipt of the pink nomination form, he informed me that the same has been left with the Returning Officer and you will get the same tomorrow morning at 11a.m. at the time of scrutiny which is allotted to me.

Though the checklist he has directed to provide the revised affidavit with columns duly filled up before the commencement of scrutiny of nominations. As instructed by the Returning Officer we have submitted the revised affidavit before scrutiny. The original affidavit inadvertently did not have column 8 which was to be blank and in terms of check list we submitted the updated affidavit before the time.

Herewith attached the copy of the checklist as Annexure "C".

Again in the morning of 28th October 2020, I have asked the RO to provide the receipt of my pink nomination form. Then to my utter shock and surprise, he totally refused the same by falsely stating that I have submitted only one green nomination form thereby proving his ulterior intent to not issuing receipts at the time of receiving the documents. It is most pertinent to mention here that contrary to the Returning Officer statement, Annexure A & B referred herein above substantiate that the Applicant (Candidate) has submitted two sets of nomination paper one in pink and other in green. Thus it is clear from the annexures that the Returning Officer has knowingly and purposely removed my pink nomination form totally unbecoming duties

of Returning Officer for free and Selections to give unlawful benefit to other candidate which is a criminal breach of trust and unfair practice by the government official who is bound by the law to ensure a free and fair election process. In this manner the entire election in issue became unfair. defeating the constitutional and statutory mandate calling for review on such actions.

Further I have also requested to initiate scrutiny of my nomination form. Then RO informed that the scrutiny will begin serial wise and my number is at last.

Around 2 p.m. the Returning Officer has called me to come forward for the scrutiny of my nomination form, then the BJP candidate, Mr. Hardwar Dubey and Mr. Lalji Verma, Proposer of BSP Candidate filed the written objection with respect to my nomination. Also one BJP minister Mr. Suresh Khanna and BSP General Secretary Mr. Satish Chandra Mishra continuously raised several objections verbally. At the time of scrutiny again I have asked for my pink nomination form, to which he again refused, for the unlawful benefit of the other candidate Then the Returning Officer provided me copies of the objections raised by the other candidate/proposer. The copy of said has been annexed ANNEXURE "D" and RO asked me to submit a reply by 4 p.m. The objections inter alia dealt with following issues:

a) It was alleged that one of the proposers in green form inadvertently mentioned Nawab Shah instead of Nawab Jan. It is submitted by us that in pink form the correct name Nawab Jan was mentioned which was erroneously mentioned as Nawab Shah in green form. It also came to our notice that in Part III of green form to be filled by RO, the name of candidate which RO noted as PRAKASH BAJPAI instead of the correct name as PRAKASH BAJAJ. The said act was not an inadvertent act of RO but a part of his criminal conspiracy as was clear from subsequent facts. The whole conspiracy of removing pink form and writing wrong name of candidate by RO in green form exposed the entire criminal conspiracy of RO. In spite of our request, we were not given the opportunity to rectify the name of proposer and our request to bring the proposer for physical verification was also not acceded by RO. In this manner our requests in terms of Representation of People Act was unlawfully not accepted by RO under intent of his criminal conspiracy. The copy of the relevant page of the pink and green form is attached as Annexure "E" and copy of the Part III of green form is attached as Annexure "F","

It was alleged that one column 8 in the affidavit which though being blank was not mentioned in the affidavit. The said objection was also frivolous as in terms of checklist I had filed updated affidavit having column 8;

The said objections apart from being frivolous instead of discharging their burden of proof towards validity of duly accepted nomination paper was hit by provisions of sections 33(4) of Representations of Peoples Act.

The said frivolous allegations were dealt with me in above said terms in my detailed reply wherein I had stated various citations to support my case. The my of my detailed reply is annexed as ***ANNEXURE "G".***

In the light of the above mentioned facts it is clearly evident that Returning Officer has been involved in the criminal conspiracy to purposely reject the nomination form filled by me to extend the benefit to other candidate, which is clearly against the fair and transparent election procedure. The said fact makes the entire

election unfair, defeating the constitutional mandates."

166. The said complaint states that the petitioner had filed a detailed reply to the objections filed by the candidates during scrutiny which also contained the citation. Moreover, noticing the reply which was filed by the petitioner, in response to the objections raised by Sri Haridwar Dubey and Lal Ji Verma which is on record as Schedule-16 and 17 respectively, it does not contain nor has any reference to any citation said to be filed by the election petitioner.

167. The replies which are contained in Schedule 16 and 17 and the compliant filed before the Election Commission of India contained in Schedule-19 again do not match and in absence of any reference to the citation which are not on record, it renders the said Schedule to be an incomplete copy. It is nowhere stated in the body of the election petition that the said annexures A to H which have been mentioned in the complaint contained in Schedule-19 are not being filed or that if filed, they are the same annexures which have been filed as Part of some other Schedule annexed with the election petition. It even does not indicate that the replies contained in Schedule 16 and 17 were accompanied by any annexure/citation, thus, there appears to be a mismatch as well as variance in the pleadings and the Schedule annexed and the petitioner appears to be taking a vacillating stand.

168. At this stage, the plea of the respondents No.1, 6 and 10 that they have not received a true copy as the affidavit filed in support of the election petition was not complete nor verified can also be considered.

169. However, this contention may not detain this Court for long as it would be seen that the petitioner has not annexed Annexures No.A to H with Schedule 19 which renders the petition as incomplete and not a true copy. Even if the objection raised by the respondents No.1, 6 and 10 regarding the affidavit in support of the election petition being incomplete is ignored yet the Schedule 19 being incomplete and not even a true copy placed before this Court for the reasons noticed in the previous paragraphs. Consequently, this Court finds that the petition suffers from the vice of non-compliance of Section 81(3) of RPA.

170. Now, coming back to the Form-26 i.e. the revised affidavit contained in Schedule-12 which as noticed in the preceding paragraphs is an incomplete and a bald copy and if it is seen in terms of Section 33(i) of RPA and Rule 4-A of the Rules of 1961, it will reveal that it was the bounden duty of the election petitioner to furnish a complete Form 2-C along with the affidavit in Form 26.

171. Insofar as the revised affidavit in Form-26 is concerned, the same had to be filed prior to the time of commencement of scrutiny but there is nothing on record to indicate that the said affidavit was actually signed by the petitioner and sworn before a Competent Notary, who notarized the same and it was filed before the Returning Officer before the appointed hour, either in pleadings or in any schedule annexed with the election petition.

172. It will be relevant to notice that the petitioner has sought to project that the nomination papers of the returned candidates has been illegally accepted, though, it also suffered from the same defects in respect of the affidavit in Form-26. However, this can only be seen once

the petitioner first establishes and substantiates his own case and it is found that the petitioner is a duly nominated candidate meaning thereby that his Form 2-C and the affidavit in Form-26 was duly filled and completed, then he can claim to be duly nominated candidate.

173. The entire issue raised by the petitioner in the election petition revolves around the grounds of illegal rejection of nomination of the petitioner and illegal acceptance of nomination of the returned candidate.

174. It was essential for the petitioner to first establish prima-facie that he had filed a valid nomination and then the Court would consider the ground of illegal rejection of his nomination. To do so, the petitioner had to show that his nomination paper and affidavit in Form-26 was valid and as such for a valid cause of action, the petitioner ought to plead material facts in respect of the Form-2-C and the affidavit/revised affidavit in Form-26.

175. Material facts leading to a valid cause of action in this context would definitely require petitioner to plead and prima-facie establish that the revised affidavit was duly filed complete in all respects. Paragraph 70 of the election petition does not bear such material particulars in respect of the revised affidavit. If the petitioner would have pleaded the details regarding signing, swearing, verification, attestation and filing of the revised affidavit then the bald copy of the affidavit as contained in Schedule 12 could be co-related to come to prima-facie conclusion regarding the cause of action.

176. Alternatively, the petitioner could have filed the true copy of the duly signed, verified and attested affidavit complete in all respect as Schedule 12 and could have complemented the same by the averments in Paragraph 70 of the petition even then it could have given some assistance to co-relate and arrive at a conclusion regarding a valid cause of action. However, neither the details are mentioned in Paragraph 70 nor they can be ascertained from perusing Schedule 12.

177. In this view of the matter, there does not appear to be clear material facts pleaded to connect the pleadings and the Schedule 12 to form a valid cause of action in respect of the petitioner being a duly nominated candidate.

178. In absence of such material particulars, the cause of action also looses its steam as the alleged affidavit contained in Schedule 12, prima-facie cannot be treated to be an valid affidavit as required in terms of Rule 4-A of the Rules of 1961 especially when there is no signatures, seal of attestation, verification and signature of the notary.

179. One must remember that a litigant is not entitled to create an illusion of a cause of action by resorting to clever drafting. The cause of action must be clearly stated with material particulars and in this regard, this Court is reminded of the decision of the Apex Court in **T. Arivandandam v. T.V. Satyapal and another, (1977) 4 SCC 467**, wherein considering the question of Order VII Rule 11 CPC and its applicability, the Apex Court observed as under:-

*"**5. ...** The learned Munsif must remember that if on a meaningful -- not formal -- reading of the plaint it is manifestly vexatious, and meritless, in the*

sense of not disclosing a clear right to sue, he should exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage."

E. CONCLUSION:-

180. At this stage, this Court finds that there is conspicuous absence of material facts in respect of the cause of action relating to the fact of filing of a valid affidavit in Form-26. This necessarily leads to infer from a meaningful reading of the petition that the revised affidavit as brought on record is bereft of material particulars so also the pleadings in co-relation to it which creates a lacuna in the cause of action.

181. In light of the detailed discussions hereinabove, the irresistible conclusion is that the revised affidavit as annexed to the election petition is not as per norms and the initial affidavit was defective which rendered the nomination of the petitioner invalid. The petitioner is not a duly nominated candidate nor can he claim to be a duly nominated candidate at an election, hence, it creates an insurmountable hurdle for the petitioner to maintain this petition.

182. For the foregoing reasons, this Court has no hesitation to hold that the challenge raised by the respondents to the election petition must succeed and the election petitioner not being a duly nominated candidate is not entitled to maintain the election petition. Ergo, the election petition is dismissed in exercise of powers under Order VII Rule 11 CPC, with no order as to costs.

(2022)07ILR A274
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.06.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 840 of 2011

Smt. Bhagauta Devi & Ors. ...Appellants
Versus
U.P.S.R.T.C. Ltd. ...Respondent

Counsel for the Appellants:
Vivek Manishi Shukla, Ashish Kumar Pandey

Counsel for the Respondent:
Akhter Abbash, Prabhakar Tiwari, Sachindra Dwivedi

Civil Law – Motor Vehicles Act, 1988 - Section 166 - U.P. Motor Vehicles Rules, 1998 - Rules 220, 220-A, 220-A(2), 220-A(3), 220-A(4): – Claimant's Appeal – Quantum of compensation – Accident was caused due to high speed & negligence driving - denial of existence of the Bus on the route in question - in absence of route permit, tribunal gave finding against corporation and allowed the claim - Enhancement of compensation - deceased was estimated to be aged between 46-50 years - deceased was an unskilled casual labour - thus, Multiplier of 13 should be applied instead of 11, - deduction of 1/3rd towards personal expense as per the law lay down in *Sarla Verma's* & Pranay Sethi' Judgment of Hon'ble Apex Court, – 20% of income ought to be added towards future loss of income - including Rs. 40,000/- towards spousal consortium as adult children would not be entitled to

parental consortium - compensation awarded by the tribunal, enhanced as from Rs. 1,48,670 with 6% rate of interest to Rs. 4,44,400/- with 7% rate of interest - Appeal allowed - directions accordingly. (Para -9, 14, 16, 20, 22, 23)

Appeal - allowed. (E-11)

List of Cases cited: -

1. National Insurance Co. Ltd. Vs Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205

2. New India Assurance Co. Ltd Vs Urmila Shukla & ors., 2021 SCC OnLine SC 822

3. Sarla Verma (Smt.) & ors. Vs Delhi Transport Corporation & anr., (2009) 6 SCC 121

4. United India Insurance Company Ltd. Vs Satinder Kaur @ Satwinder Kaur & ors., 2020 SCC OnLine SC 410

5. Magma General Insurance Company Ltd. Vs Nanu Ram alias Chuhru Ram & ors., (2018) 18 SCC 130

6. Jiuti Devi & ors. Vs Manoj Kumar Rai & ors., 2022 SCC OnLine All 46

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a claimants' appeal, seeking enhancement of the compensation awarded by the Motor Accident Claims Tribunal.

2. On 18th of September, 2007, Ramasrey, a resident of Village Jamhoura, Post Sikandrabad, Police Station Neemgaon, District Lakhimpur Kheri, had gone to the north of his village in the fields, to answer the call of nature. While returning home at 7:30 p.m. on the Sitapur-Lakhimpur Road, as he reached the culvert near Village Jamhoura, a U.P. Roadways bus bearing Registration No. UP-25G-9999, that was driven at a high speed and negligently, hit him head-on. He was grievously injured and conveyed by the members of his family to the District Hospital, Lakhimpur Kheri, where during treatment, he breathed his last. At the time of his demise, Ramasrey was aged about 48 years. He was engaged in agriculture as well as supply of milk. He had a monthly income of Rs.7,000/-. In future, this income was expected to go double as per his dependents' claim. He left behind his widow, Smt. Bhagauta Devi, besides three sons as his dependents.

3. The claimants petitioned the Motor Accident Claims Tribunal, Lakhimpur Kheri seeking compensation in the sum of Rs. 20 lakhs. The claim petition was numbered as Motor Accident Claim Petition No. 207 of 2007 on the file of the Motor Accident Claims Tribunal/ District Judge, Lakhimpur Kheri.

4. A written statement was filed on behalf of the Uttar Pradesh State Road Transport Corporation (for short, 'the Corporation), who denied the accident. They said that the bus in question, on the date of accident, was plying on the Sitapur-Gola Road. The bus was operated according to rules. It had all the necessary papers, such as the Registration Certificate, Road Tax Payment Certificate and Fitness Certificate. The driver had a valid and effective driving licence.

5. On the issue relating to the factum of accident involving the Corporation's bus, the Tribunal held that it was the Corporation's bus that was responsible for causing the accident, as it was driven negligently and at a high speed in the manner alleged by the claimants. The driving licence of the driver operating the bus was found valid and effective as also

the other papers. There is just one remark by the Tribunal in its finding on the second issue that the route permit was not produced.

6. Before this Court, the issue is about the compensation, that is payable to the claimants, who are in appeal. The Tribunal, by the judgment impugned, has awarded the claimants compensation in the sum of Rs.1,48,670/- together with interest at the rate of 6% per annum from the date of order until realization. Out of the compensation payable, a two-thirds has been directed to be paid to the widow and one-third, in equal share, to the three sons of the deceased.

7. Dissatisfied by the quantum of compensation awarded by the Tribunal, the claimants have preferred the instant appeal.

8. Heard Mr. Ashish Kumar Pandey, learned Counsel for the appellant-claimants and Mr. Prabhakar Tiwari, learned Counsel for the Corporation.

9. The Tribunal has proceeded to work out the compensation on the basis that there was no proof that the deceased had a monthly income of Rs. 7000/-, and, therefore, his income would be reckoned on the daily-wage payable to an unskilled casual labourer, contemporaneous in time. The daily-wage of a casual labourer has been determined by the Tribunal at a figure of Rs. 60/- per day, which would lead to an annual income of Rs. 21,600/-. The Tribunal has made a deduction of Rs. 600/- for the fact that a daily-wager/casual labourer would not earn throughout the year. Thus, annual income of the deceased has been determined at a sum of Rs. 21,000/-.

10. There is no written certification of the deceased's age and, therefore, parole evidence, medical estimation and other circumstances have been taken into consideration by the Tribunal to arrive at a conclusion that the deceased was aged about 50 years. He has been placed in the age bracket of 50-55 years for the purpose of adopting a multiplier. A multiplier of '11' has been adopted. Thus, to the annual income of Rs. 20,000/-, a multiplier of "11' was applied to arrive at a total income of Rs. 2,20,000/-. A deduction of one-third towards personal expenses has been made in order to workout the dependency. The dependency has been calculated at a figure of Rs.1,46,670/-. To this, a sum of Rs.2000/- has been added on account of money spent on the funeral. It is, thus, that a compensation of Rs.1,48,670/- has been awarded by the Tribunal.

11. The learned Counsel for the claimants has argued that the daily-wages of a casual labourer fixed at a figure of Rs. 60/- is abysmally low. At the relevant time, the minimum wages fixed by the Government were Rs. 100/- per day. The applicable multiplier and the deduction made towards personal expenses too have been criticized as unlawfully disadvantageous to the claimants. It is also argued that nothing has been awarded towards future prospects or loss of estate and loss of consortium.

12. On the other hand, the learned Counsel for the Corporation has supported the award, saying that it is just.

13. In the opinion of this Court, the edifice on which the compensation has been assessed, that is a daily-wage of Rs. 60/-, is unrealistic and abysmally low. At the relevant time, there is no dispute that

the minimum wages payable to an unskilled casual labourer was Rs. 100/-. This Court, therefore, thinks that the award has to be determined based on a daily-wage of Rs. 100/-. Also, no deduction can be made for the intermittent employment that a casual labourer gets. Therefore, the daily income of the deceased has to be revised to the figure of Rs. 100/-. The monthly income would be Rs. 3000/- and the annual income Rs.36,000/-, instead of Rs.20,000/- determined by the Tribunal.

14. The age of the deceased, accepting that it was in the age bracket of 50-55, would not deprive the claimants of the accretion towards future prospects, going by the rule in **National Insurance Company vs. Pranay Sethi and others, (2017) 16 SCC 680**. The deceased being self-employed, there would be an addition to his income of 10%. However, in the State of Uttar Pradesh, determination of future prospects has to be done in accordance with Rule 220-A(3) of the Uttar Pradesh Motor Vehicles Rules, 1998 (for short, "the Rules of 1998') framed under the Motor Vehicles Act, 1988 (for short, 'the Act of 1988'). These rules are to be applied in preference to the Rule in **Pranay Sethi (supra)** in view of the decision of the Supreme Court in **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822**. Thus, going by Rule 220-A(3)(iii), the claimants would be entitled to add 20% to the deceased's monthly emoluments by way of future prospects.

15. So far as the multiplier is concerned, it has to be applied according to the table in Paragraph 42 of the judgment of the Supreme Court in **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another, (2009) 6 SCC 121**. This has been approved by the Constitution Bench decision in **Pranay Sethi and followed in United India Insurance Company Ltd. v. Satinder Kaur alias Satwinder Kaur and others, 2020 SCC OnLine SC 410.** In **Sarla Verma (supra)**, about the applicable multiplier, going by different age brackets for the deceased, it has been held:

"40. The multipliers indicated in Susamma Thomas [(1994) 2 SCC 176 : 1994 SCC (Cri) 335] , Trilok Chandra [(1996) 4 SCC 362] and Charlie [(2005) 10 SCC 720 : 2005 SCC (Cri) 1657] (for claims under Section 166 of the MV Act) is given below in juxtaposition with the multiplier mentioned in the Second Schedule for claims under Section 163-A of the MV Act (with appropriate deceleration after 50 years):

Age of the deceased	*Multiplier scale as envisaged in Susamma Thomas [(1994) 2 SCC 176 : 1994 SCC (Cri) 335]*	*Multiplier scale as adopted by Trilok Chandra [(1996) 4 SCC 362]*	***Multiplier scale in Trilok Chandra [(1996) 4 SCC 362] as clarified in Charlie [(2005) 10 SCC 720 : 2005 SCC (Cri) 1657]***	*Multiplier specified in Second Column in the Table in Second Schedule to the MV Act*	*Multiplier actually used in Second Schedule to the MV Act (as seen from the quantum of compensation)*

'(1)	'(2)	'(3)	**'(4)**	'(5)	'(6)
Up to 15 yrs	-	-	-	15	20
15 to 20 yrs	16	18	**18**	16	19
21 to 25 yrs	15	17	**18**	17	18
26 to 30 yrs	14	16	**17**	18	17
31 to 35 yrs	13	15	**16**	17	16
36 to 40 yrs	12	14	**15**	16	15
41 to 45 yrs	11	13	**14**	15	14
46 to 50 yrs	10	12	**13**	13	12
51 to 55 yrs	9	11	**11**	11	10
56 to 60 yrs	8	10	**09**	8	8
61 to 65 yrs	6	08	**07**	5	6
Above 65 yrs	5	05	**05**	5	5

41. Tribunals/courts adopt and apply different operative multipliers. Some follow the multiplier with reference to Susamma Thomas [(1994) 2 SCC 176 : 1994 SCC (Cri) 335] [set out in Column (2) of the table above]; some follow the multiplier with reference to Trilok Chandra [(1996) 4 SCC 362] , [set out in Column (3) of the table above]; some follow the multiplier with reference to Charlie [(2005) 10 SCC 720 : 2005 SCC (Cri) 1657] [set out in Column (4) of the table above]; many follow the multiplier given in the second column of the table in the Second Schedule of the MV Act [extracted in Column (5) of the table above]; and some follow the multiplier actually adopted in the Second Schedule while calculating the quantum of compensation [set out in Column (6) of the table above]. For example if the deceased is aged 38 years, the multiplier would be 12 as per Susamma Thomas [(1994) 2 SCC 176 : 1994 SCC (Cri) 335] , 14 as per Trilok Chandra [(1996) 4 SCC 362] , 15 as per Charlie [(2005) 10 SCC 720 : 2005 SCC (Cri) 1657] , or 16 as per the multiplier given in Column (2) of the Second Schedule to the MV Act or 15 as per the multiplier actually adopted in the Second Schedule to the MV Act. Some tribunals, as in this case, apply the multiplier of 22 by taking the balance years of service with reference to the retiring age. It is necessary to avoid this kind of inconsistency. We are concerned with cases falling under Section 166 and not under Section 163-A of the MV Act. In cases falling under Section 166 of the MV Act, Davies method [Davies v. Powell Duffryn Associated Collieries Ltd., 1942 AC 601 : (1942) 1 All ER 657 (HL)] is applicable.

42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas [(1994) 2 SCC 176 : 1994 SCC (Cri) 335] , Trilok Chandra [(1996) 4 SCC 362] and Charlie [(2005) 10 SCC 720 : 2005 SCC (Cri) 1657]), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years,

M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

16. Here, the Tribunal has placed the deceased in the age bracket of 50-55 years. There are two age brackets in Paragraph 42 of the decision in **Sarla Verma,** under which the deceased could, therefore, be placed. One is 46-50 years and the other, 51-55 years. There is no age bracket of 50-55 years in Sarla Verma. Considering that the Act of 1988 is a beneficial legislation, any doubt about an applicable principle that governs compensation must be construed in favour of the claimants. Here, what is all the more relevant is that according to medical opinion, in the absence of any written certification of age, the deceased has been estimated to be aged 50 years. This is indicated in the autopsy report. Therefore, in the opinion of this Court, the deceased ought to be placed in the age group of 46-50 years for the purpose of adopting the applicable multiplier. For the age bracket of 46-50, the applicable multiplier is '13'. Therefore, the claimants are entitled to determination of compensation by an application of the multiplier of '13'; not '11'.

17. Going by the number of dependents that the deceased left behind, that is to say, the claimants, deduction of one-third towards personal and living expenses ordered by the Tribunal is unexceptionable. This accords with Rule 220-A(2) of the Rules of 1998 as well as the principle laid down in **Sarla Verma**. However, the Tribunal has certainly gone wrong in not awarding anything by way of compensation for the loss of estate and the loss of consortium. The principle regarding compensation under the conventional heads has been authoritatively considered and laid down by the Constitution Bench of the Supreme Court in **Pranay Sethi** thus :

"**48.** This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule to the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra [UP SRTC v. Trilok Chandra, (1996) 4 SCC 362] . Recently, in Puttamma v. K.L. Narayana Reddy [Puttamma v.K.L. Narayana Reddy, (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574] it has been reiterated by stating : (SCC p. 80, para 54)

"54. ... we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:

"3. General damages (in case of death):

The following general damages shall be payable in addition to compensation outlined above:

(i)	Funeral expenses	Rs 2000
(ii)	Loss of consortium, if beneficiary is the spouse	Rs 5000
(iii)	Loss of estate	Rs 2500
(iv)	Medical expenses -- actual expenses incurred before death supported by bills/vouchers but not exceeding	Rs 15,000 "

50. On a perusal of various decisions of this Court, it is manifest that the Second

Schedule has not been followed starting from the decision in Trilok Chandra [UP SRTC v.Trilok Chandra, (1996) 4 SCC 362] and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs 1,00,000 was granted towards consortium inRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . The justification for grant of consortium, as we find fromRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , is founded on the observation as we have reproduced hereinbefore.

51. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh[Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . It has granted Rs 25,000 towards funeral expenses, Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. ThoughRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] refers to Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] , it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads."

(emphasis by Court)

18. The award of compensation under the conventional heads, particularly for the loss of consortium, subsequently received the consideration of the Supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others, (2018) 18 SCC 130. In Magma General Insurance Company Ltd.** (supra), it has been held:

"21. A Constitution Bench of this Court in Pranay Sethi[National Insurance

Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, "consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse : [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149]

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation". [Black's Law Dictionary(5th Edn., 1979).]

21.2. Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training".

21.3. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

22. Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognised that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

23. The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium. Parental consortium is awarded to children who lose their parents in motor vehicle accidents under the Act. A few High Courts have awarded compensation on this count [Rajasthan High Court in Jagmala Ram v. Sohi Ram, 2017 SCC OnLine Raj 3848 : (2017) 4 RLW 3368; Uttarakhand High Court in Rita Rana v. Pradeep Kumar, 2013 SCC OnLine Utt 2435 : (2014) 3 UC 1687; Karnataka High Court in Lakshman v. Susheela Chand Choudhary, 1996 SCC OnLine Kar 74 : (1996) 3 Kant LJ 570] . However, there was no clarity with respect to the principles on which compensation could be awarded on loss of filial consortium.

24. The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under "loss of consortium" as laid down inPranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] . In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs 40,000 each for loss of filial consortium."

19. The award under the conventional heads being provided on a dynamic scale and more to the advantage of the claimants in **Pranay Sethi**, as compared to Rule 220-A(4) of the 1998 Rules, the principle in the former would govern the award of compensation under the conventional heads.

20. There is one facet of the matter, which requires some further consideration, and that is about the award of compensation for the loss of consortium to the children. Here, all the three children are adults, with Mohan Lal being an all of 26 years, Shri Chandra 24 years and Prem Prakash 22 years, when the cause of action arose. In case of children, who are adults, compensation for the loss of parental consortium would not be their entitlement. The adult children would not be entitled to parental consortium, as held by me in **Jiuti Devi and others vs. Manoj Kumar Rai and others, 2022 SCC OnLine All 46.**

21. Thus, in the opinion of this Court, under the conventional head of compensation for the loss of consortium, the claimant, Smt. Bhagauta Devi would alone be entitled. She would be entitled to spousal consortium in the sum of Rs. 40,000/-. However, for the loss of estate, the claimants would be entitled to Rs. 15,000/- and likewise, for the funeral expenses, a sum of Rs. 15,000/-. The impugned award passed by the Tribunal has, therefore, to be modified and compensation re-determined as follows :

(i)Monthly Income (of the deceased)= 3000/-

(ii)Monthly Income + Future Prospects (monthly income x 20%) = 3000+600 = 3600/-

(iii) Annual Income (of the deceased) = 3600 x 12 = 43,200/-

(iv)Annual Dependency = Annual Income - one-third deduction towards personal expenses of the deceased = 43,200 - 14,400 = 28,800/-

(iv) Total Dependency = Annual Dependency x Applied Multiplier = 28,800 x 13 = 3,74,400/-

(v)Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependent's Consortium = 15,000 + 15,000 + 40,000 = **70,000/-**

The total claim of compensation would, therefore, work out to a figure of Rs.3,74,400 + Rs.70,000 = 4,44,400/-

22. The aforesaid sum of money would carry simple interest @ 7% per annum in accordance with Rule 220-A of the Rules of 1998 from the date of institution of claim petition until realization. However, the sum of money already deposited (paid or invested in terms of the impugned award or interim order of this Court) shall be adjusted.

23. In the result, this appeal **succeeds** and is ***allowed*** with costs throughout. The impugned award is **modified** and the compensation stands enhanced to a sum of Rs. 4,44,400/- (Rupees Four Lac Forty Four Thousand Four Hundred only). The said sum of money shall be payable by the Corporation. The claimants shall be entitled to simple interest @ 7% on the sum of compensation awarded from the date of institution of the claim petition until

realization. The inter se apportionment of compensation and the other directions made by the Tribunal shall remain intact.

(2022)07ILR A283
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.05.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 866 of 2011
Connected with
First Appeal From Order Nos. 867 of 2011, 868 of 2011, 869 of 2011, 870 of 2011, & 871 of 2011

Smt. Shanti & Ors. ...Appellants
Versus
Anil Awasthi @ Anil Kumar Awasthi & Anr. ...Respondent

Counsel for the Appellants:
Balendu Shekhar, Prakash Chandra

Counsel for the Respondent:
A.K. Shukla, Anil Srivastava

(A) Civil Law - Motor Vehicles Act, 1988 - Sections 163-A, 168 - UP Motor Vehicles Rules, 1998 - Rule-220-A(2)(i), 220-A(3), 220-A(3)(iii), 220-A(4) - Indian Penal Code,1860 - Sections 279, 304-A, 427: - Claimants' Appeals - seeking similar question of quantum of compensation - six MACP are filed by claimants against an accident in question - awarded separately - since, common questions of facts like FIR, Charge sheet, DL, site plan, inquest report & insurance papers, registration certificate, tax receipts of offending vehicle and question of law arises in all the appeals are similar - as such, connected & heard together and decided through a common judgment - however, the distinguishing features of each case in the matter of determining the compensation. (Para - 5**)**

(B) Civil Law- Motor Vehicles Act, 1988 - Section -163-A, 168 - UP Motor Vehicles Rules, 1998 - Rule-220-A(2)(i), 220-A(3), 220-A(3)(iii), 220-A(4) - Indian Penal Code, 1860 - Sections 279, 304-A & 427: - Claimants' Appeals - quantum of compensation - No cross appeals are filed - no issue about factum of negligence, accident, contributory negligence or the liability of insurers - only single issue of enhancement of award - in view of law laid down by the by Apex Court, claimants are entitled for consideration of their claim for enhancement of compensation. (Para 11)

(C) Civil Law - Motor Vehicles Act, 1988 – Sections 163-A, 168 - UP Motor Vehicles Rules, 1998 - Rule-220-A(2)(i), 220-A(3), 220-A(3)(iii), 220-A(4) - Indian Penal Code,1860 - Sections 279, 304-A & 427 - Claimants' Appeals - quantum of compensation - there are three law points would be considerable in these appeal respectively i.e. (i) Whether awarded compensation is requires scrutiny?, (ii) Whether the tribunal was right in denying any compensation towards future prospects?, (iii) Whether the award of compensation under the conventional heads is in accordance with law? - Determination of all law points - positively - all appeals are allowed - claimants in each of the appeals shall be entitled to enhanced compensation, accordingly. (Para 16, 72)

(D) Civil Law- Motor Vehicles Act, 1988 - Section -163-A, 168 - UP Motor Vehicles Rules, 1998 - Rule-220-A(2)(i), 220-A(3), 220-A(3)(iii), 220-A(4) - Indian Penal Code,1860 - Sections - 279, 304-A & 427 - Claimants' Appeals - quantum of compensation - determination - question of law regarding future prospects - there is no scope to doubt that the principle relating to future prospects are to be determined in accordance with Rules of 1998 not in accordance with the decision in Pranay Sethi's Case - as the Rules, 1998 afford better & greater benefits to the claimants - claimants are entitled to enhanced compensation - in their

respective appeals accordingly.(Para - 19, 20, 21, 22)

(E) Civil Law - Motor Vehicles Act, 1988 – Sections 163-A, 168 - UP Motor Vehicles Rules, 1998 - Rule-220-A(2)(i), 220-A(3), 220-A(3)(iii), 220-A(4) - Indian Penal Code,1860 - Sections 279, 304-A & 427 - Claimants' Appeals - quantum of compensation - determination - question of law regarding deduction towards personal expenses - it would be admissible/based on the decision of the Supreme Court in '*Sarla Verma'* & '*Pranay Shethi's &* 'Satinder Kaur's' cases - claimants are entitled to enhanced compensation accordingly, in their respective appeals.(Para - 25, 26)

(F) Civil Law- Motor Vehicles Act, 1988 - Sections 163-A & 168 - UP Motor Vehicles Rules, 1998 - Rule-220-A(2)(i), 220-A(3), 220-A(3)(iii), 220-A(4) - Indian Penal Code,1860 - Sections 279, 304-A & 427 - Claimants' Appeals - quantum of compensation - determination so far as compensation towards Conventional Heads - court is of opinion that what is to be awarded for loss of estate, loss of consortium, funeral expenses, loss of filial consortium etc - held, to be entitled thereof - as per law laid down by the constitution bench of Hon'ble Apex Court in 'P*ranay Shethi's as well as Magma General Insurance Co. Ltd. C*ases - since Pranay Sethi would prevail over that under the Rules of 1998 - each of claimants are entitled to enhanced compensation - in respective appeals, accordingly.(Para - 28, 29, 30, 31)

Appeal Allowed. (E-11)

List of Cases cited: -

1. National Insurance Co. Vs Pranay Sethi & ors., (2017) 16 SCC 680

2. Sarla Verma Vs DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002

3. New India Assurance Co. Ltd Vs Urmila Shukla & ors., 2021 SCC OnLine SC 822

4. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd. & ors., F.A.F.O. No. 2581 of 2011, decided on 26.04.2017

5. United India Insurance Co. Ltd. Vs Satinder Kaur @ Satwinder Kaur & ors., 2020 SCC OnLine SC 410

6. Magma General Insurance Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors., (2018) 18 SCC 130

7. Kurvan Ansari alias Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr., (2022) 1 SCC 317

8. Roop Lal & anr. Vs Suresh Kumar Yadav & ors., 2022 SCC OnLine All 25.

9. Jiuti Devi & ors. Vs Manoj Kumar Rai & ors., 2022 SCC OnLine All 46

(Delivered by Hon'ble J.J. Munir, J.)

This judgment will dispose of the present appeal and connected Appeal Nos. 867 of 2011, 868 of 2011, 869 of 2011, 870 of 2011 and 871 of 2011.

2. This appeal arises out of a judgment and award of Mr. Balendu Singh, Motor Accident Claims Tribunal/Additional District Judge, Court No. 1, Lucknow dated 26.10.2010 passed in Motor Accident Claim Petition No. 141 of 2005.

3. The appeal has been preferred by the claimants, who seek enhancement of the compensation awarded by the Tribunal. The claimants are the dependents of one Keshan (Krishna), who died in a motor accident on March the 8th, 2005 at about 5 O' Clock in the morning at a place beyond Bhitariya near Badaila-Narayanpur Chauraha, falling within the local limits of P.S. Ramsanehi Ghat in the District of Barabanki. According to the claimants, the

deceased had boarded a tractor trolley, bearing Registration No. U.P. 78 A-9585, along with other natives of the village to do darshan of Mahadeva at Barabanki. On way to destination on the date, time and place indicated, the passengers on board the tractor trolley got down to answer the nature's call, the tractor trolley being parked on the left hand side of the road. Some passengers proceeded to the nearby fields and some stayed on board. There were still others, who de-boarded, but stood about the parked vehicle. At that time, a DCM truck bearing Registration No. U.P. 78 AN 4185, proceeding from the opposite direction, driven rashly and negligently, hit the stationary tractor trolley. The right side of the tractor trolley was damaged. In consequence of the accident, the deceased suffered serious injuries, of which he died.

4. A first information report of the accident was lodged with the Police by one Krishna Pal Singh, a passenger on board the ill-fated tractor trolley, on 8th March, 2005 at about 05:45 a.m. The information was registered as Case Crime No. 106 of 2005, under Sections 279, 304-A, 427 IPC, P.S. Ramsanehi Ghat, District Barabanki against the unknown driver of the DCM truck. This was so because after the accident, the offending truck was apprehended but the driver made good his escape. The inquest and autopsy of the dead body was done in accordance with law and the Police, after investigation, filed a charge-sheet against the driver of the offending vehicle, Suresh Kumar Mishra. The Police, as part of the case diary, also drew up a site plan of the accident.

5. Besides MACP No. 141 of 2005 giving rise to the present appeal, MACP Nos. 142 of 2005 to 146 of 2005 were filed by the dependents of the other deceased-victims of the aforesaid accident. All the claim petitions were tried together and decided by separate judgments and awards, all dated 26.10.2010 passed by the same Tribunal. The connected Appeal Nos. 867 of 2011 to 871 of 2011 arise out of the judgments and awards passed in the claim petitions instituted by the dependents of the other victims of the accident. Since common questions of fact and law arise in all the appeals, these were connected, heard together and are being decided by a common judgment, as already said. FAFO No. 866 of 2011 shall be treated as the leading case. However, the distinguishing features of each case in the matter of determining the compensation shall be indicated during the course of this judgment.

6. Heard Mr. Balendu Shekhar, learned counsel for the appellants and Mr. Anil Srivastava, learned counsel for respondent no. 2, United India Insurance Company Ltd. in the leading case and in all connected appeals, where parties are identically arrayed. The appellants shall hereinafter be referred to as the "claimants', whereas the United India Insurance Company-respondent no. 2 shall be called the "Insurance Company'. In the claim petition giving rise to the leading appeal, the owner of the offending truck, Anil Awasthi was arrayed as opposite party no. 1. Anil Awasthi, the owner of the vehicle shall hereinafter be referred to as the "owner'.

7. A written statement was filed on behalf of the owner, who has generally denied the case in the claim petition in almost evasive terms, but pleaded that the offending vehicle was in his registered ownership and that it was duly insured with the Insurance Company. It was not

seriously pleaded that the offending vehicle was not involved in the accident but a clear case was set up that the liability, if any, adjudged by the Tribunal would fall on the shoulders of the Insurance Company. A separate written statement was filed on behalf of the Insurance Company, which wholesomely and specifically denied the case in the claim petition - the factum of accident and their liability under the law to indemnify. Defences of fact and law were raised by the Insurance Company, including those regarding the validity of the driver's licence on the date of accident, as also the validity of the offending vehicle's permit, registration papers and fitness certificate. The following issues were framed by the Tribunal in the claim petition giving rise to the leading appeal (translated from Hindi into English):-

(1) Whether on 08.03.2005 at 05:00 O' Clock in the morning at a place ahead of Bhitariya near Badaila-Narayanpur Crossing within the local limits of P.S. Ramsanehi Ghat, District Barabanki, the driver of truck DCM No. U.P. 78 AN 4185, driving it rashly and negligently, hit the stationary tractor trolley, leading to severe injuries suffered by Keshan (Krishna), who was standing near it and in consequence whereof he died?

(2) Whether at the time of accident, the driver of truck DCM No. U.P. 78 AN 4185 had a valid and effective driving licence?

(3) Whether at the time of accident, truck DCM No. U.P. 78 AN 4185 was insured with opposite party no. 2, United India Insurance Company Ltd. and driven according to the conditions of the policy?

(4) Whether the accident occurred on account of contributory negligence of the driver of the DCM truck and that of the tractor?

(5) Are the claimants entitled to any relief? If yes, to what sum of money and from which opposite party?

8. The claimants in all the appeals filed copies of the FIR, relative inquests, the postmortem reports, copy of the charge sheet filed against the driver of the offending vehicle and the site plan. Besides these documents, copies of the insurance cover/policy, the registration certificate, additional tax receipt relating to the offending vehicle and the driving licence of the driver thereof were all filed by Anil Awasthi, the owner.

9. PW-1 Bhaiya Lal was examined to prove the occupation, age and monthly income of the deceased, whereas PW-2 Sumat Lal was examined to prove the factum of accident. Sumat Lal is an eye witness and was a passenger on board the ill-fated tractor trolley. No oral evidence was admittedly led on behalf of the Insurance Company or the owner of the offending vehicle. It must be remarked here that in all the connected appeals, there are identical issues and similar evidence recorded, where Sumat Lal is a common witness about the accident. PW-1 differs in each case and is either the father or the son of the deceased concerned, examined to prove the occupation, age, income and other relevant facts about the deceased, necessary to work out the dependency.

10. Issue nos. 2 and 3 regarding the validity of the driving license and the insurance cover were not pressed by the insurance company at the hearing of the claim petition. Issue nos. 1 and 4 were answered in favour of claimants and against the Insurance Company. A sum of Rs. 4,41,500/- was awarded in favour of the claimant in the leading appeal with simple

interest @ 6% per annum from the date of institution of the claim petition and compensation directed to be paid within 30 days of the date of award. In the event of default, the Tribunal directed 9% simple interest per annum to be paid to the claimants. There are some ancillary directions in the award as regards the inter se share of the claimants, besides its investment with a nationalized bank in an interest bearing account for a period of five years.

11. In all other appeals, different sums of money towards compensation have been awarded to the respective claimants. In all cases, the liability has been fastened upon the Insurance Company to satisfy the award. The claimants are disillusioned by the quantum of compensation awarded and have, therefore, appealed. No cross appeal has been preferred on behalf of the Insurance Company. In the present appeal and the connected appeals, there appears to be no issue about the factum of negligence, the accident, the contributory negligence or the liability of the Insurance Company. The only issue that arises for consideration in the leading appeal, as well as connected appeals, is about the quantum of compensation to which the claimants are entitled.

12. Learned counsel for the claimants, Mr. Balendu Shekhar has assailed the award, saying that compensation is far from adequate. It is, according to Mr. Shekhar, not a just award. He has particularly emphasized that the future prospects of the deceased have not at all been taken into consideration by the Tribunal and a deduction of 1/3rd has been made in each case towards personal expenses without reference to the number of dependents. He has also assailed the award for the quantum of compensation under the conventional heads of consortium, loss of estate and funeral expenses. Learned counsel for the claimants in support of his contention on the above score has placed reliance upon the decision of the Constitution Bench of the Supreme Court in **National Insurance Company v. Pranay Sethi and others, (2017) 16 SCC 680.**

13. Mr. Anil Srivastava, learned counsel for the Insurance Company, on the other hand, has supported the award saying that just compensation has been ordered.

14. It would now be apposite to deal with the facts of each of the appeals, commencing with the leading case, in order to determine the validity of the award vis-a-vis the compensation awarded.

15. In the leading case, the deceased Keshan *alias* Krishna is survived by five dependents, to wit, his widow Smt. Shanti, two minor children, a son named Sumer and a daughter Km. Manisha aged 4 years and 6 months, respectively at the time the cause of action arose. Bhaiya Lal and Smt. Devrati, are the deceased's father and mother, respectively. The deceased's widow was aged 23 years, his father, 55 and mother 48. The deceased was aged 25 years. The deceased was a labourer and the Tribunal, going by the rate of daily-wages earned at the relevant time, determined the deceased's income at a figure of Rs. 3000/- as against Rs. 4000/- claimed. A deduction of 1/3rd was ordered towards the money that the deceased would spend on himself. The annual dependency was determined at a sum of Rs. 24,000/- and applying the multiplier of 18, the Tribunal worked out the substantive compensation in the sum of Rs. 4,32,000/- (other than conventional heads). Under the conventional heads a

sum of Rs. 5000/- was awarded to the widow towards loss of consortium, Rs. 2000/- towards funeral expenses and Rs. 2500/- towards loss of estate. Thus, the total compensation worked out is a figure of Rs.4,41,500/-.

16. Considering the submissions advanced by the learned counsel for the parties, there are three points on which the awarded compensation requires scrutiny and a just award made. It is to be seen whether the Tribunal was right in denying any compensation towards future prospects and that if the Tribunal was right in directing a deduction of 1/3rd of the deceased's income, given the number of his family members. It is also to be seen whether the award of compensation under the conventional heads is in accordance with law. The law regarding future prospects was summarized by the Supreme Court in **Pranay Sethi (supra)**, where it is held:

"56. The seminal issue is the fixation of future prospects in cases of deceased who are self-employed or on a fixed salary. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

57. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardisation, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income

unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardisation on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

58. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] thinks it appropriate not to add any amount and the same has been approved inReshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] . Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self-employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts."

17. The question whether future prospects are to be awarded in accordance with the principle laid down in **Pranay Sethi** or Rule 220-A(3) of the Uttar Pradesh Motor Vehicles Rules, 1998 (for short, the Rules of 1998) fell for consideration of the Supreme Court in **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822**. The said appeal arose out of a decision of this Court, and, therefore, there is not the slightest doubt that the principle there squarely applies to the determination of future prospects in the State of U.P. In **Urmila Shukla** *(supra)*, the question that arose for consideration before their Lordships is set forth in paragraph no. 4 of the report. It reads:

"4. The basic ground of challenge by the appellant is that sub-rule 3(iii) of Rule 220A is contrary to the conclusions arrived at by the Constitution Bench of this Court in National Insurance Company Ltd v. Pranay Sethi reported in (2017) 16 SCC 680."

18. In the case of **Urmila Shukla**, it was held :

"9. It is to be noted that the validity of the Rules was not, in any way, questioned

in the instant matter and thus the only question that we are called upon to consider is whether in its application, sub-Rule 3(iii) of Rule 220A of the Rules must be given restricted scope or it must be allowed to operate fully.

10.The discussion on the point inPranay Sethiwas from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11.If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision inPranay Sethicannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated inPranay Sethicannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs."

19. There is thus no cavil that in the State of U.P., so long as Rule 220-A(3) is on the statute-book, future prospects have to be determined according to the Rules of 1998 and not by the figures for determination thereof as laid down in **Pranay Sethi**.

20. There is one more question that arises for consideration. The question is whether Rule 220-A (3) of the Rules of 1998, that was inserted by Notification No. 777/XXX-4-2011-4(3)-2010 dated 26 September, 2011 (Eleventh Amendment) Rules, 2011, would apply retrospectively to an accident like the one here, that happened much prior to the introduction of Rule 220-A of the Rules of 1998. Here, the accident is one that took place on 08.03.2005. The said question fell for consideration before a Division Bench of this Court in **F.A.F.O. No. 2581 of 2011, Sushil Kumar and others v. M/s. Sampark Lojastic Private Limited and others, decided on 26.04.2017.** In **Sushil Kumar (supra),** it was held by their Lordships of the Division Bench :

"30. Rule 220-A was inserted in the Uttar Pradesh Motor Vehicles Rules, 1998 in view of the various decisions of the law courts for providing benefit on account of future prospects of the injured/deceased. It provides for addition of certain percentage of the income of the injured/deceased in his actual income depending upon the age of the injured/deceased for the purposes of determination of the compensation. The aforesaid Rule came into effect on 26.09.2011 after the decision of the claim petition but before filing of the appeal though the accident took place on 08.05.2010 much before the enforcement of the above Rule.

31. It is in view of the above that an argument is being raised that Rule 220-A of the Rules which came into effect on 26.09.2011 would not apply to the accident which had taken place on 08.05.2010.

32. In Ram Sarup Vs. Munshi AIR 1963 SC 553 it was laid down that a change in law during the pendency of an appeal

has to be taken into account and will cover the rights of the parties.

33. The view expressed above was followed by the Supreme Court in Mula Vs. Godhu AIR 1971 SC 89.

34. In Dayawati Vs. Inderjit AIR 1966 SC 1423 the court had observed as under:- If the new law speaks in language, which expressly or by clear intendment, takes in even pending matters, the court of trial as well as the court of appeal must have regard to an intention so expressed, and the court of appeal may give effect to such a law even after the judgment of the court of first instance.

35. In Amarjit Kaur Vs. Pritam Singh AIR 1974 SC 2068 effect was given to the change in law during the pendency of an appeal as the hearing of an appeal under the procedural law of this country is in the nature of rehearing of the suit by superior court.

36. It was in the light of the above decisions that in Lakshmi Narayan Guin and others Vs. Niranjan Modak AIR 1985 SC 111 it was held that a change in law during the pendency of an appeal has to be taken into account and will cover the right of the parties.

37. The aforesaid decision was followed by a Division Bench of this court in U.P. State Road Transport Corporation Vs. Smt. Madhu Sharma and others, 2003 (4) AWC 2620 which was a case in relation to the provisions of the Motor Vehicles Act and it was observed that it is apparent that the change in law during the pendency of the original proceedings has to be taken into account so as to cover the rights of the parties.

38. In view of above decision the view expressed by the Division Bench of this court in ICICI Lombard (Supra) is not of good law as it does not takes into account the decisions referred to above in holding that the Rule 220-A of the Rules which came into effect on 26.09.2011 would not apply to the accident that took place prior to the said date only for the reason that the Rule was not specifically stated to be retrospective in nature."

21. Nothing has been brought to the notice of this Court that the decision of the Division Bench in Sushil Kumar has been expressly or impliedly overruled by a larger Bench or by their Lordships of the Supreme Court. The said decision still, therefore, continues to hold the field and is binding on this Court. Thus, there is no scope to doubt the principle relating to future prospects that are to be determined in accordance with Rule 220-A (3) of Rules of 1998.

22. It must also be remarked that for the same reason, whatever issues are governed by Rule 220-A would be dealt with according to its provisions and not in accordance with the decision in Pranay Sethi, insofar as the Rules of 1998 'afford better or greater benefit' to the claimants, to borrow the expression of their Lordships in Urmila Shukla.

23. Rule 220-A of the Rules of 1998 reads:

220-A. Determination of Compensation-

(1) X X X

(2) X X X

(3) The future prospects of a deceased, shall be added in the actual salary or minimum wages of the deceased as under-

(i)	*Below 40 years of age*	*: 50% of the salary*
(ii)	*Between 40-50*	*: 30% of the*

	years of age	*salary*
(iii)	*More than 50 years* :	*20% of the salary*
(iv)	*When wages not sufficiently proved* :	*50% towards inflation and price index.*

24. Going by the aforesaid position of law, it is evident that the deceased, a self-employed man well below the age of 40 years, would entitle his dependents, that is to say, the claimants, to add 50% to his income by way of future prospects.

25. Again, the deduction of that part of the deceased's income from the claimants dependency that he would have spent on himself, or so to speak, his personal expenses, in the opinion of this Court ought to be 1/4th, and not 1/3rd as directed by the Tribunal. This deduction towards personal expenses of the deceased is based on the decision of the Supreme Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121** that has been followed and approved by the Constitution Bench of the Supreme Court in **Pranay Sethi**, and, later on, followed in **United India Insurance Company Ltd. vs. Satinder Kaur alias Satwinder Kaur and others, 2020 SCC OnLine SC 410**. In **Sarla Verma (supra)**, it has been held :

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra [(1996) 4 SCC 362], the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

26. It must be noticed that the scale regarding deduction towards personal and

living expenses of a married person under Rule 220-A(2)(ii) is also the same as in **Sarla Verma.**

27. This Court notices that the deceased has left behind five dependents, all of whom have claimed. There is no case that the deceased's parents were not dependent upon him. In usual circumstances, the father would have to be left out of the count of dependents assuming that he would have an income of his own, or else, the claimants would have to be burdened with the onus of producing evidence that he was dependent upon the deceased. Here, however, it is noticed that the father is 55 years old and the deceased was a labourer, a young man of 25 years, who was providing for the entire family. Considering the two minors to be a unit of one, the widow and the deceased's father and mother would make for a total of four dependents. In the circumstances, the number of the deceased's dependents are in the bracket of 4 to 6; to be precise 4. This would lead to the inevitable conclusion that the personal expense has to be fixed at a fraction of 1/4th, instead of 1/3rd, as directed by the Tribunal.

28. Again, so far as the conventional heads are concerned, this Court is of opinion that far less than what is to be awarded for the loss of estate, loss of consortium and funeral expenses has been directed by the Tribunal. Moreover, loss of consortium is not confined to the widow alone, but the parents too are entitled to be compensated for the loss of filial consortium. The two minor children are entitled to compensation on account of loss of parental consortium. In this regard, the holding of the Constitution Bench in **Pranay Sethi** is again of much relevance, where it is observed:

"48. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule to the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra [UP SRTC v. Trilok Chandra, (1996) 4 SCC 362] . Recently, in Puttamma v. K.L. Narayana Reddy [Puttamma v.K.L. Narayana Reddy, (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574] it has been reiterated by stating : (SCC p. 80, para 54)

"54. ... we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:

"3. General damages (in case of death):

The following general damages shall be payable in addition to compensation outlined above:

(i)	Funeral expenses	Rs 2000
(ii)	Loss of consortium, if beneficiary is the spouse	Rs 5000
(iii)	Loss of estate	Rs 2500
(iv)	Medical expenses -- actual expenses incurred before death supported by bills/vouchers but not exceeding	Rs 15,000"

50. On a perusal of various decisions of this Court, it is manifest that the Second

Schedule has not been followed starting from the decision in Trilok Chandra [UP SRTC v.Trilok Chandra, (1996) 4 SCC 362] and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs 1,00,000 was granted towards consortium inRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . The justification for grant of consortium, as we find fromRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , is founded on the observation as we have reproduced hereinbefore.

51. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh[Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . It has granted Rs 25,000 towards funeral expenses, Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. ThoughRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] refers to Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] , it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads."

(emphasis by Court)

29. The principles governing award of compensation under conventional heads, particularly with regard to award for loss of consortium, have been laid down by the Supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others, (2018) 18 SCC 130**. In **Magma General Insurance Company Ltd. (supra)**, it has been held:

"21. A Constitution Bench of this Court in Pranay Sethi[National Insurance

Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, "consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse : [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149]

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation". [Black's Law Dictionary(5th Edn., 1979).]

21.2. Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training".

21.3. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

22. Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognised that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

23. The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium. Parental consortium is awarded to children who lose their parents in motor vehicle accidents under the Act. A few High Courts have awarded compensation on this count [Rajasthan High Court in Jagmala Ram v. Sohi Ram, 2017 SCC OnLine Raj 3848 : (2017) 4 RLW 3368; Uttarakhand High Court in Rita Rana v. Pradeep Kumar, 2013 SCC OnLine Utt 2435 : (2014) 3 UC 1687; Karnataka High Court in Lakshman v. Susheela Chand Choudhary, 1996 SCC OnLine Kar 74 : (1996) 3 Kant LJ 570] . However, there was no clarity with respect to the principles on which compensation could be awarded on loss of filial consortium.

24. The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under "loss of consortium" as laid down inPranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] . In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs 40,000 each for loss of filial consortium."

(emphasis by Court)

30. It must be noted that under Rule 220-A(4) of the Rules of 1998, compensation or damages under the non-pecuniary heads or the conventional heads have been stipulated. But, these are disadvantageous to the claimants and do not confer better or greater benefit upon them in comparison to the liquidated figures laid down in P**ranay Sethi,** where the figures under the conventional heads have been arrived at, bearing in mind the price index, falling bank interest, escalation of rates in different cases. There is a provision for 10% upward revision to be done in a span of three years. By contrast, the Rules of 1998, that have been amended to bring in Rule 220-A more than ten years ago, in the year 2011, cannot serve as a realistic index to award compensation under the conventional heads. The determination of compensation in Pranay Sethi would, therefore, be applicable. The revised and dynamic determination of compensation payable under the conventional heads stipulated in **Pranay Sethi** would prevail over that under the Rules of 1998. It is held, accordingly.

31. Here, each of the claimants are entitled to compensation for the loss of consortium. The widow is entitled to compensation for loss of spousal consortium, the parents to filial consortium and the two minor children to parental consortium. Of course for loss of estate, the award has to be enhanced to Rs. 15,000/- and an equal sum of money in compensation awarded towards funeral expenses in one set each. But, for the loss of consortium, each of the claimants are entitled to a sum of Rs. 40,000/- going by the principle laid down in Pranay Sethi and Magma General Insurance Company Ltd.

32. It is to be noted that the learned Counsel for the claimants has not disputed the finding of the Tribunal about the income of the deceased which, therefore, has to be held to be a sum of Rs. 3000/- per month.

33. There is no quarrel about the multiplier because it is the same according to the Second Schedule appended to the Motor Vehicles Act, 1988 (for short, "the MV Act') (as was then in force) framed under Section 163-A and in paragraph no. 42 of the decision of the Supreme Court in Sarla Verma. In case of conflict, it is to be determined in accordance with the decision in Sarla Verma. Accordingly, the compensation payable in the leading case is worked out as follows:-

(i) Monthly Income (of the deceased) = 3000/-

(ii) Monthly Income + Future Prospects(monthly income x 50%) = 3000+1500 = 4500/-

(iii) Annual Income (of the deceased) = 4500 x 12 = 54,000/-

(iv) Annual Dependency = Annual Income - one-fourth deduction towards personal expenses of the deceased = 54,000 - 13500 = 40,500/-

(v) Total Dependency = Annual Dependency x Applied Multiplier = 40,500 x 18 7,29,000/-

(vi) Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium = 15,000 + 15,000 + 40,000x5 = 2,30,000/-

The total compensation would therefore, work out to a figure of Rs. 7,29,000 + Rs.2,30,000= 9,59,000/-

34. The aforesaid sum of money would carry simple interest at the rate of 7% per annum in accordance with Rule 220-A(6) of the Rules of 1998 from the

date of institution of claim petition until realization. However, the sum of money already deposited (paid or invested in terms of the impugned award or interim order of this Court) shall be adjusted.

In re. : FAFO No. 867 of 2011

35. The other facts and issues in this appeal do not arise for consideration as there is no quarrel about the factum of accident, the identity of the vehicle and the liability of the Insurance Company to satisfy the award. The deceased here was Anand Prakash Singh alias Pintu. He was standing near the tractor trolley at the time of the accident. He is survived by four dependents, where claimant nos. 1 and 2 to the claim petition are the father and mother respectively, whereas claimant nos. 3 and 4 are the deceased's brothers. There is no evidence to show that the deceased's brothers were, in any way, dependent upon him nor are they Class-I heirs, as the Tribunal has remarked. However, the dependency for the deceased's parents has to be worked out, which the Tribunal too has accepted. The deceased's age at the time of the accident was 15 years. It is claimed by his father Om Prakash Singh, who has testified as PW-1, that the deceased was a student but would help him with farming. The deceased had an income of Rs. 3000/- per month from his exertions in the fields that the family utilized. The Tribunal accepted the deceased's income, not on the basis of what the father stated in the witness box, but going by the notional income indicated in the Second Schedule to the MV Act (as was then in force) framed under Section 163-A of the Act. The Tribunal deducted 1/3rd towards personal expenses. The Tribunal has applied a multiplier of "15' also going by the Second Schedule to the Act. Thus, deducting 1/3rd from the notional income of the deceased, the annual dependency for the two claimants was worked out to a figure of Rs. 10,000/-. Applying the multiplier of 15, the total dependency was worked out to a figure of Rs. 1,50,000/-. To this was added under the conventional heads of compensation for loss of estate and funeral expenses a sum of Rs. 2500/- and Rs. 2000/- respectively. Nothing was awarded towards parental consortium. In the aforesaid manner, the Tribunal arrived at a figure of compensation equal to the sum of Rs. 1,54,500/-. This was directed to be paid with 6% simple interest from the date of institution of claim petition.

36. Now, in this case, this Court finds that the Tribunal has erred in determining the notional income of the deceased at a figure of Rs. 15,000/- per annum in accordance with the Second Schedule framed under Section 163-A of the MV Act. This is so because the consistent view of the Supreme Court is that the notional income is to be enhanced so long as the Second Schedule is not amended. It must be noticed here that as the MV Act stands, the Second Schedule has been omitted vide Act No. 32 of 2019 with effect from 01.09.2019. In this regard, reference may be made to the decision of the Supreme Court in Kurvan Ansari alias **Kurvan Ali and another v. Shyam Kishore Murmu and another, (2022) 1 SCC 317**, where it has been held:

"11. As the claim was made under Section 163-A of the Motor Vehicles Act, 1988, since the deceased child was not an earning member, the Tribunal has considered notional income as per Schedule II for the purpose of fixing compensation. The Tribunal has awarded compensation by taking notional income of the deceased at Rs, 15,000 per annum by applying multiplier of 15, awarded

compensation of Rs. 2,25,000 towards loss of dependency with interest @ 6% p.a. from the date of judgment. When the appeals are preferred by the insurance company as well as the appellants herein, by the impugned common judgment, the High Court has dismissed the appeal preferred by the insurance company, and in the appeal preferred by the claimants, while confirming the compensation awarded for loss of dependency at Rs. 2,25,000, has awarded a further sum of Rs. 15,000 towards funeral expenses and accordingly granted a total compensation of Rs. 2,40,000 with interest @ 6 p.a. payable by Respondent no. 2 insurance company and by permitting it to recover the same from Respondent 1 owner of the motorcycle.

12. In the judgment in Puttamma, this Court has observed that the Central Government was bestowed with the duties to amend Schedule II in vew of Section 163-A (3) of the Motor Vehicles Act, 1988, but it failed to do so. In view of the same, specific directions ewere issued to the Central Government to make appropriate amendments to Schedule II keeping in mind the present cost of living. In the said judgment, till such amendments are made, directions were issued for award of compensation by fixing a sum of Rs. 1,00,000/- (Rupees one lakh only) towards compensation for the non-earning children up to the age of 5 (five) years old and a sum of Rs 1,50,000 (Rupees one lakh fifty thousand only) for the non-earning persons of more than 5 (five) years old.

13. In R.K. Malik also, this Court has observed that the notional income fixed under Section 163-A of the Motor Vehicles Act, 1988 as Rs. 15,000 per annum should be enhanced and increased as the same continued to exist without any amendment since 11-1994. In Kishan Gopal where the deceased was a ten-year-old, this Court has fixed his notional income at Rs. 30,000 per annum.

14. In this case, it is to be noted that the accident was on 06.09.2004. In spite of repeated directions, Schedule II is not yet amended. Therefore, fixing notional income at Rs. 15,000/- per annum for non-earning members is not just and reasonable.

15. In view of the judgments in Puttamma, R.K. Malik and Kishan Gopal, we are of the view that it is a fit case to increase the notional income by taking into account the inflation, devaluation of the rupee and cost of living in. In view of the same, the judgment in Rajendra Singh relied on by the learned counsel for respondent 2 insurance company would not render any assistance to the case of the insurance company.

16. In view of the above, we deem it appropriate to take notional income of the deceased at Rs. 25,000/- (Rupees twenty-five thousand only) per annum....."

37. The aforesaid decision in **Kurvan Ansari (supra)** was followed by a Division Bench of this Court in **Roop Lal and another vs. Suresh Kumar Yadav and others, 2022 SCC OnLine All 25.**

38. It is further remarked that the Tribunal erred in deducting 1/3rd from the notional income of the deceased, inasmuch as the deceased was a young boy and a bachelor. The multiplier of 15, going by the Second Schedule to the MV Act, also appears to be contrary to the principle in **Sarla Verma**, which has been approved by the Constitution Bench of their Lordships of the Supreme Court in **Pranay Sethi** and followed in **Satinder Kaur** alias **Satwinder Kaur**. According to the paragraph no. 42 of the judgment in **Sarla Verma,** for the age group of 15-20 years, the multiplier of 18 is applicable; not 15.

39. The principle in **Sarla Verma** would require a deduction of 50% towards the personal and living expenses of the deceased. Rule 220-A (2)(i) of the Rules of 1998 also requires a deduction of 50% towards personal expenses of an unmarried deceased. However, 1/3rd deduction is permissible, where the family of the bachelor is large and dependent on the deceased's income. This is not the case here. The deceased has left behind two dependents or who can legitimately be called dependents. Thus, whether the principle in Sarla Verma is applied or Rule 220-A(2)(i) of the Rules of 1998, a deduction of 50% towards personal and living expenses of the deceased has to be made; not 1/3rd. Again, the deceased was a young boy of 15 years and the Tribunal erred in not granting any compensation for loss of future prospects. Going by his age, the claimants would be entitled to add 50% of the income towards future prospects. Likewise, the Tribunal ought to have awarded in compensation, for the loss of filial consortium to both parents, a sum of Rs. 40,000/- each, and for loss of estate and funeral expenses, a sum of Rs. 15,000/- respectively.

40. In this view of the matter, the compensation payable in this appeal is worked out as follows:-

(i) Annual Income (of the deceased) = = 25,000/-

(ii) Total Annual Income = Annual Income + Future Prospects (Annual Income x 50%) = 25,000+12,500 = 37,500/-

(iii) Annual Dependency = Annual Income - 50% deduction towards personal expenses of the deceased = 37,500 - 18,750 = 18,750/-

(iv) Total Dependency = Annual Dependency x Applied Multiplier = 18,750 x 18 = 3,37,500/-

(v) Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium = 15,000 + 15,000 + 40,000x2 = 1,10,000/-

The total compensation would therefore, work out to a figure of Rs. 3,37,500/- + Rs.1,10,000/- = 4,47,500/-

41. The aforesaid sum of money would carry simple interest at the rate of 7% per annum in accordance with Rule 220-A(6) of the Rules of 1998 from the date of institution of claim petition until realization. However, the sum of money already deposited (paid or invested in terms of the impugned award or interim order of this Court) shall be adjusted.

In re. : FAFO No. 868 of 2015

42. The only question that arises for consideration in this appeal is about the quantum of compensation, inasmuch as the factum of accident, death of the deceased in that accident and liability of the Insurance Company are not in issue.

43. The deceased here is Chhota. He was standing near the parked tractor trolley when the accident happened. The deceased is survived by his widow and six children. At the time of the accident, he was aged 54 years. According to the claimants, the deceased had a monthly income of Rs. 4500/-. He was earning his living by toiling on his fields. The deceased's wife Sumeria has testified as PW-1 and admitted the fact in her cross-examination that the deceased was working as a labourer. The Tribunal has, therefore, proceeded on the basis that the deceased was working as a labourer. The Tribunal assessed the deceased's income, going by the prevalent rate of

wages for casual labourers, at a figure of Rs. 100/- a day or Rs. 3000/- per month. On that basis, the deceased's annual income was determined at a figure of Rs. 36,000/-. On the said figure, a deduction of 1/3rd was made towards personal expenses.

44. The Tribunal applied the multiplier of 11 to an annual dependency of Rs. 24,000/- in order to arrive at the substantive dependency of Rs. 2,64,000/-. The multiplier of 11 was applied following the Second Schedule to the MV Act framed under Section 163-A. That multiplier was arrived at by placing the deceased in the age bracket of 51 to 55 years. Compensation under the conventional heads was awarded in the manner that for the loss of consortium, loss of estate and funeral expenses, a sum of Rs. 5000/-, Rs. 2500/- and Rs. 2000/- in that order were determined. Adding up the total entitlement, a compensation of Rs. 2,73,500/- was determined for the claimants by the Tribunal, carrying a simple interest of 6% per annum from the date of institution of the claim petition. It is further directed that in the event, compensation was not made good within 30 days, simple interest at the rate of 9% per annum would be levied.

45. In view of the legal position that has been discussed above, this Court finds that the Tribunal has erred in omitting from the compensation awarded the requisite sum towards future prospects. It must be remarked that there is no dispute about the monthly wages of the deceased. Considering that the deceased was aged more than 50 years, going by Rule 220-A (3) of the Rules of 1998, the dependents would be entitled to add 20% to his income towards future prospects.

46. Also the Tribunal has erred in deducting 1/3rd towards personal expenses, whereas going by the number of members in the deceased's family who are his dependents, a deduction of 1/5th ought to have been made. The multiplier of "11' is of course unexceptionable, going by the deceased's age.

47. The Tribunal has also awarded far below the sum payable under the conventional heads to each of the three dependents. The widow would be entitled to compensation for the loss of spousal consortium, and the two minor children, that is to say, claimant nos. 6 and 7, Ram Lal and Km. Mithilesh, for the loss of parental consortium. The adult children would not be entitled to compensation vis-a-vis parental consortium as held by me in **Jiuti Devi and others v. Manoj Kumar Rai and others, 2022 SCC OnLine All 46.**

48. In view of the aforesaid conclusions, the compensation payable to the claimants in this appeal would have to be revised in the following manner:-

(i) Monthly Income (of the deceased) = 3000/-

(ii) Monthly Income+Future Prospects (monthly income x 20%) = 3000+600 = 3600/-

(iii) Annual Income (of the deceased) = 3600 x 12 = 43,200/-

(iv) Annual Dependency = Annual Income - one-fifth deduction towards personal expenses of the deceased = 43,200- 8640= 34,560/-

(v) Total Dependency = Annual Dependency x Applied Multiplier = 34,560 x 11 = 3,80,160/-

(vi) Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium = 15,000 + 15,000 + 40,000x3 = 1,50,000/-

The total compensation would therefore, work out to a figure of Rs.3,80,160 + Rs.1,50,000=5,30,160/-

49. The aforesaid sum of money would carry simple interest at the rate of 7% per annum in accordance with Rule 220-A(6) of the Rules of 1998 from the date of institution of claim petition until realization. However, the sum of money already deposited (paid or invested in terms of the impugned award or interim orders of this Court) shall be adjusted.

In re. : FAFO No. 869 of 2011

50. All other issues are not being agitated by the parties. The limited question for consideration in this appeal is about the compensation payable to the claimants, that is to say, the dependents of the deceased Shiv Sewak Singh. The deceased Shiv Sewak Singh was sitting in the parked tractor trolley when he became a victim of the accident. He is survived by five dependents, who claimed, to wit, his widow Smt. Dhanman Devi, his son Vijay Shankar Singh, Km. Kusum Singh and Km. Nisha Singh, both daughters of the deceased Shiv Sewak Singh and the deceased's father, Shiv Badan Singh.

51. There is no evidence to show that the deceased's son Vijay Shankar Singh, who was 25 years old at the time of accident, was, in any way, dependent upon the deceased. However, so far as the widow (aged 44 years at the time of accident) and the deceased's father (claimed to be 83 years at that time) are concerned, they are clearly his dependents. So far as the two unmarried daughters, aged at the relevant time 20 and 18 years, are concerned, they too were the deceased's dependents. The deceased was asserted in the claim petition to be earning a sum of Rs. 6000/- per month from his employment with the Government fair price shop and agriculture. The Tribunal, on an evaluation of the evidence on record, has held the deceased's income to be Rs. 3000/- per month. For the purpose, the Tribunal has looked into the cross-examination of PW-1, Vijay Shankar Singh, the deceased's son, who has said that the deceased was employed as a labourer. There is no evidence led about the deceased's income from his employment with the Government fair price shop or agriculture. The Tribunal has, therefore, rightly concluded that the deceased was a labourer, who had a daily income of Rs. 100/- per day or Rs. 3000/- a month. Thus, the deceased's annual income has been reckoned as Rs. 36,000/-.

52. The deceased had four dependent members in his family and, therefore, a deduction of 1/4th ought to be made towards personal expenses. In the opinion of this Court the Tribunal was not right in directing a deduction of 1/3rd towards personal expenses. The deceased's age was 54 years at the time of accident and the parties are not at issue about this determination of his age done by the Tribunal. This Court finds the said determination is one made on the basis of cogent evidence, which includes the postmortem report. Going by the table for determination of the appropriate multiplier applicable, as set out in paragraph no. 42 of the judgment in **Sarla Verma**, the appropriate multiplier would be 11. The Tribunal has applied the said multiplier. The parties before this Court are not at issue whether "11' is the appropriate multiplier, the deceased being aged 54 years.

53. The Tribunal has not awarded anything towards future prospects, which ought to have been done according to Rule 220-A (3) of the Rules of 1998. The deceased was a casual labourer, whose

income has been determined by the Tribunal at a figure of Rs. 100/- per day or Rs. 3000/- per month. The said income going by the provisions of Rule 220-A(3)(iii), given the age of the deceased, would entitle the claimants towards future prospects to add 20% to his wages.

54. The deceased has left behind his widow, who is entitled to compensation for the loss of spousal consortium and the father for the loss of filial consortium. However, as far as the children are concerned, they are all adults and bearing in mind what I have held in Jiuti Devi, they would not be entitled to compensation on account of the loss of parental consortium.

55. In view of the aforesaid conclusions, the compensation payable to the claimants in this appeal would have to be revised in the following manner:-

(i) Monthly Income (of the deceased) = 3000/-

(ii) Monthly Income+Future Prospects (monthly income x 20%) = 3000+600 = 3600/-

(iii) Annual Income (of the deceased) = 3600 x 12 = 43,200/-

(iv) Annual Dependency = Annual Income - one-fourth deduction towards personal expenses of the deceased = 43,200-10,800 = 32,400/-

(v) Total Dependency = Annual Dependency x Applied Multiplier = 32,400 x 11 = 3,56,400/-

(vi) Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium = 15,000 + 15,000 + 40,000x2= 1,10,000/-

The total compensation would therefore, work out to a figure of Rs.3,56,400 + Rs.1,10,000 = 4,66,400/-

56. The aforesaid sum of money would carry simple interest at the rate of 7% per annum in accordance with Rule 220-A(6) of the Rules of 1998 from the date of institution of claim petition until realization. However, the sum of money already deposited (paid or invested in terms of the impugned award or interim orders of this Court) shall be adjusted.

In re. : FAFO No. 870 of 2011

57. The only issue involved in this appeal is about compensation payable to the claimants. No other issue arises for consideration, which stand concluded in terms of the judgment of the Tribunal and the parties are not at issue about other matters before this Court.

58. The claimants are the dependents of the deceased Dehla alias Ram Dayal. The deceased, Dehla alias Ram Dayal was sitting in the ill-fated parked tractor trolley at the time of the accident. He is survived by five dependents, to wit, his widow Smt. Asha, aged 28 years at the time the cause of action arose, besides a son, Deepak aged 8 years, a daughter Leelawati aged 6 years and another son Vikas, aged 3 years. Besides the aforesaid members in his nuclear family, the deceased has also left behind his dependent mother, Jiriya aged about 55 years. The age of the deceased at the time of accident is claimed to be 34 years. In the postmortem report, he was found to be 30 years. The Tribunal has determined him in the age bracket of 31-35 years for the purpose of working out the dependency. There is no quarrel between parties about the deceased's age.

59. The claimants have asserted that the deceased was engaged in agriculture to earn his livelihood and had an income of

Rs. 5000/- per month. The impugned award shows that PW-1 Sushil Kumar, who has testified in support of the deceased's income, amongst other matters, has supported the claim. This finding of the Tribunal appears to be an apparent error, inasmuch as a perusal of the record shows that the deceased' wife Smt. Asha Devi filed her affidavit testifying as PW-1 and asserted that the deceased would earn a sum of Rs. 4000/- per month from agriculture and working as a labourer. In her cross examination, she has maintained her stand that her husband would do agriculture and would go over whenever called by someone to work as a labourer. She has further said that her husband left home at 7 O'clock in the morning to work as a labourer and come back at 4 O'clock in the evening. In the circumstances, the finding of the Tribunal that the deceased would earn a sum of Rs. 3000/- per month, working as a labourer, cannot be accepted.

60. The Tribunal has looked into the evidence of some other person named Sushil Kumar, who is not a witness in the present case. The testimony of PW-1 Asha Devi is clear where she has stood firm during cross-examination that her husband was a labourer and earned Rs. 4000/- per month. He also earned some money out of agriculture. There is no basis to disbelieve the latter part of her assertion also. It is, therefore, held in modification of the Tribunal's finding that the deceased had an income of Rs. 4000/- per month from his twin occupation- doing agriculture and working as a casual labourer.

61. The deceased was a young man aged between 31-35 years. The Tribunal has not awarded anything towards future prospects. Going by the provisions of Rule 220-A(3) (ii) of the Rules of 1998, the deceased, being aged below 40 years, would be entitled to an addition to his monthly income by way of future prospects to the extent of 50%. The deceased being aged between 31-35 years, the multiplier of 16 would be applicable.

62. The deceased has left behind five dependents. Therefore, deduction towards personal expenses under the Rule in Sarla Verma would be 1/4th, the dependent family members being 4 to 6 in number. The Tribunal has deducted 1/3rd of the deceased's income towards personal expenses, which is contrary to the aforesaid Rule. The said finding is, therefore, not sustainable. It deserves to be modified.

63. Over and above the substantive compensation payable, the claimants are also entitled to compensation under the conventional heads determined in accordance with the principles laid down in Pranay Sethi.

64. In view of the aforesaid conclusions, the compensation payable to the claimants in this appeal would have to be revised in the following manner:-

(i) Monthly Income (of the deceased) = 4000/-

(ii) Monthly Income+Future Prospects (monthly income x 50%) = 4000+2000 = 6000/-

(iii) Annual Income (of the deceased) = 6000 x 12 = 72,000/-

(iv) Annual Dependency = Annual Income - one-fourth deduction towards personal expenses of the deceased = 72,000- 18,000 = 54,000/-

(v) Total Dependency = Annual Dependency x Applied Multiplier = 54,000x 16 =8,64,000/-

(vi) Claimants' entitlement towards conventional heads = Loss of Estate +

Funeral Expenses + dependents' Consortium = 15,000 + 15,000 + 40,000x5 =2,30,000/-

The total compensation would therefore, work out to a figure of Rs.8,64,000 + Rs.2,30,00 = 10,94,000/-

65. The aforesaid sum of money would carry simple interest at the rate of 7% per annum in accordance with Rule 220-A(6) of the Rules of 1998 from the date of institution of claim petition until realization. However, the sum of money already deposited (paid or invested in terms of the impugned award or interim orders of this Court) shall be adjusted.

In re. : FAFO No. 871 of 2011

66. The issue in this appeal is confined to the compensation payable to the claimants, of which they have sought enhancement. About the other issues, there is no cavil before this Court and the determination of the Tribunal is acceptable to the parties.

67. The deceased here is Shiv Pratap Singh. He was standing near the parked tractor trolley when the offending vehicle dashed against it. The deceased is survived by three dependents, to wit, his widow Gayatri Devi, besides a son and an unmarried daughter, both adults. Sushil Kumar is the deceased's son aged 20 years, whereas Km. Neha Singh is the deceased's daughter aged about 18 years at the time of the accident. In support of the deceased's income and loss of dependency, the relevant evidence is that of PW-1 Sushil Kumar, who is the deceased's son. He has proved by his evidence that the deceased was engaged in agriculture and supply of milk. The Tribunal, going by the then prevalent rates payable to the casual labourers, has estimated the income of the deceased at a figure of Rs. 3000/- per month. The claimants asserted that the deceased had an income of Rs. 5000/- per month from agriculture and supply of milk and would contribute Rs. 4000/- to his family. In his cross-examination, he has stated that his father had 15 bighas kachcha land and 6-7 cattle heads. However, he has admitted in his cross-examination that no document regarding ownership of the agricultural holdings has been brought on record. This witness has not been shaken about his stand that his father would earn Rs. 5000/- a month. There is not a word in the evidence of PW-1 to infer that the deceased was employed as a casual labourer. The Tribunal, in the impugned award, has held the income of the deceased to be Rs. 3000/- per month holding him to be a casual labourer. This finding is based on an error apparent in reading the testimony of PW-1. It has been remarked by the Tribunal in the impugned judgment to the following effect:

"पी.डब्लू.1 सुशील कुमार मृतक का पुत्र है, उसने अपनी प्रतिपरीक्षा में बताया कि मृतक मजदूरी करता था। अतः पी.डब्लू.1 की स्वीकृति से यह सिद्ध होता है कि मृतक का पेशा मजदूरी था। वर्तमान समय में प्रचलित मजदूरी को देखते हुए तथा माननीय उच्चतम न्यायालय द्वारा विभिन्न निर्णय विधियों में प्रकट किए गए अभिमत के अनुसार मृतक की मासिक आय 3000 रूपए अर्थात 36000 रु. वार्षिक आय निर्धारित किया जाना समीचीन होगा।"

68. This Court has looked into the records and across the length and breadth of the cross-examination of PW-1, there is not a word said in acknowledgement by PW-1 of the fact that the deceased would work as a labourer or a casual labourer. To the contrary, the stand maintained by PW-1 in his examination-in-chief and the cross-

examination is that the deceased had an income of Rs. 5000/- per month from agriculture and dairy business. There is no doubt that no document relating to the land owned by the deceased has been filed. But, going by the unchallenged testimony of PW-1 Sushil Kumar, there is no reason to disbelieve his assertion. It is nowhere said that the deceased was a labourer or worked as a casual labourer. The inference of the Tribunal about the deceased's income is found on a non-existent basis. It cannot be accepted. In consequence, it is held that the deceased had an income of Rs. 5000/- per month.

69. The deceased was aged 55 years at the time of accident. Going by the provisions of Rule 220-A(3)(iii) of the Rules of 1998, the deceased is entitled to an accretion of his income by 20% towards future prospects.

70. The deceased has left behind two dependents. Going by Rule 220-A (2)(ii), the deduction towards personal expenses would be 1/3rd of the deceased's income. The Tribunal is right in deducting 1/3rd towards personal expenses of the deceased. The deceased was aged 55 years and the appropriate multiplier would, therefore, be 11, according to the schedule set out in paragraph no. 42 of the judgment in **Sarla Verma**. The Tribunal has erred in applying the multiplier of 8 acting in terms of the Second Schedule framed under Section 163-A of the MV Act. Under the conventional heads, the claimants would be entitled to loss of estate and funeral expenses in terms of the law laid down in **Pranay Sethi.** However, so far as the loss of consortium is concerned, this Court is of considered opinion that the widow alone is entitled to spousal consortium. Both children are adults and they are not entitled to parental consortium, bearing in mind the view that I have taken in **Jiuti Devi**.

71. In view of the aforesaid conclusions, the compensation payable to the claimants in this appeal would have to be revised in the following manner:-

(i) Monthly Income (of the deceased) = 5000/-

(ii) Monthly Income+Future Prospects (monthly income x 20%) = 5000+1000 = 6000/-

(iii) Annual Income (of the deceased) = 6000 x 12 = 72,000/-

(iv) Annual Dependency = Annual Income - one-third deduction towards personal expenses of the deceased = 72,000-24,000 = 48,000/-

(v) Total Dependency = Annual Dependency x Applied Multiplier = 48,000x11 = 5,28,000/-

(vi) Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium = 15,000 + 15,000 + 40,000 = 70,000/-

The total compensation would therefore, work out to a figure of Rs.5,28,000 + Rs.70,000 = 5,98,000/-

72. The aforesaid sum of money would carry simple interest at the rate of 7% per annum in accordance with Rule 220-A(6) of the Rules of 1998 from the date of institution of claim petition until realization. However, the sum of money already deposited (paid or invested in terms of the impugned award or interim orders of this Court) shall be adjusted.

Conclusion :

All these appeals **succeed** and are hereby **allowed**. The impugned awards

passed in each of the appeals are modified and compensation enhanced, including interest, as directed hereinabove. The claimants in each of the appeals shall be entitled to payment of the enhanced compensation with inter se share thereof in the same terms, as directed by the Tribunal. The claimants shall also be entitled to their costs in the respective appeals.

(2022)07ILR A306
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.03.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 2631 of 2008

Smt. Raj Bala & Ors. ...Appellants
Versus
Pravesh Kumar Anand & Anr. ...Respondents

Counsel for the Appellants:
Sri Devendra Dahma

Counsel for the Respondent:
Sri Vipul Kumar, Sri Pawan Kumar Singh

Civil Law – Motor Vehicles Act, 1988 - Section -166 - UP Motor Vehicle Rules, 2011 - Rule 220 - Income tax Act, 1961 - Section 194-A(3)(ix): - **Appeal - for enhancement of compensation - accident - due to contributory negligence - while awarding compensation future loss was not taken in to account - since accident took place in year 2004 and the State Rules, 2011 is came into force in year 2011 - being settled of Hon'ble Apex - claimants cannot be deprived of this benefit though the rules are silent - therefore, as per the law lay down by the Hon'ble Apex Court - compensation awarded by the tribunal, enhanced as from Rs. 9,87,300 with 7% rate of interest to Rs. 38,03,360/- with 7.5% rate of interest - Appeal is partly Allowed.**

(Para -4, 13, 14, 15, 16)

Appeal - partly allowed. (E-11)

List of Cases cited: -

1. Smt. Raj Bala & ors. Vs Parvesh Kumar & anr., M.A.C.P. No.204 of 2004, dated 12.5.2008

2. Pappu Deo Yadav Vs Naresh Kumar, AIR 2020 SC 4424

3. Erudhaya Priya Vs State Express Transport Corporation Ltd., AIR 2020 SC 4284

4. Karthik Subramanian Vs B. Sarath Babu & Anr., 2021 ACJ 993

5. Archit Saini & anr. Vs Oriental Insurance Co. Ltd., AIR 2018 (SC) 1143

6. Khenyei Vs New India Assurance Co. Ltd. & ors., (2015) 0 Supreme(SC) 397

7. T.O. Anthony Vs Karvarnan & ors., (2008) 0 Supreme(SC) 157

8. Rahisa Begum Since Deceased & anr. Vs Susheel Chandra Gupta & anr., 2021 LawSuit (All) 805

9. Meera Devi & anr. Vs HRTC & ors., (2014) 0 Supreme(SC) 194

10. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors., First Appeal From Order No. 1818 of 2012, decided on 19.7.2016

11. Vimal Kanwar & ors. Vs Kishore Dan & ors., (2013) 7 SCC 476

12. Malarvizhi & ors. Vs United India Insurance Co. Ltd & anr., (2020) 4 SCC 228

13. Yadava Kumar Vs Divisional Manager, National Insurance Co. Ltd, (2010) 10 SCC 341

14. National Insurance Co. Vs Pranay Sethi, 2014 (4) TAC 637 (SC)

15. Smt. Sarla Verma Vs Delhi Transport Corporation, 2009 (2) TAC 677 (SC)

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

17. Smt. Sudesna & ors. Vs Hari Singh & anr., Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001

18. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd., First Appeal From Order No.2871 of 2016, decided on 19.3.2021

19. Rylands V/s. Fletcher, (1868) 3 HL (LR) 330

20. Jacob Mathew Vs State of Punjab, (2005) 0 ACJ(SC) 1840)

21. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Company Ltd., 2007 (2) GLH 291

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

1. By way of this appeal, the claimants-appellants have approached this Court for enhancement of compensation awarded to appellants-claimants by Motor Accident Claims Tribunal/Senior District Judge, Ghaziabad ('*Tribunal', for short*), vide judgment/award dated 12.5.2008 in M.A.C.P. No.204 of 2004 (Smt. Raj Bala And Others vs. Parvesh Kumar And Another) whereby claimants/appellants was awarded Rs.9,87,300/-, with 7% rate of interest as compensation.

2. Heard Shri Devendra Dhama, learned counsel for the appellants-claimants and Shri Pawan Kumar Singh for the respondents-Insurance Company. None appears for the owner.

3. The accident involving the vehicle, though denied by the driver in his evidence, has been held by the Tribunal to be involved in the accident and the finding of fact that the accident occurred on 11.2.2004 involving the vehicle insured by the respondents has attained finality. Secondly, the finding of facts that the deceased, namely, Suresh Chandra, aged about 46 years worked in Nagar Telephone Nigam Ltd, Tugalkabad, New Delhi and left his widow, two sons and a daughter are also not in dispute. The income of the deceased is also not in dispute. The twin questions raised for our consideration for which this Court is called upon to decide are findings of the Tribunal as to whether the deceased driving motorcycle was a contributor to the accident had taken place to the tune of 50% and whether the compensation awarded by the Tribunal was in consonance with the principles enunciated by the Apex Court in catena of decisions for computing compensation.

4. As far as the compensation to be granted is concerned, learned counsel for the Insurance Company has submitted that in the State of Uttar Pradesh Rule 220 of the Uttar Pradesh Motor Vehicle Rules, 2011, came into force in the year 2011 and hence, no future loss of income could be granted as in this case accident occurred in the year 2007. The Apex Court has held that future loss of income has to be awarded whether the rules specify or not. This is an accident of the year 2007. Just because the rules are silent, the claimants cannot be deprived of this benefit. In catena of decisions even prior to the year 2011 future loss of income was considered to be added to income of deceased. We cannot accept the submission of Sri Pawan Kumar Singh, learned counsel for the respondent-Insurance Company as in catena of decisions which are binding on this Court namely **Pappu Deo Yadav Vs. Naresh Kumar, AIR 2020 SC 4424, Erudhaya Priya Vs. State Express Transport**

Corporation Ltd., AIR 2020 SC 4284 and Karthik Subramanian Vs. B. Sarath Babu & Anr., reported in **2021 ACJ 993** have laid down the principle that future loss of income has to be granted.

5. As far as the negligence is concerned, Shri Dhama, learned counsel for the appellants, has taken us to the evidence of four witnesses and the evidence of the driver of the opponent, who has stepped into the witness box. Learned counsel for the appellants has submitted that 50% decided to be contribution of appellants in view of the judgment in the case of ***Archit Saini and another vs. Oriental Insurance Co.Ltd., AIR 2018 (SC) 1143*** is bad particularly when the Tribunal has returned the finding to this effect that the deceased was on correct side. The evidence of PW4, namely, Sunil Kumar, is on record, where the witness has deposed that it was one way path and the accident occurred in side lane where the driver of the opponent could not have come with his tempo and, therefore, it is submitted that in view of the judgments quoted herein below the finding holding the deceased to be guilty of 50% is bad, (a) ***Khenyei vs. New India Assurance Co.Ltd. & others***, 2015 0 Supreme(SC) 397; (b) ***T.O.Anthony vs. Karvarnan and others,*** 2008 0 Supreme(SC) 157 (c) ***Rahisa Begum Since Deceased and another vs. Susheel Chandra Gupta and another***, 2021 LawSuit (All) 805; and (d) ***Meera Devi and another vs. HRTC and others***, 2014 0 Supreme(SC) 194.

6. It has also been contended by Shri Dhama, learned counsel for the claimants that there was no negligence on the part of the deceased and the finding of fact of the Tribunal is bad in the eye of law.

7. Shri Pawan Kumar Singh, learned counsel appearing for the respondent-Insurance Company, has vehemently submitted that from the site-plan, it can be seen that the accident had not taken place on the one-way road. It was the evidence of the driver of the said vehicle and that too in the findings returned by the Tribunal, therefore, it is just and proper that the road was not one-way. The deceased had contributed to the accident, which had taken place. It is further submitted that the Tribunal has shown leniency in not considering the deceased to be 100% negligent.

8. 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.

9. 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 (section 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)

10. In view of the judgments relied by counsel for the appellants and the factual scenario, we are unable to accept the submissions of Shri Pawan Kumar Singh, learned counsel for the Insurance Company that the accident occurred due to co-authorship of the deceased.

11. In such view of the matter, the impact of the motorcycle, which according to the witnesses and even the finding returned by the Tribunal was on its correct side, we would consider the alternative submission of Shri Pawan Kumar Singh that it was not a one way road when there is a clinching evidence that the driver of the motorcycle was driving the motorcycle on correct side, this is also finding of fact by the Tribunal. The site-plan according to the decision of **Archit Saini (supra)** can not be the sole conclusion of the negligence. Hence, submission of Shri Pawan Kumar Singh cannot be acceded as is against weight of evidence on record. Even if we go by the submission of Shri Pawan Kumar Singh, a bare scanning of the siteplan would also not permit us to accept his submission as site-plan goes to show that it is against the version of the driver of the tempo, which is a light vehicle, but it is bigger in size in comparison to the motorcycle and driver of the tempo should have been more cautious while driving the same in a bye-lane. Therefore, we hold that finding of fact of the Tribunal is bad in the eye of law.

12. As far as compensation is concerned, the matter is very simple. The Tribunal could not have deducted HRA. Learned counsel for the appellant even pointed out to us that when we scan the record it transpires that salary of the deceased was considered after deducting HRA, which is against the mandate of Apex Court in the case of ***Vimal Kanwar and others vs. Kishore Dan and others*** (2013) 7 SCC 476.

13. We, therefore, are in full agreement with Shri Pawan Kumar Singh that the income tax has rightly been deducted. The amount, which would be considered to be datum figure would be Rs.26,800/-. As the deceased was a permanent employee and below the age of 50 years, 30% would have been added for future loss of income as we are unable to accept the submission of Shri Pawan Kumar Singh that no addition for future income can be granted as even in ***Malarvizhi and others vs. United India Insurance Co.Ltd and another*** [(2020) 4 SCC 228] and in ***Yadava Kumar vs. Divisional Manager, National Insurance Co.Ltd***, [(2010) 10 Supreme Court Cases

341] it is held in judgment of ***National Insurance Company vs. Pranay Sethi*** [2014 (4) TAC 637 (SC)] , would apply retrospectively also. Hence the addition will have to be granted. 1/3 should be deducted for personal expenses of the deceased. Multiplier of 13 would be just and proper as the appellant was in the age group of 50 Years as per Apex Court judgment in ***Smt.Sarla Verma vs. Delhi Transport Corporation*** [2009 (2) TAC 677 (SC)] .

14. Learned counsel for the appellant submitted that due to inadvertance, medical expenses are shown as Rs.10,00,000/- should be read as Rs.1,00,000/- as the deceased survived for two days, though, we award the medical expenses to be Rs.80,000/- as it is awarded by the Tribunal. Under the non-pecuniary heads, Rs.15,000/- shall be awarded for loss of estate, Rs.15,000/- for funeral expenses and Rs.40,000/- shall be awarded under the head of loss of consortium with upward remission of 10% every three years, rounded off lump-sum Rs.1,00,000/- as per ***Pranay Sethi (supra)***.

15. Hence, the total compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

i.	Annual Income	Rs.26,800/- x 12	Rs.3,21,600/-
ii.	Percentage towards Future-Prospects (30%)		Rs.96,480/-
iii.	Total Income	Rs.3,21,600/- + Rs.96,480/-	Rs.4,18,080/-
iv.	Income after deduction of 1/3	Rs.4,18,080/- - Rs.1,39,360/-	Rs.2,78,720/-
v.	Multiplier applicable	13	
vi.	Loss of dependency	Rs.2,78,720/- x 13	Rs.36,23,360/-
Vii.	Medical Expenses		Rs.80,000/-
Viii.	After adding Non-pecuniary Damages	Rs.36,23,360/- +Rs.1,00,000/-	Rs.37,03,360/-
ix.	Total Compensation		Rs.38,03,360/-

16. 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."

17. Learned Tribunal has awarded rate of interest as 6% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

18. No other grounds were urged when the matter was heard.

19. The appeal is ***partly allowed.*** Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The Insurance Company shall deposit the amount within a period of 8 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. The amount already deposited be deducted from the amount to be deposited.

20. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd***., reported in 2007(2) GLH 291 and this High Court in 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 claimants 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)*** and in First Appeal From Order No.2871 of 2016 (***Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.***) decided on 19.3.2021 while disbursing the amount.

21. The records and proceedings be sent back to the Tribunal for disbursement.

(2022)07ILR A312
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.05.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Special Appeal Defective No. 162 of 2022

Raj Bali Singh ...Appellant
Versus
Sri Nitin Ramesh Gokaran & Anr. ...Respondents

Counsel for the Appellant:
Sri Braj Lal

Counsel for the Respondents:
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A. Special Appeal-Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952-maintainability of –an appeal u/s 19 of the Contempt of Court's Act 1971 would be only from an order or a decision imposing a punishment for contempt-the case at hand the orders passed by the learned Single Judge in exercise of contempt jurisdiction merely dismiss the contempt petition, such orders are not amenable to appeal u/s 19 of the Contempt of Court's Act, 1971-Chapter VII Rule 5 of the Courts provides for an appeal to the Court from a "Judgment"-the orders are not in any manner touching the merits of the

controversy or the dispute between the parties so as to be deemed to be judgment or deemed to have been issued in exercise of powers conferred under Article 226 of the Constitution of India-Hence, the Intra-Court Appeal under Chapter VIII Rule 5 of the Rules of the Court is held to be not maintainable.(Para 1 to 12)

B. In order to constitute a judgment, an interlocutory order must: (a) decide a matter of moment; or (b) affect vital and valuable rights of the parties and must also work serious injustice to the party concerned. Routine orders which are passed by a Single Judge to facilitate the progress of a case may cause some element of inconvenience or prejudice to a party but do not constitute a 'Judgment' because they do not finally determine the rights or obligations of the parties. Procedural orders in aid of the progression of a case or to facilitate a decision are not judgments.(Para 10)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Prem Singh Vs St. of U.P. & ors., Civil Appeal No. 6798 of 2019

2. St. of U.P. thru Prin. Secy. & ors. Vs Ram Murat & ors., Civil Appeal No. 872 of 2020

3. Midnapore Peoples Co-operative Bank Ltd. & ors. Vs Chunilal Nanda & ors. (2006) 5 SCC 399

4. Ashutosh Shrotriya & ors. Vs Vice Chancellor, Dr. B.R. Ambedkar University & ors. (2015) AIR All 187 DB

(Delivered by Hon'ble Pritinker Diwaker, J. & Hon'ble Ashutosh Srivastava, J.)

1. This Intra-Court Appeal under Chapter VIII Rule 5 of the Rules of the Court has been filed against the order dated 16.12.2020 passed by the learned Single Judge in Contempt Application (Civil) No. 2027 of 2020 (Raj Bali Singh versus Shri Nitin Ramesh Gokarn, Additional Chief Secretary / Principal Secretary and Shri Devendra Nigam, Executive Engineer) as also the order dated 10.3.2022 passed in CAPL (Civil) No. 6315 of 2021 (Raj Bali Singh versus Shri Nitin Ramesh Gokaran and another). By the order dated 16.12.2020, the learned Single Judge has ordered the Contempt Application to be consigned to record being of the view that there is no good ground to proceed further with the contempt application. By the order dated 10.3.2022, the second contempt application being CAPL (Civil) No. 6315 of 2021 has been dismissed as not maintainable and consigned to record.

2. The facts shorn of unnecessary details giving rise to the present proceedings are that the appellant / writ petitioner approached the writ Court inter-alia claiming the following reliefs:

"a) issue a writ, order or direction in the nature of mandamus commanding the respondent no. 1 and 6 to reckon the petitioner's work charge establishment services into regular services for the purposes of gratuity, pension and consequential benefits.

b) issue a writ, order or direction in the nature of mandamus commanding the respondent no. 6 to grant the pension and consequential benefits to the petitioner."

3. It was contended by the counsel for the appellant / writ petitioner that the controversy involved was squarely covered by the decision of the Apex Court in ***Prem Singh versus State of U.P. and others, Civil Appeal No. 6798 of 2019, dated 2.9.2019*** and the writ petition be decided in terms of the aforesaid decision.

4. The writ Court by order dated 29.11.2019 disposed of the writ petition

requiring the competent authority to look into the grievance of the petitioner and pass appropriate order strictly, in consonance with the judgment passed by Hon'ble Apex Court in the case of Prem Singh, expeditiously within a period of two months from the date of production of certified copy of the order. When the direction of the writ Court dated 29.11.2019 was not complied with, a contempt application, being CAPL (Civil) No. 2027 of 2020 was filed by the appellant / writ petitioner alleging violation of the direction of the writ Court.

5. Initially, the Contempt Court being prima facie satisfied that the direction of the writ Court had not been complied with issued notice to the contemnors i.e. Shri Nitin Ramesh Gokaran, Addl. Chief Secretary, Government of U.P. and Shri Devendra Nigam, Executive Engineer requiring their presence to answer the contempt proceedings. The contemnors filed an affidavit of compliance annexing a copy of the order dated 27.11.2020 passed by the Executive Engineer, whereby the claim of the appellant / writ petitioner was rejected. The learned Single Judge exercising contempt jurisdiction considered the compliance affidavit as also the order dated 27.11.2020 rejecting the claim of the writ petitioner. The learned Single Judge noted that the order dated 27.11.2020 duly considered the decision of the Apex Court in the case of Prem Singh (supra) as also the directions of the Apex Court in the case of ***State of U.P. through Principal Secretary and others versus Ram Murat and others***; Civil Appeal No. 872 of 2020, decided on 21.10.2020. The learned Single Judge also took note of the Ordinance No. 19 of 2020 (U. P. Qualifying Service for Pension and Validation Ordinance, 2020) which has been made effective with retrospective effect and in relation to Sub Rule 8 of the Rule 3 of the U.P. Retirement Benefit Rules, 1961, the ordinance would be effective from April 1, 1961. It also noted the fact that in the case of Prem Singh (supra) the judgment was given by the Apex Court by reading down Rule 23 Sub Rule 8 of the U.P. Retirement Benefit Rules, 1961. The learned Single Judge, thus was of the view that no good ground existed to proceed further with the contempt proceeding and accordingly directed the contempt application to be consigned to record vide order dated 16.12.2020..

6. The appellant / writ petitioner filed yet another contempt application, being Contempt Application No. 6315 of 2021 alleging non compliance of the order dated 29.11.2019 passed by the writ Court in Writ Petition (A) No. 19190 of 2019. The said contempt application has been dismissed as not maintainable taking note of the dismissal of the earlier Contempt Application No. 2027 of 2020.

7. The question for consideration in this Intra-Court Appeal is as to whether an appeal under Chapter VIII Rule 5 of the Rules of the Court will lay against an order of a Single Judge passed in exercise of contempt jurisdiction refusing to proceed further with the contempt proceeding and consigning the same to records.

8. To scope and ambit of maintainability of an appeal under Section 19 of the Contempt of Courts Act, 1971 and also an Intra-Court Appeal under the relevant rules of the High Court in a case of an order passed in contempt proceedings was considered in the case of ***Midnapore Peoples Co-operative Bank Ltd., and others versus Chunilal Nanda and others, 2006 (5) SCC***

399 and it was held that any direction issued or decision made by the High Court in contempt proceedings on the merits of a dispute between the parties unless the same is incidental to or inextricably connected with the order punishing for contempt would not be in the exercise of "jurisdiction to punish for contempt" and, therefore, would not be applicable under Section 19 of the Contempt of Courts Act, 1971. However, such an order was held amenable to a challenge in an Intra-Court Appeal under the relevant rules of the High Court. The position with regard to filing of appeals against orders passed in contempt proceedings was summarized in Para 11 of the decision which is being reproduced as under:

"11. The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarized thus :

I. An appeal under section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

II. Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of 'jurisdiction to punish for contempt' and therefore, not appealable under section 19 of CC Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under section 19 of the Act, can also encompass the incidental or inextricably connected directions.

V. If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases).

The first point is answered accordingly."

9. From the above, it is more than clear that an appeal under Section 19 of the Contempt of Court's Act, 1971 would be only from an order or a decision imposing a punishment for contempt. Unless there is an order or decision on punishment, the appeal under Section 19 (1) of the Contempt of Court's Act, 1971 would not be competent. So long as no punishment is imposed by the learned Single Judge, it could not be said to be exercising its jurisdiction or power to punish for contempt. Since in the case at hand, the orders dated 16.12.2020 and 10.3.2022

passed by the learned Single Judge in exercise of contempt jurisdiction merely dismiss the contempt petition, such orders are not amenable to appeal under Section 19 of the Contempt of Court's Act, 1971. But whether such orders are amenable to an appeal contemplated under Chapter VIII Rule 5 of the Rules of the Court is to be considered in the light of the provisions of Chapter VIII Rule 5 of the Rules of the Court which is quoted here-in-below:-

*"**5. Special appeal :**- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction 66[or in the exercise of the jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award--(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge."*

10. Chapter VIII Rule 5 of the Courts provides for an appeal to the Court from a "judgment". The meaning of "judgment" for the purposes of Chapter VIII Rule 5 of the Rules of the Court came to be examined by a Full Bench of this Court in the case of ***Ashutosh Shrotriya and others versus Vice Chancellor Dr. B. R. Ambedkar University and others reported in AIR 2015 All 187 (DB)***. The Full Bench after considering various judgments of the Apex Court proceeded to formulate the governing principles in Para 30 of the judgment which is reproduced as under:

"We now formulate the governing principles :

(i) The expression 'judgment' was advisedly not defined in the Letters Patents of various High Courts which conferred a right of appeal against a judgment of a Single Judge to a Division Bench of that Court;

(ii) The expression 'judgment' is not to be construed in the narrower sense in which the expression 'judgment', 'decree' or 'order' is defined in the CPC, but must receive a broad and liberal construction;

(iii) Every order passed by a trial Judge on the Original side of a High Court exercising original jurisdiction or, for that matter, by a learned Single Judge exercising the writ jurisdiction, would not amount to a judgment. If every order were construed to be a judgment, that would result in opening a flood of appeals and there would be no end to the number of orders which could be appealable under the Letters Patent;

(iv) Any interlocutory order to constitute a judgment, must possess the characteristic of finality in the sense that it must adversely affect a valuable right of a party or decide an important aspect of the trial in an ancillary proceeding. In order to constitute a 'judgment', the adverse effect on a party must be direct and immediate and not indirect or remote;

(v) In order to constitute a judgment, an interlocutory order must: (a) decide a matter of moment; or (b) affect vital and

valuable rights of the parties and must also work serious injustice to the party concerned:

(vi) On the other hand, orders passed in the course of the proceedings of a routine nature, would not constitute a judgment even if they result in some element of inconvenience or hardship to one party or the other. Routine orders which are passed by a Single Judge to facilitate the progress of a case may cause some element of inconvenience or prejudice to a party but do not constitute a 'judgment' because they do not finally determine the rights or obligations of the parties. Procedural orders in aid of the progression of a case or to facilitate a decision are not judgments."

11. Now considering the impugned orders dated 16.12.2020 and 10.3.2022 against which the present appeal has been preferred, we are of the opinion that the orders cannot in any manner be said to touch the merits of the controversy or the dispute between the parties so as to be deemed to be judgment or deemed to have been issued in exercise of powers conferred under Article 226 of the Constitution of India and thus, making them amenable to an Intra-Court Appeal under Chapter VIII Rule 5 of the Rules of the Court.

12. In view of the above discussion, the Intra-Court Appeal under Chapter VIII Rule 5 of the Rules of the Court is held to be not maintainable and is, accordingly, ***dismissed.***

(2022)07ILR A317

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 12.07.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.

THE HON'BLE MRS. SAROJ YADAV, J.

Special Appeal No. 233 of 2015

Most Rev. John Augustine Inre 406 M/S 2015 ...Appellant

Versus

Christ Church Mcconaghy School Society Lucknow & Ors. ...Respondents

Counsel for the Appellant:

Prashant Singh Atal, Ankit Singh, Dr. L.P. Misra, Pooja Singh, Pranjal Krishna, Santosh Kumar

Counsel for the Respondents:

C.S.C., Aniket Raj, Gaurav Mehrotra, Nadeem Murtaza, Rahul Srivastava, Saurabh Shankar Srivastav, Sudeep Seth

A. Special Law -Chapter VIII Rule 5 of the Rules of the Allahabad High Court Rules, 1952-Societies Registration Act, 1860 - Section 4 & 4B - Saving Clause in British Statutes(Application to India) Repeal Act, 1960, the learned Single Judge opined that the British Statutes(Repeal) Act, 2004 received the assent of the President of India on 20.02.2004 and con-joint reading of the provisions of Section 3 of Repeal Act, 1960, sub-sections (1) (2)(3) and (4) of section 1 of the Act, 1949 as well as Repeal Act, 2004 shows that what was saved by Section 3 of the Act, 1960 was the application of any statute repealed by it in relation to India and to persons and things in any way belonging to or connected with India, in any country to which India (Consequential Provision) Act, 1949 extended, therefore, assuming that the said provision saved the application of the Indian Church Act, 1927, the same stood repealed w.e.f. 20.02.2004 but this aspect of the matter was not considered by the Deputy Registrar-Moreover the Deputy Registrar did no at all consider the question as to whether the CIBC was in existence defacto or not and further neither the appellant nor any other person claiming under CIBC or CIPBC had staked any claim to the management of the society since 1970, hence their defacto existence was

seriously questionable-These findings recorded by learned Single Judge have substance for proper adjudication of the case and the Deputy Registrar has erred in not considering the aforesaid fact-Thus, the learned Single Judge rightly remanded back the matter to the Deputy Registrar to take a decision afresh in the light of Section 4 and 4-B of the Act, 1860 keeping in mind the directions of the Apex Court-Therefore, the plea of the appellant has no substance and is rejected.(Para 1 to 80) (E-6)

List of cases cited:

1. Vinod Kumar M. Malviya & ors. Vs Maganlal Mangaldas Gameti & ors. (2013) 15 SCC 394

2. Church of North India Vs Lavajibhai Ratanji Bhai & ors. (2005) 10 SCC 760

3. Vinod Kumar Mathur Sewa Malavia Vs Maganlal Mangal Das Gameti & ors. (2006) 9 SCC 282

4. A.Vs Papayya Sastry & ors. Vs Govt. of A.P. & ors. (2007) 4 SCC 221

5. Meghmala & ors. Vs G. Narasimha Reddy & ors. (2010) 8 SCC 383

6. Chairman-cum-Managing Dr. Coal India Ltd. Vs Ananta Shah & ors. (2011) 5 SCC 142

7. Kalabharti Advertising Vs Hemant Vimal Nath Naricharma & ors. (2010) 9 SCC 437

8. A.P. Aboobaker Musaliar Vs Distt. Registrar(G) Kozhikode & ors. (2004) 11 SCC 247

9. Bhavnagar University Vs Palitana Sugar Mills Pvt. Ltd. & ors. (2003) 12 SCC 111

10. St. of Mah. Vs Ramdas Srinivas Naik (1982) 2 SCC 463

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

(A) Introduction

1. The instant *intra Court* appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 has been preferred by **Most Rev. John Augustine** (*appellant herein/respondent no.3 in writ petition*), challenging the correctness of the judgment and order dated 28.05.2015 passed in Writ Petition No. 406 (M/S) of 2015 : *Christ Church McConaghy School Society, Lucknow and another Vs. Registrar, Firms, Societies and Chits, Lucknow and others*, whereby the learned Single Judge, while quashing the order dated 07.02.2015 passed by the Deputy Registrar, Firms, Societies and Chits, Lucknow, by which the General Body of the writ petitioners' society (*Christ Church Mc Conaghy School Society, Lucknow*) was declared invalid and further directed the appellant herein (respondent no.3 in writ petition), to take action for re-constitution of the Committee of Management of Christ Church McConaghy School Society, Lucknow in accordance with bye-laws, allowed the writ petition in the following terms :-

"Having pondered over the issue as to whether the dispute needs to be referred to prescribed authority under Section 25 (1) of Act 1860 the Court is of the view that it is not a fit case for such reference as the opposite party no. 3 has set up his claim based on a separate general body belonging to CIBC distinct from the one existing at present. Thus the dispute is a fundamental one and the membership of the opposite party no. 3 and his associates in the existing general body itself is disputed. Therefore, considering the complicated questions of fact and law involved, the summary proceedings under Section 25(1) would not be suited for resolution of the same. The opposite party no. 3 and his associates would also find it difficult to take recourse to Section 25(1) as they would not be able to muster 2/3rd members of the existing general body as they are basing their claim

on a different general body. In the facts and circumstances the appropriate remedy for opposite party no. 3 would be to get his rights declared in regular proceedings of a suit, whether pending or a fresh one. Till then he has no locus to interfere in the functioning of the petitioner-society nor to raise any dispute or objection with regard to it. As far as the list of officer-bearers and members of general body submitted by petitioner no. 2 for the year 2014-15 is concerned, the matter is remanded back to Deputy Registrar to take a decision afresh in the light of Section 4 and 4-B of Act 1860 keeping in mind the directions of the Supreme Court in the case of A.P. Aboobaker Musaliar Vs. District Registrar (G) Kozhikode and others (supra) and the observations made hereinabove, subject to any order or declaration by any court in favour of opposite party no. 3 in a pending or fresh suit, if filed by him or his associates.

It is made clear that the discussions made hereinabove are only for the purpose of adjudicating the validity of the order of the Deputy Registrar and any observations made shall not prejudice the rights of the parties pending adjudication in any proceedings before any court.

The writ petition is allowed in the aforesaid terms."

B. Factual Matrix

2. The facts leading to the instant *intra Court* appeal, in a nutshell, are as under:-

3. A Society has been registered under the Societies Registration Act (XXI of 1860) (hereinafter referred to as "**Act, 1860**") in the year 1947 called "Christ Church McConaghy School Society, Lucknow' (hereinafter referred to as "Society'). The objects of the Society are :- to give Christian education among the people of Lucknow; to give opportunities for teaching, witness, and worship according to the faith, doctrine and practices of the Church of India, Burma and Ceylon, and more specially to the Christian staff and students; to maintain a Christian staff sufficient to preserve and strengthen the Christian character and purpose of the institution; to provide for the care of orphans and their education; to undertake any form of work which is directed to the improvement, increase and spread of education and is for the benefit of the people of India etc.

4. Rule-3 of the Rules and Regulations of the Society refers *ex officio* members of the Society, which is reproduced as under :-

(a) The Bishop of Lucknow for the time being.

(b) The Secretary of the Board of Education of the Lucknow Diocean Council for the time being.

(c) The Principal of Christ Church Mc Conaghy School, Lucknow for the time being.

(d) The Principal of La Martiniere College, Lucknow, for the time being.

(e) The civil Chaplain, Lucknow, for the time being.

(f) The priest in-charge of the Epiphany Church, Lucknow, for the time being.

(g) The Secretary of the Indian Board of the Lucknow Diocean Council for the time being.

(h) The Secretary of the Lucknow Diocesan Trust Association for the time being.

5. Rule 4 of the Rules and Regulations of the Society refers Members of the Society, according to which, there are three classes of Members of Society viz. (i) Life Members shall be those who subscribed a sum of not less than

Rs.10,000/- to the Society, and who shall have been accepted to be Life Members of the Society by the Managing Committee; (ii) Ordinary Members shall be those who subscribed a sum of Rs.200/- to the Society as admission fee and thereafter a sum of Rs.5/- per month as monthly subscription which shall be payable either monthly or as the Managing Committee shall direct and who shall have been accepted to be Ordinary Members of the Managing Committee of the Society; (iii) Honorary Members shall be those who are ex officio members of the society and other individuals who may be elected as Members of the Managing Committee either by the Society at the Annual General Meeting, or by the Managing Committee, but such persons shall cease to be members of the Society when they cease to be members of the Managing Committee.

6. Rule 8 of the Rules and Regulations of the Society says that the business and affairs of the Society shall be managed by a Managing Committee of not less than five and not more than twelve members, elected by the Society at the Annual Meeting and at least three members of the Managing Committee shall be *ex officio* members of the Society.

7. As per Rule 9 of the Rules and Regulations of the Society, the aforesaid *ex officio* members of the Society shall be the first Managing Committee and they shall continue in office until after the first General Meeting of the Society. As per Rule 10 of the Rules and Regulations of the Society, the Office Bearers of the Society shall be a Chairman, a Vice-Chairman, a Secretary and a Treasurer and these shall be elected at the Annual Meeting of the Society. The Office Bearers shall be elected from among the members of the Society and they shall be members of the Managing Committee. The other members of the Managing Committee shall also be elected by the Annual Meeting of the Society. Nevertheless the Bishop of Lucknow, if willing to act, shall always be ex officio Chairman of the Society as per Rule 15 of the Rules and Regulations of the Society.

8. Rule 15 of the Rules and Regulations of the Society provides that the Bishop of Lucknow, if willing to act, shall be the *ex officio* Chairman of the Society, otherwise the Chairman shall be elected by the General Meeting of the Society. Rule 49 of the Rules and Regulations of the Society provides that in order that the Constitution, canons and Rules of the Church of India, Burma and Ceylon and the Constitution, Rules and Regulations of the Diocese of Lucknow may be properly safeguarded, none of the proceedings or acts of the Society shall be valid without the assent of the Bishop of Lucknow from the time being.

9. After partition of India in 1947, the erstwhile Church of India, Burma and Ceylon (hereinafter referred to as "**CIBC**') became Church of India, Pakistan, Burma and Ceylon (hereinafter referred to as "**CIPBC**'), but no such amendment was made in the Rules and Regulations of the Society and in the Rules and Regulations of the Society, the Society has continued to refer CIBC.

10. On 27th November, 1970, six Churches including the erstwhile CIPBC merged into one entity and created "the Church of India' (hereinafter referred to as "**CNI**') under Indian Churches Act, 1927 and rules/regulations framed thereunder.

11. It appears that appellant herein, while claiming himself to be Metropolitan Church of India and Bishop of Diocese of

Lucknow, had submitted an undated application to the **Deputy Registrar**, Firms, Societies and Chits, Lucknow Division, Lucknow (hereinafter referred to as "Deputy Registrar"), which was received in the office of Deputy Registrar on 14.08.2014 (Annexure No.14 of the writ petition). In the aforesaid undated application, the appellant herein had prayed that in the light of **Vinod Kumar M. Malviya and others Vs. Maganlal Mangaldas Gameti and others :** (2013) 15 SCC 394, the present Managing Committee of the Society is illegal and, therefore, the approval/registration of the list of the members/office bearers of the Managing Committee of the writ petitioners' Society be cancelled and in its place the list of members and office bearers presented by CIPBC, be registered. In the aforesaid application, it has been admitted by the appellant that since 1970 (from the date of formation of CNI), respondent no. 1/writ petitioner no.1's Society is in control and management of the members of the CNI.

12. The Deputy Registrar, vide order dated 07.02.2015, declared the entire General Body of the writ petitioners' Society as invalid and directed the appellant herein (respondent no.3 in writ petition) to take action for re-constitution of the Committee of the Management of the petitioners' society in accordance with the bye-laws.

13. Feeling aggrieved by the aforesaid order dated 07.2.2015, the respondents no. 1 and 2/writ petitioners had approached this Court by filing writ petition No. 406 (M/S) of 2015, which was allowed by the learned Single Judge while quashing the order dated 07.02.2015 vide judgment and order dated 28.05.2015.

14. Hence the instant special appeal.

15. Pleadings have been exchanged between the parties.

C. Application for Impleadment filed by applicant-The Right Revd. Dr. Peter Baldev, Bishop Diocese of Lucknow (C.M. Application No. 109924 of 2019)

16. During the course of arguments, it has been pointed out by the learned Counsel for the parties that application for impleadment filed by the Right Revd. Dr. Peter Baldev, Bishop Diocese of Lucknow (C.M. Application No. 109924 of 2019) is pending and a Co-ordinate Bench of this Court, vide order dated 20.11.2019, observed that this application for impleadment be considered at the time of final hearing of the appeal. In these backgrounds, this Court proceeds to consider the application for impleadment.

17. Shri Anil Kumar Tewari, learned Senior Advocate assisted by Shri Vivek Kumar, appearing on behalf of the applicant-the Right Revd. Dr. Peter Baldev, Bishop Diocese of Lucknow, has argued that the applicant-the Right Revd. Dr. Peter Baldev is presently the Bishop of Diocese of Lucknow, Church of North India. As per Clause-3 and Clause-15 of the bye-laws of the Society, the applicant being the Bishop of Diocese of Lucknow is the ex officio Chairman of the Society and therefore, he is vested with certain powers. He argued that after passing the interim order with regard to maintaining status quo in the present appeal vide order dated 15.06.2015, the parties inter se CIPBC and CNI maintained status quo with regard to the governance of the Society and that consequently the Society was being

managed by the CNI. He argued that after passing the interim order dated 15.06.2015, the respondent no.2 has wrongly interpreted the interim order dated 15.06.2015 and not convened the meeting of the Society in the garb of the interim order dated 15.06.2015 and subsequently wrote a letter to Mr. Ricardo Henry Soler with regard to the applicant not being the Chairman of the Society even inspite of attending the annual general meeting of the society in the year 2015 and 2016 under the Chairmanship of the applicant. Thus, the conduct of the respondent no.2 is not good. In these backgrounds, his submission is that the applicant being the Chairman has no faith in the intentions and integrity of the respondent no.2, hence the applicant be impleaded as respondent no.5 in the present appeal.

18. Per contra, Shri Santosh Kumar, learned Counsel for the appellant, Shri Gaurav Mehrotra, learned Counsel for the respondent no.2 and Shri Nadeem Murtaza, learned Counsel for the respondent no.1 have vehemently opposed the aforesaid submissions of the learned Senior Counsel for the applicant and argued that as per the Memorandum, the business and affairs of the Society shall be managed by a Management Committee (Governing Body) of the Society. Clause-19 of the bye-laws explicitly provide that in any litigation etc., it is the Secretary of the Society who has to append his/her signature and above all necessary action on behalf of the Society. He argued that applicant-Right Revd. Dr. Peter Baldev, Bishop Diocese of Lucknow, was never a party either before the learned Single Judge during the writ proceedings nor was the applicant ever represented or was a party before the Deputy Registrar, Firms, Societies and Chits, U.P., Lucknow, by whom order dated 07.02.2015 was passed which was assailed in the writ petition filed by the respondent no.1/society and the Secretary of the respondent no.1/Society. Thus, applicant-Right Revd. Dr. Peter Baldev, Bishop Diocese of Lucknow has no locus standi to seek impleadment as a respondent before this Court. They argued that the Society is already impleaded as respondent no.1 in the instant intra Court appeal. The byelaws nowhere authorize the Chairman of the respondent no.1-Society to represent the respondent no.1-Society in any litigation, therefore, the impleadment application preferred by the applicant is absolutely frivolous and not maintainable and is liable to be rejected.

19. Having examined the submissions advanced by the learned Counsel for the parties and gone through the record, it is an admitted position that applicant was not a party before the Deputy Registrar nor before the learned Single Judge in a writ proceedings. Rule 19 of the Rules and Regulations of the Society clearly indicates that it is the Secretary, who shall sue and be sued on behalf of the Society and shall be the officer to execute all legal documents on behalf of the Society. It is not in dispute that presently, the respondent no.2 is the Secretary of the Society and managing the affairs of the Society.

20. On due consideration, this Court is of the view that the applicant is not the necessary party in the present special appeal. Accordingly, **the application for impleadment filed on behalf of the applicant (C.M. Application No. 109924 of 2019) is hereby rejected.**

D. Submissions of the parties on the Merit of the special appeal.

21. Heard Shri Santosh Kumar assisted by Shri Ankit Singh and Dr. Pooja

Singh, learned Counsel for the appellant, Shri Gaurav Mehrotra, learned Counsel for the respondent no.2, Shri Nadeem Murtaza, learned Counsel for the respondent no.1 and Shri V.P. Nag, learned Standing Counsel for the State.

D.1. Submission on behalf of the appellant

22. Challenging the impugned order dated 28.05.2015 passed by the learned Single Judge, Shri Santosh Kumar, learned Counsel for the appellant argued that on 23.11.1927, the National Assembly of the Church of England approved the request for the dissolution of the union existing between the Church of England and the Church of England in India and accordingly, it passed the Indian Church Measure, 1927, providing for such dissolution and that after such severance, the Church of England in India would be free to manage its own affairs. It further mentioned that the ecclesiastical law of Church of England so far as it exists in India, shall in India cease to exist as law; and no proceeding by way of rehearing or appeal from any decision, judgment, sentence, decree or other order of any ecclesiastical court or official of the Indian Church shall be entertained, admitted, prosecuted, heard or determined in by or before any of His Majesty's Courts of Justice in India or elsewhere, any Court of Commissioners delegate in India or his Majesty in Council. On 22.12.1927, the British Parliament passed an Act, known as the "Indian Church Act, 1927', by which union between Church of England and Church of England in India was dissolved and Church of England in India was free to manage its own affair. Later on, after creation of Pakistan from Indian mainland, the Church of England in India was succeeded by the Indian Church known as "CIPBC'. The Christ Church was established within the jurisdiction of CIPBC for the purpose of imparting education through Christ Church School and Christ Church College.

23. Shri Santosh Kumar has argued that on 23.03.1948, Ministry of Defence of the Government of India addressed a letter to Metropolitan of India, Burma and Ceylon, Calcutta; the Secretary of Church of Scotland Colonial Chaplaincy, Board In India; Apostolic Delegate of East Indies in Banglore; and Roman Catholic Archbishop of Bombay, stating therein that all Anglican Churches included in the list of maintained Churches (Second Schedule to Indian Church Act, 1927), which will have the effect of vesting them in the Indian Church Trustees w.e.f. 04.01.1948 and the Anglican Churches being maintained at State expenses will not be maintained by the Government after wind up of ecclesiastical affairs and they will also be transferred to Indian Church Trustees w.e.f. 1st April, 1948.

24. Learned Counsel for the appellant argued that on 26.12.1960, the Indian Church Act, 1927 was repealed but in the saving clause, it was declared that the repeal shall not affect the operation of any such statute in relation to India or person(s) or things connected to India. According to him, allegedly on 27.11.1970, Church of North India (CNI) came into existence out of the union of six churches, namely, (i) the Council of Baptist Churches in Northern India, (ii) the Church of the Brethren in India, (iii) the Disciples of Christ, (iv) the Church of India (formerly known as the Church of India, Pakistan, Burma and Ceylon), (v) The Methodist Church (British and Australasian Conferences), (vi) the

United Church of Northern time. His submission is that CNI is neither registered as a Society nor a Company in the present time and CNI was never empowered to manage the affairs of the Society.

25. Sri Santosh Kumar has argued that on 20.02.2004 Indian (Consequential Provision) Act, 1949 was repealed vide British Statutes (Repeal) Act, 2004 (Act 17 of 2004). His submission is that the effect of the enactments of British Statutes (Repeal) Act, 2004, the British Statutes (Application to India) Repeal Act, 1960 and the India (Consequential Provision) Act, 1949 is that by virtue of the Church of India known as CIPBC in view of the Section 6 of the General Clauses Act, 1897 is a statutory body having been created under the statute i.e. Indian Church Act, 1927. He argued that Section 6 of the General Clauses Act, 1897 provides that the repeal shall not affect the previous operation of any enactment so repealed; affect any right privilege, obligation or liability acquired/accrued under any enactment so repealed etc. Therefore, the provisions of Indian Church Act, 1927 remained in force because the operation of the Statute does not get affected even after the repeal of the Act.

26. It has been argued by the learned Counsel for the appellant that the Society (Christ Church McConaghy School Society) was registered under the Act, 1880 in Uttar Pradesh with the objective of imparting Christian education and opportunities for teaching witness and worship according to the faith, doctrine and practices of the CIBC (earlier CIPBC) and more especially to Christian staff and students as stated in its Memorandum of Association. His submission is that the Society is to be run and managed by CIPBC Lucknow Diocease. Section 49 of the bye-laws of the Society states that the acts of the Society shall be done with the assent of Bishop of Lucknow. However, the registration of the Society had expired and was not renewed since 1977. On 17.04.2002, the registration of the Society was renewed but without disclosing to the Deputy Registrar that as per the bye-laws of the Society, its affairs were to be managed by the CIPBC Lucknow Diocese. He argued that the said renewal was sought by furnishing fraudulent information and the list of the Society contained various irregularities, viz. the Committee of Management list of Society for the years 1977-1978 and 2001-2002 was not countersigned by the old members and whatever subsequent addition and alterations was made in the list thereon was also not countersigned by the old members which is major irregularity. He argued that till now, the Society had no connection with CNI. In these backdrops, his submission is that the Society has never been dissolved and no dissolution has at all taken place and, therefore, the affairs of the Society including the properties of the Society and the Institution have to be managed by the Church of CIPBC, Lucknow Diocease and none else and any other claimant is nothing but a usurper.

27. Learned Counsel for the appellant has contended that appellant had filed a suit, bearing Regular Suit No. 104 of 2003, before the Court of Civil Judge (Senior Division), Lucknow, seeking a decree of declaration to the effect that all the properties including the property in question are lawfully held by CIPBC and further restraining the defendants therein from administering and managing affairs of the property in question. The learned Civil Judge (Senior Division), Lucknow, vide

order dated 28.05.2003, granted interim protection in favour of CIPBC. Thereafter, on 24.02.2005, the appellant was elected and enthroned as the Bishop of Lucknow by the Lucknow Diocesan Council as per the provisions of the Constitutions, Cannons and Rules of the CIPBC. The certificate of enthronement duly signed by the concerned authorities has been annexed as Annexure No. 3 to the instant special appeal.

28. Sri Santosh Kumar has further submitted that the question as to whether the CNI is a successor of the CIPBC is no more res integra and now it is a settled position that the CIPBC has not become non-existent and the CNI is not the successor of the affairs and properties of the CIPBC in view of the judgment of the Apex Court rendered in **Church of North India Vs. Lavajibhai Ratanji Bhai and others** : 2005 (10) SCC 760, **Vinod Kumar Mathur Sewa Malavia Vs. Maganlal Mangal Das Gameti and others** : 2006 (9) SCC 282, and **Vinod Kumar M. Malvia etc. Vs. Maganlal Mangal Das Gameti and others** : 2013 (15) SCC 394.

29. Learned Counsel for the appellant has argued that in the year 2008, the appellant had filed a transfer petition bearing no. 680/2008, before the Apex Court seeking transfer of the Regular Suit No. 104 of 2003 pending before the Civil Judge (Senior Division), Lucknow from Lucknow to New Delhi, which was allowed by the Apex Court. After transfer, the Regular Suit No. 104 of 2003 has been renumbered as CS (OS) 2685 of 2008 and is pending before the Hon'ble Delhi High Court. In the meanwhile, in view of the dictum of the Apex Court in **Vinod Kumar M. Malvia etc. Vs. Maganlal Mangal Das Gameti and others (supra)**, the appellant being the Bishop of CIPBC filed a complaint to the Deputy Registrar against the Managing Committee of the respondents' Society along with documents on 14.08.2014. On 04.09.2014, the Deputy Registrar issued notice to the respondent no.2. In response thereof, the respondent no.2 filed reply to the complaint on 25.11.2014. On 05.12.2014, the appellant filed rejoinder along with documents. Thereafter, pleadings were exchanged between the parties. On 07.02.2015, the Deputy Registrar examined the entity of the two churches, namely, CIPBC and CNI as both claimed their control over the affairs of the Society and the Deputy Registrar, after examining the issue in detail, has declared the entire general body of the Society as invalid and while affirming that the appellant is the rightful Bishop of Lucknow Diocese, directed him to take action for reconstitution of the Committee of Management of the Society in accordance with bye-laws of the Society and submit a status report thereafter. Not satisfied by the order of the Deputy Registrar dated 07.02.2015, respondent no.1 and 2 herein approached this Court by filing Misc. Bench No. 406 of 2015, which was allowed by the learned Single Judge vide impugned judgment and order dated 28.05.2015 while setting aside the order dated 07.02.2015 on the ground that the Deputy Registrar has exceeded its jurisdiction in determining the validity of Churches and further remitted the matter back to the Deputy Registrar and directed him to take a decision afresh in the light of Sections 4, 4B and 25 (2) of the Act, 1860 in regards to the list of office bearers and members, submitted by the respondent no.2 for the year 2014-15. Feeling aggrieved, the appellant has filed the instant appeal.

30. Submission of the learned Counsel for the appellant is that learned Single Judge, while passing the impugned order dated 28.05.2015, has erred in not appreciating the fact that the list of office bearers of the Management Committee and the General Body members as submitted by the respondent no.2 was not in conformity with the bye-laws of the Society nor in consonance with Section 4 of the Act, 1860, which requires the counter signature of the outgoing office bearers. He further argued that the Deputy Registrar had lawfully exercised statutory jurisdiction vested in it while passing the order dated 07.02.2015 as the complaint filed by the appellant before the Deputy Registrar was within the ambit of inquiry under Section 4B of the Act, 1860. He argued that Section 4 of the Act, 1860 requires a regular annual general meeting of Society and filing of list of members with Registrar. Subsequently, by U.P. Act No. 25 of 1958, Section 4 of Act, 1860 was amended, by which words "*Registrar of Joint-stock Companies*' were substituted by word "Registrar'. Another amendment was made by U.P. Act No. 52 of 1975 and existing Section 4 was renumbered as sub-section (1) and thereafter sub-section (2) was inserted w.e.f. 10.10.1975. A further amendment was made by U.P. Act No. 11 of 1984 w.e.f. 30.04.1984 and in sub-section (1), a proviso was inserted i.e. *if the managing body is elected after the last submission of the list, the counter-signatures of old members, shall, as far as possible, be obtained on the list. If the old office-bearers do not countersign the list, the Registrar may, in his discretion, issue a public notice or notice to such persons as he thinks fit inviting objections within specified period and shall decide all objections received within the said period.* Thereafter, a new section i.e. 4-A was inserted by U.P. Act No. 52 of 1975 w.e.f. 10.10.1975. Subsequently, Section 4-B was inserted by U.P. Act No. 23 of 2013 published in U.P. Gazette Extra-ordinary dated 09.10.2013. He argued that the reason for insertion of Section 4-B mentioned in "Statement of Objects and Reasons' of U.P. Act No. 23 of 2013 is that there is no provision of filing of list of General Body of Society and a large number of disputes in Societies are raised due to non-existence of correct list of General Bodies with Registrar. According to him, the list of members of General Body of the Society has to be filed at the time of registration or renewal of society and in the list, name, father's name and occupation of members must be mentioned. Thus, the Registrar is under a statutory duty to examine correctness of list of members of General Body of such Society on the basis of register of members of General Body and minutes thereof, cash book, receipt book of membership fee and Bank pass book of Society. If a member is not included in list, whether such non-inclusion also can be examined by the Registrar, is not very clear from sub-section (1) of Section 4-B of the Act, 1860 but this is made clear by sub-section (2) of Section 4-B of the Act, 1860, which provided that if there is any change of list of members of General Body of the Society referred to in sub-section (1) of Section 4-B of the Act, 1860 on account of induction, removal, registration or death of any member, a modified list of members of General Body shall be filed with Registrar within one month from the date of change.

31. It has been pointed out by the learned Counsel for the appellant that bare perusal of the aforesaid provisions shows that at the time of registration or renewal, a list of members of General Body of Society

has to be filed by Assistant Registrar. Thereafter, whenever there is any change in the said list, same has to be informed to Registrar by submitting a modified list of members of General Body. When such a modified list is submitted to Registrar, examination allowed to be made by Registrar in respect of correctness of list of members of General Body in terms of sub-section (1) of Section 4-B of the Act, 1860, would also include removal of member(s) for the reason, when modified list is communicated to Registrar, whether modification is on account of induction or removal in any manner, both aspects and correctness thereof, can be examined by Registrar. The intendment of Legislature under Section 4 and Section 4B of the Act, 1860 is to empower the Registrar to examine correctness of any inclusion, alteration or change in the list of Membership of Society, particularly when an objection is raised. According to him, in the instant case, the Registrar in its order dated 07.02.2015 has examined the relevant records and has found the facts evident from record that list submitted by the respondents /writ petitioners' society for the year 2013-2014 is not in consonance with bye-laws of Society.

32. Learned Counsel for the appellant has argued that the Society remained unregistered from 1977 to 16.04.2002. The alleged Secretary of the Society had moved a letter dated 08.03.2002, requesting for renewal of Society from 27.10.1947 to March, 2002 and had thereby also filed a list of Committee of Management from the year 1977-1978 to 2001-2002 in haste and with a fraudulent intention, as the same was not countersigned by old members of the Society as mandated by law. Thereafter, the list of members submitted for the year 1981-82 had new members added in serial nos. 3, 4, 5 and 8 but the same was again not countersigned by old members. Further, in 1985, new names were added at serial no. 2, 3 and 7 of the list of members of the Society but again the same was not signed in accordance with Section 4 of the Act, 1860. Further, in 1986-87, the same irregularity was repeated. Moreover, the renewal of the registration of the Society in the the year 2002 was sought without disclosing to the Deputy Registrar that as per the bye-laws of the Society, the affairs of the same were to be run by CIPBC. Thus, the Deputy Registrar has lawfully declared the entire General Body of the respondent no.1's Society as illegal.

33. Learned Counsel for the appellant has further argued that no election of the Society was held till 2003, but the registration of the Society of the respondent no.2 was renewed on the basis of list of office bearers and proceedings of election on 16.04.2002. Further, the Secretary of the Society has submitted a list of 14 members to the Deputy Registrar and the Society's all ex officio members are related to CNI, which are both in clear contravention of the Rule 8 of the Rules and Regulations of the Society. However, the learned Single Judge, while passing the impugned order, has not paid any regards to the irregularities made by the respondents' Society.

34. Learned Counsel for the appellant has next argued that CNI has no role to play in the management of Society, which was formed in 1947 with the object of pursuing ideals of CIBC as mentioned in the Rules and Regulations of the Society in the wake of the judgment of the Apex Court in **Vinod Kumar M. Malviya and others Vs. Maganlal Mangaldas Gameti and others (supra)**. Hence CNI does not have any locus poenitentiae in

administration and running Chirst Church College but the learned Single Judge, while passing the impugned order, misinterpreted the judgment of the Apex Court rendered in **Vinod Kumar M. Malviya and others Vs. Maganlal Mangaldas Gameti and others (supra)** and also erred in appreciating the fact that CNI has ceased to have any legal existence whatsoever.

35. The next argument of the learned Counsel for the appellant that the CNI has continued to manage the Society under the assumption of validity of merger till it was declared otherwise. They are usurpers of office bearers by playing fraud. His submission is that fraud vitiates every solemn act, which cannot be validated even if continuing for a long period. To substantiate his submission, he has placed reliance upon the judgment of the Apex Court in **A.V. Papayya Sastry & Ors Vs Government of Andhra Pradesh. & Others :** 2007 (4) SCC 221 and **Meghmala & Ors vs G. Narasimha Reddy & Ors** : 2010 (8) SCC 383.

36. Learned Counsel for the appellant has next argued that CNI cannot be a successor of the Society and it cannot be successor of CIPBC as merger is illegal. He argued that the British Parliament enacted the Indian Church Act, 1927, wherein it dissolved the union between Church of England and the Church of England in India, whereby the Church of England in India was free to manage its own affairs. Thereafter, the Indian Church Act, 1927 created a body known as Church of India, which later came to be known as CIPBC after partition of Pakistan from India. The Indian Church Act, 1927 was then repealed on 26.12.1960, however, in Section 3 of the said Act, titled as "Savings', it was declared that the repeal shall not affect the operation of any statute in relation to India and to persons and things in anyway belonging of any statute in relation to India and to person and things in anyway belonging to or connected with India. He pointed out that it is well settled law that "saving' implies "saving' of all right which the parties previously had and does not conferring any new rights upon the parties covered under the law being repealed. Moreover, Section 1 (1) of the India (Consequential Provision) Act, 1949 also stated that the pre-existing laws will, continue to operate until India, after becoming a Republic, passes a law to the contrary. Thereafter, India (Consequential Provision) Act, 1949 was repealed by British Statutes (Repealed) Act, 2004 (Act of 2004) w.e.f. 23.02.2004. The effect of repeal of British Statutes (Repealed) Act, 2004, British Statutes (Application to India) Repealed Act, 1960 and the Indian (Consequential Provision) Act, 1949 was that, CIPBC, in view of Section 6 of the General Clauses Act, 1897, was now a statutory body having been created under the Indian Church Act, 1926. His submission is that it can be easily inferred from the aforesaid that Indian Church Act, 1927 remained in force even after it was repealed, as the repeal did not affect the operation of the Statute. Hence, the CIPBC continued to exist. In these backdrops, his submission is that the learned Single Judge has erred in came to the conclusion that the CIPBC was in existence *de facto*, whereas there is sufficient proof to show that indeed CIPBC continues to exist and CNI has no existence in the eyes of law.

37. Learned Counsel for the appellant has further argued that as per the judgment and order dated 23.04.2012 passed by the High Court of Gujarat in First Appeal Nos. 1535 and 1536 of 2009 and the judgment of

the Apex Court in ***Vinod Kumar M. Malavia etc. Vs. Maganlal Mangaldas Gameti & Ors (supra)***, there has been only resolutions in regard to the union of the six churches but such resolutions cannot affect the composition of the Church of India (CIPBC) created under the Indian Church Act, 1927. Further, the resolutions were neither exhibited nor proved in accordance with law. His submission is that the Rules and Regulations of the Society were never amended and in view of the same, CIPBC continued to be its governing body and the affairs, were still attributed to the Bishop of Lucknow, which is the appellant himself in the present case. In support of his submission, he has relied upon **CNI Vs. Lavaji Ratanji Bhai : 2005 (10) SCC 760 and Vinod Kumar Mathursewa Malavia vs. Maganlal Mangaldas Gameti & Ors : 2006 (9) SCC 282.**

38. Learned Counsel for the appellant has also argued that if the edifice or foundation of action falls, the superstructure would automatically falls. In support of his submission, he relied upon **Chairman-cum-Managing Director Coal India Ltd. Vs. Ananta Shah and others :** 2011 (5) SCC 142 and **Kalabharti Advertising Vs. Hemant Vimal Nath Naricharma and others :** 2010 (9) SCC 437.

39. Learned Counsel for the appellant has also argued that CNI is not entitled to manage the affairs of the Society. The bye-laws of the Society unequivocally shows that Bishop of diocease of Lucknow shall be Chairman of Society. According to him, the appellant was enthroned as the Bishop of Diocease of Lucknow on 24.02.2005 by the Lucknow Dioceasan Council as per the provisions of the Constitution, Canons and rules of the CIPBC at Christ Church, Hazratganj, Lucknow by Bishop's of the CIPBC. A certificate of enthronment has also been issued to the appellant which is duly signed by the concerned authorities. Moreover, the enthronement of the appellant as the Bishop of Lucknow Diocease has not been contested by the respondents' Society. In fact the order dated 07.02.2015 was passed by the Deputy Registrar while considering this fact only. This fact has also not been disputed by the respondents' Society. His submission is that a bare perusal of the Memorandum of Association and Rules and Regulations of the Society makes it clear that the Society is to be run by CPIBC and the Bishop of Lucknow has to be its Chairman alone.

40. Learned Counsel for the appellant, therefore, argued that the observation of the learned Single Judge that CNI was in control of management of the Society since past 34 years does not hold good as long continuation in management is not a ground for perpetuating illegality. Moreover, CIPBC had filed a Regular Suit No. 104 of 2003,, which was subsequently transferred to Delhi High Court and marked as CS (OS) No. 2685 of 2008, in which an interim injunction was granted by the Court in favour of CIPBC, in respect of the properties owned and lawfully held by the CIPBC including the Christ Church Lucknow property, and the same is still operative. The learned Single Judge has passed the impugned order dated 28.05.2015 without considering the operative interim injunction.

41. Lastly, learned Counsel for the appellant has argued that the observation of the learned Single Judge that CNI was in control of management of the Society since past 34 years does not hold good as long as continuation in management is not a

ground for perpetuating illegality. Thus, the impugned order is liable to be quashed.

D.2 Submission of the respondent no.2

42. Shri Gaurav Mehrotra, learned Counsel for the respondent no.2, while supporting the impugned judgment and order dated 28.05.2015, has argued that respondent no.1 herein is a Society under the Act, 1860, which was established and registered under the Act, 1860, in the year 1947. As per recitals contained in the bye-laws of the respondent no. 1's society, it was formed inter alia to give Christian education and opportunities for teaching, witness and worship according to the faith, doctrine and practices of the "CIBC' and more specially to the Christian staff and students. After creation of Pakistan, the erstwhile CIBC became CIPBC but no such amendment was made in the bye-laws of the respondent no. 1's Society, which continued to refer CIBC.

43. Learned Counsel for the respondent no.2 has argued that in the year 1970, six Churches including the erstwhile CIBC merged into an entity, namely, CNI. The respondent no.2 and his associates indisputably are followers of the CNI and the appellant i.e. the rival claimant, is the follower of the CIBC and he is the Bishop of Lucknow Diocease. It is not disputed that ever since the formation of CNI, the respondent no.1's Society is in control and management of members of the CNI. This fact has also been admitted by the appellant in his application/complaint dated 14.08.2014.

44. Shri Gaurav Mehrotra has argued that on 30.09.2013, the Apex Court has passed the order in **Vinod Kumar Malviaya etc. Vs. Maganlal Mangaldas Gameti and others (supra)**, holding that merger of First District Church of Brethren (hereinafter referred to as "**FDCB**") vide resolution dated 17.02.1970 was not in accordance with the provisions for such merger/dissolution prescribed under Act, 1860 and the Bombay Public Trust Act (hereinafter referred to as "**BPTA**") under which it was registered and, therefore, was illegal. He argued that out of six churches, which merged resulting in the formation of CNI in the year 1970, FDCB was a society registered under the Act, 1860 as also a trust registered under BPTA and other five churches were neither societies nor trusts registered under the aforesaid four Acts nor were they registered under any other statute. His submission is that erstwhile CNI was creation of a statute consequent to the Indian Church Measure Act, 1927, by which the union between the erstwhile Church of England and the Church of England in India was severed/dissolved and the Church of India came into being, unfettered by any control by the Church of England or the Church of England in India. The Act, 1972 was repealed by the British Statutes (Application to India) Repeal **Act, 1960** (hereinafter referred to as "Act, 1960") insofar as it extended to and operated as part of law of India or any part thereof, subject however, saving its operation in relation to India and to persons and things in any way belonging to or connected with India in the country to which India (Consequential Provision) Act, 1947 (hereinafter referred to as "Act, 1947") extended. The Act, 1949 referred in Section 3 or 6 was repealed by the British Statutes (Repeal) **Act, 2004** w.e.f. 23.02.2004 (hereinafter referred to as "Act, 2004").

45. Learned Counsel for the appellant has argued that the genesis of pronouncement of **Vinod Kumar M.**

Malviya (supra) was a dispute challenging the said merger of FDCB by filing objections by members of FDCB Gujarat Chapter before the Charity Commissioner regarding change of reports, before the Charity Commissioner under the BPTA. The question before the Charity Commissioner were (i) whether the change was legal, (ii) whether the said change reports or any of the change reports are liable to be allowed. The Charity Commissioner answered both the question in affirmative and dismissed the objections against the change reports, allowed the properties vested in FDCB to be vested in CNI.

46. Shri Mehrotra argued that against the order of the Charity Commissioner, the objectors preferred an application before the City Civil Court, Ahmedabad under Section 72 of the BPTA alleging that there was no lawful merger of the trust and the property vested with the Property Committee continued to exist with it. He argued that the questions which arose before the learned City Civil Judge were (i) Whether the Society is dissolved and secondly, whether the Trust i.e. FDCB is also dissolved, (ii) Whether CNI is successor of the Trust i.e. FDCB, (iii) Whether by mere merger of FDCB into various other churches, the properties are by rules and regulations of the Society ipso facto vested in CNI, without having to perform any other obligation or formality. The learned City Civil Court opined that FDCB had not been dissolved as there was no proper proof of the same. Furthermore, as the trust and society are creations of statutes, they must be dissolved accordingly and the question of merger is a factual one, wherein the merging trust continues to exist unless specifically dissolved under the statute. Furthermore, without following Section 50-A of the BPTA which deals with the dissolution of trust, FDCB property cannot be vested with CNI. Thus, the learned Civil Court Judge quashed and set-aside the order of Charity Commissioner.

47. It has been argued by the learned Counsel for the appellant that against the aforesaid order of learned Civil Court Judge, first appeals were filed before the High Court of Gujarat, wherein the basic issue before the learned Single Judge was to determine whether CNI is the successor and legal continuation of FDCB or not. The Gujarat High Court dismissed the appeal and confirmed the order of the Civil Court. Thereafter, the matter went up to the Apex Court, which was eventually decided in **Vinod Kumar M. Malviya (supra).**

48. Shri Mehrotra has argued that as per paragraph-13 of **Vinod Kumar M. Malviya (supra)**, the primary issue for consideration before the Apex Court was "whether the alleged unification of the First District Church of Brethern with Church of North India is correct or not'. The Apex Court held that FDCB being a society registered under the Act, 1860 as also a trust under the BPTA. It could only be dissolved/merged as per the provisions of the said Acts and not otherwise. It also held that unless the properties vested in FDCB are divested in accordance with the provisions of the Act, 1860 and BPTA, merely by filing change reports CNI cannot be claim merger of trust and thereby the properties would vest in them. The passing of the resolution in the year 1970 in this regard was nothing but an indication to show the intention to merge and nothing else. In these backdrops, the Apex Court upheld the judgment of the City Civil Court and the High Court of Gujarat on the

ground that there was no dissolution of the society and further the merger was not carried out in accordance with the provisions of law. It was further held that the Society and the trust being creatures of the Statute, have to resort to the modes provided by the statute six for amalgamation and the so called merger cannot be treated or cannot be given effect to the dissolution of the trust without taking any steps in accordance with the provisions of law, the effect of resolutions or deliberations is not acceptable in the domain of law. Thus, facts and circumstances of **Vinod Kumar M. Malviya (Supra)** is entirely different from the facts and circumstances of the instant case, hence the learned Single Judge has rightly observed that **Vinod Kumar M. Malviya (Supra)** is not applicable in the facts and circumstances of the instant case.

49. Shri Gaurav Mehoratra, learned Counsel for the respondent no.2 argued that after about ten months of the judgment of the Apex Court in **Vinod Kumar M. Malviya (Supra)**, the appellant preferred an undated application/complaint before the Deputy Registrar on 14.08.2014, enclosing therewith the list of alleged members of the Governing Body of the respondent no.1-Society for the year 2013-14 and 2014-15 as also an alleged list of General Body containing 12 names. He argued that the lists submitted by the appellant did not bear the signatures of the outgoing members and office bearers as required under Section 4 of the Act, 1860. However, the Deputy Registrar issued notice to the respondents no. 1 and 2 on 04.09.2014 on the aforesaid application/complaint preferred by the appellant. In response thereof, the respondents no. 1 and 2/writ petitioners filed their objections on 25.11.2004. Thereafter, the appellant filed replication on 05.12.2014 annexing therewith a modified list of members of general body. He argued that while the earlier list which was submitted along with application 14.08.2014 comprised 12 members, the subsequent list comprised 18 members including the respondent no.2 as ex *officio* member.

50. Shri Mehrotra has pointed out at this stage that the election of the Committee of Management of respondent no.1-Society in the meanwhile were held on 29.11.2014 and the list of office bearers for the year 2014-15 along with the list of members of general body were submitted by the respondent no.2 in November, 2014 before the Deputy Registrar under Section 4 and 4-B of the Act, 1860. The Deputy Registrar, while passing the order dated 07.02.2015, exercised his powers under Section 4 of the Act, 1860 and considered the genesis of the Act, 1927 and Act, 1960 etc. The Deputy Registrar also considered the judgment of the Apex Court rendered in **Vinod Kumar M. Malviya (supra)** and opined that as per the decision of the Apex Court in **Vinod Kumar M. Malviya (supra)**, the formation of CNI was declared illegal and its occupation over the immovable properties of CNI had ceased consequent to the aforesaid dictum of the Apex Court and the provisions/rules of CNI are not applicable to the respondent no.1-Society. Therefore, CNI (subsequently CIBC and thereafter CIPBC) which was still in existence, in view of saving clause 3 of the Act, 1860, was entitled to control and manage the affairs of the respondent no.1-Society in view of the contents of its bye-laws which refer CIBC but nowhere refer CNI. The Deputy Registrar has also referred to the object of the respondent no.1-Society as mentioned in the bye-laws.

The Deputy Registrar has further opined that the appellant/respondent no.3 was the Bishop of Lucknow Diocese of the CIPBC and his election/appointment thereon was valid, therefore, he was entitled to function as Chairman of respondent no.1-Society. Consequently, the Deputy Registrar had accepted the lists submitted by the appellant and rejected those lists submitted by the respondent no.2/writ petitioner no.2. The rejection of the list submitted by the respondent no.2 was based on deficiencies therein as they were not in conformity with the provisions of the bye-laws. According to the Deputy Registrar, the list of the office bearers submitted by the respondent no.2 for the year 2007-08, 2008-09 and 2009-10 mentioned 13, 14 and 14 members, respectively, whereas the bye laws permitted only a maximum of 12 members. The Deputy Registrar has further opined that the inclusion of Vinod B. Lal Legal Advisor and Daniel Subhan as ex officio members was contrary to byelaws 3, therefore, he did not accept the list submitted by respondent no.2. Vide order dated 07.02.2015, the Deputy Registrar has directed the appellant to constitute the Committee of Management of respondent no.1 society as per its byelaws and submit the same.

51. Shri Mehrotra has further submitted that aforesaid order of the Deputy Registrar dated 07.02.2015 was challenged by the respondent no.1 and 2/writ petitioners before this Court in Misc. Single No. 406 of 2015. The learned Single Judge ultimately allowed the writ petition vide judgment and order dated 28.05.2015. He argued that the learned Single Judge, while passing the impugned order dated 28.05.2015, had framed two issues i.e. (i) whether the Deputy Registrar exceeded his powers as provided under Act, 1860; (ii) the applicability of pronouncement of the Apex Court in the matter of **Vinod Kumar M. Malviya (supra)**. The learned Single Judge considered the provision contained in Section 4 of the Act, 1860 and also the scope of Section 4 of the Act, 1860. After considering the aforesaid, the learned Single Judge has rightly came to the conclusion that the Deputy Registrar had exceeded its jurisdiction as vide order dated 07.02.2015, the Deputy Registrar decided certain issues, which were clearly beyond the pale of Section 4 of the Act, 1860 as under Section 4 of the Act, 1860, the Deputy Registrar was not empowered to decide any lis pertaining to control and management of the respondent no.1-Society nor the validity or continuance of the Committee of Management in control since 1970 or its office bearers or their election.

52. Sri Mehrotra has drawn our attention to the subject of the application preferred by the appellant before the Deputy Registrar dated 14.08.2014 and argued that the subject of the said application was disapproval/cancellation of the "existing illegal Committee of Management and registration of the Committee of Management and its members/office bearers as presented by CIPBC. Thus, from the heading of the application as also its contents it was evident that appellant/respondent no.3 claiming himself to be part of CIPBC and its Bishop of Lucknow was laying claim to the management of the respondent no.1/society solely based on the judgment of the Hon'ble Supreme Court of India in **Vinod Kumar M. Malviya (supra)** and nothing else. The learned Single Judge, while appreciating the fact that appellant/respondent no.3 that the appellant in his application had admitted the fact that respondents nos. 1 and 2 herein/writ

petitioners were in control of the management of the respondent no.1/society since 1970, has rightly opined that it was not a case where two lists of the office-bearers had been submitted by the rival groups of the Society but a case of submission of a list of office bearers by persons including the appellant/respondent no.3 herein, who are strangers to the respondent no.1/society. Further, learned Single Judge has opined that prior to 14.08.2014, appellant/respondent no.3 never laid any claim to the management or membership of the respondent no.1/society and it was not their case that they were original members of the respondent no.1/society prior to 1970, hence the appropriate course for the appellant/respondent no.3 herein and his associates was to get their rights to manage the aforesaid respondent no.1/society declared by appropriate forum either under Section 25 (1) of the Act, 1860 or better in regular proceedings by a civil Court and the Deputy Registrar should not have initiated the proceedings on the basis of the application of the appellant/respondent no.3. His submission is that these findings recorded by the learned Single Judge is in accordance with law and also in accordance with Act, 1860.

53. Sri Mehrotra has further argued that the learned Single Judge has rightly placed reliance upon **A.P. Aboobaker Musaliar Vs. District Registrar (G) Kozhikode and others** : (2004) 11 SCC 247 and has rightly remanded back the matter to the Deputy Registrar to take a decision afresh in the light of Section 4 and 4-B of the Act, 1860 keeping in mind the ratio laid down in **A.P. Aboobaker Musaliar (supra)**.

54. Sri Mehrotra, learned Counsel for the respondent no.1 has next argued that the appellant is habitual of committing such frauds, with the intention of illegally and unauthorizedly usurping the Management of the Societies related to various Christian organizations. The aforesaid is evident from the fact that earlier also in the year 2010, an application was moved by the appellant/respondent no.3 in respect of the Society at Allahabad, namely, *The Allahabad High School Society*' duly registered under the Act, 1860. Vide the aforesaid application dated 12.04.2012, the respondent no.3 had made an attempt to illegally get the proceedings initiated before the Assistant Registrar, Firms, Chits and Societies at Allahabad with an intention to usurping the Management of the afore-named Society, although the issue pertaining to the Management of the aforesaid Society had attained finality till the level of the Hon'ble Supreme Court of India. On the aforesaid application dated 12.04.2012, the Registrar, Firms, Societies and Chits, Lucknow, vide its order dated 14.05.2012 sought report from the Assistant Registrar, Allahabad Region, Allahabad. Against the aforesaid order of Registrar, Firms, Societies and Chits, a Writ Petition, bearing Writ-C No. 31962 of 2012 was preferred by the Allahabad High Court Society, in which this Court, vide order dated 05.07.2012, issued direction for keeping the aforesaid dated 14.05.2012 in abeyance.

55. Sri Mehrotra has pointed out that in view of the grounds urged in Ground "Q' and Ground "U' of the memo of the appeal and averments contained in paragraphs 49 and 59 of the affidavit in support of the application for interim relief, the instant special appeal is not maintainable and the remedy of the appellant/respondent no.3 would lie in filing appropriate application for review before the learned Single Judge. In support of this submission, he has relied

upon **Bhavnagar University Vs. Palitana Sugar Mills Pvt. Ltd. and others** : 2003 (12) SCC 111 and **State of Maharashtra Vs. Ramdas Srinivas Naik** : (1982) 2 SCC 463.

56. Learned Counsel for the respondent no.2 has further argued that appellant/respondent no.3 claiming himself to be Arch Diocesan of Lucknow and Attorney Holder of Indian Church Trustees had filed a suit for declaration and permanent injunction in the Court of Civil Judge (Senior Division), Lucknow, which was registered as Regular Suit No. 104 of 2003. In this suit, the appellant has sought a declaration that the properties in dispute mentioned in Schedule No.1 to the plaint are the properties of the plaintiff and the defendants have no right, title and interest in the same as also a permanent injunction for restraining the defendants, their officers, members or any other person claiming or acting on behalf of defendants from interfering into the enjoyment of the properties of the plaintiff indicated in Schedule No.1 to the plaint and also from alienating these properties in any manner whatsoever. He pointed out that the Church of North India Trust Association and Moderator of Church of North India Trust Association were the defendants in the said suit. Schedule No.1 to the said plaint was in fact Schedule no.2 to the Act, 1927, wherein Christ Church was mentioned as Church under Diocese of Lucknow and Saint Thomas Church of Gonda was also mentioned. He argued that vide order dated 20.10.2008 passed by the Apex Court in Transfer Petition (Civil) No. 680 of 2008 filed by the appellant/respondent no.3, the aforesaid suit was transferred in the Hon'ble High Court of Delhi at New Delhi and after transfer, the aforesaid suit was re-numbered as CS (OS) No. 2685 of 2008 : *Church of India and another Vs. Church of North India Trust Association* and others and the same is pending consideration before the Hon'ble Court of Delhi. In the meanwhile, various other frivolous suits were filed with respect to succession and control of Church properties of Church of North India situated in various places including the diocese of Lucknow, out of which a majority of suit vide orders passed by the Hon'ble Apex Court have been transferred to the Hon'ble Delhi High Court for determination of issue of succession of Church of India wherein the appellant himself is a party in some of the suits. The Hon'ble High Court of Delhi is now ceased with the aforesaid suits and is hearing the matter. The matter after being listed on several dates was at the stage of evidence. In the meanwhile, an interlocutory application bearing IA No. 10822 of 2017 under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 was filed by the plaintiffs seeking the amendment of the plaint. He pointed out that a perusal of prayer no. ii, which has been sought by means of the aforesaid amendment application under Order VI Rule 17 read with Section 151 C.P.C. would reveal that the plaintiffs of the aforesaid suit are *intar alia* seeking categorical declaration by means of the amendment in prayers to the effect that the Act of Unification of six churches held in November, 1970 into Church of North India (CNI) be declared illegal, null and void and inoperative. He pointed out that plaintiff no.2 in the aforesaid civil suit, bearing No. CS (OS) No. 2685 of 2008 is "*Vulnerable and Father John Augustine, aged about 40 years, son of Late Dr. Z. Augustine, resident of St. Mary's Para Road, Rajajipuram, Lucknow* i.e. the appellant in the instant Special Appeal, who was impleaded as respondent no.3 in the

writ petition No. 406 (M/S) of 2015 and the same was decided by the learned Single Judge vide order dated 28.05.2015. Thus, it is quite clear that after the order dated 28.05.2015 (Supra), the appellant has choosen to seek an appropriate declaration, seeking declaration of the unification of six Churches into the Church of North India, as "illegal, null and void and inoperative'.

57. Sri Mehrotra has argued that the appellant, who is plaintiff no.2 in the aforesaid suit, bearing No. CS (OS) No. 2865 of 2008, has consciously sought to amend the plaint seeking declaration of unification of six Churches of India into the Church of North India as "illegal, null, void and inoperative' as the appellant is aware that such a declaration is explicitly required and the same does not flow from the judgment of the Apex Court passed in **Vinod Kumar N. Malviya and others Vs. Mangan Lal Mangal Das Gameti and others (supra).** He further argued that the appellant is further aware that such declaration would require leading of evidence which is not generally permissible in the writ proceedings before this Court in exercise of extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India as also in the *intra Court* appeal before the Division Bench, which is continuation of such extra ordinary jurisdiction of this Court. Thus, it is not open for the appellant to allege contrary prior to the declaration, as has been sought by seeking to amend the plaint of the Civil Suit pending before the Hon'ble Delhi High Court at New Delhi.

58. Sri Mehrotra has, thus, argued that all the arguments which are being sought to be raised by the appellant, have already been settled by specific findings recorded by the learned Single judge by the impugned judgment and order dated 28.05.2015 after due discussion and consideration on each point. Hence, the instant special appeal is devoid of merits and same is liable to be dismissed with exemplary costs.

D.3. Submission on behalf of Respondent no.1

59. Shri Nadeem Murtaza, learned Counsel for the respondent no.1 has supported the aforesaid arguments advanced by Sri Gaurav Mehrotra, learned Counsel for the respondent no.2 and argued that he has nothing to add further more.

E. Analysis

60. It is pertinent to mention that during the course of the arguments, learned Counsel for the respondent no.2 has vehemently opposed the Ground "Q' and Ground "U' taken in the instant appeal as well as averments contained in paragraphs "49' and "59' of the affidavit filed in support of the application for interim relief by the appellant and argued that these types of the averments cannot be permitted to be made while assailing the order passed by the learned Single Judge in *intra Court* appeal.

61. Shri Santosh Kumar, learned Counsel for the appellant has submitted that he does not want to press the averments contained in Ground "Q' and Ground "U' in the instant appeal as well as averments contained in paragraphs "49' and "59' of the affidavit filed in support of the application for interim relief and the same may be treated as not pressed.

62. Considering the aforesaid, averments contained in Ground "Q' and Ground "U' in the instant appeal as well as averments contained

in paragraphs "49' and "59' of the affidavit filed in support of the application for interim relief are hereby treated as not pressed.

63. The instant controversy starts from the undated application submitted by the appellant before the Deputy Registrar contained in Annexure No.14 to the writ petition (page no. 259 of the instant special appeal). This undated application was received in the office of the Deputy Registrar on 14.08.2014 and the same is reproduced as under :-

"सेवा में,
श्रीमान् डिप्टी रजिस्ट्रार,
फर्म्स, सोसाइटीज एवं चिट्स,
लखनऊ मण्डल, लखनऊ।

विषय :– क्राइस्ट चर्च मैकानेगी स्कूल सोसाइटी की वर्तमान अवैध प्रबन्धसमिति को निरस्त करते हुये चर्च ऑफ इण्डिया (ब्च्ठब्) द्वारा प्रस्तुत प्रबंध समिति एवं सदस्य/पदाधिकारियों की सूची को पंजीकृत करने के सम्बन्ध में।

महोदय,

क्राइस्ट चर्च मैकानेगी स्कूल सोसाइटी फाइल सं0 1 3167, पंजीकरण सं0–96/1947–48 की स्थापना दिनांक 27.10.1947 को की गई थी। इसका मुख्य उद्देश्य चर्च ऑफ इंग्लैण्ड के ईसाई मूल्यों, विश्वास, सिद्धान्त एवं उपासना पद्धति के आधार पर शिक्षा का प्रचार–प्रसार आदि करना था। क्राइस्ट चर्च स्कूल उ0प्र0 की राजधानी लखनऊ अत्याधिक सराहनीय रुप से कार्यरत है, परन्तु 1970, से तथाकथित एक चर्च यूनियन "चर्च आफ नार्थ इण्डिया" नाम की एक नये ईसाई मत की संस्था ने क्राइस्ट चर्च कालेज का संचालन एवं प्रबंधन अवैध रुप से कब्जा कर लिया।

यहां यह विशेष रुप से उल्लेखनीय है कि चर्च ऑफ इण्डिया की स्थापना इण्डियन चर्च एक्ट 1927 के द्वारा की गई थी, इससे पूर्व इसको चर्च ऑफ इंग्लैण्ड इन इण्डिया के नाम से जाना जाता था। इस एक्ट के पारित होने के उपरान्त अंग्रेजी साम्राज्य द्वारा या चर्च ऑफ इंग्लैण्ड द्वारा स्थापित सभी धर्मप्रान्त (डायसिस) की सभी अचल सम्पत्तियां जैसे–स्कूल, चर्च एवं अन्य सभी प्रकार के संचालन, प्रबन्धन एवं आधिपत्य चर्च ऑफ इण्डिया में निहित हो गये। लखनऊ धर्मप्रान्त (डायसिस) की स्थापना सन् 1893 में हुई जोकि स्वयमेव चर्च ऑफ इण्डिया का हिस्सा बन गया। इसलिए लखनऊ धर्मप्रान्त (डायसिस) का बिशप एवं सदस्य क्राइस्ट चर्च कालेज की प्रबंधसमिति या सामान्य सभा का सदस्य होता है जो कि नहीं है। चर्च ऑफ इण्डिया का विश्वास, दर्शन एवं उपासना पद्धति अन्य किसी भी ईसाई संस्था से सुमेलित या मिश्रित नहीं है अर्थात एकदम भिन्न है और न ही इस संस्था का विलय किसी अन्य संस्था में हो सकता है। परन्तु कुछ स्वार्थी तत्वों के व्यक्तिगत स्वार्थ के कारण सन् 1970 चर्च यूनियन के नाम पर गठित संस्था चर्च ऑफ नार्थ इण्डिया से चर्च ऑफ इण्डिया या इसका लखनऊ धर्मप्रान्त (डायसिस) का कोई सम्बन्ध नहीं है। जिस व्यक्ति ने चर्च यूनियन या चर्च ऑफ नार्थ इण्डिया की सदस्यता ग्रहण की, उसकी सदस्यता चर्च ऑफ इण्डिया से स्वतः समाप्त हो गई। इस घटनाक्रम के आधार पर गैर–संस्था के लोग/सदस्य इस संस्था के प्रबंध तन्त्र पर काबिज हो गये तथा आज तक अप्राधिकृत रुप से काबिज है। इस प्रकार क्राइस्ट चर्च मैकानेगी स्कूल सोसाइटी, लखनऊ धर्मप्रान्त (डायसिस), चर्च ऑफ इण्डिया की एक अधीनस्थ संस्था है और इसके सही संचालन हेतु इस संस्था में मूल सदस्य एवं बिशप का सदस्य होना अनिवार्य है। उपरोक्त घटनाक्रम से न केवल चर्च ऑफ इण्डिया के अनुयायियों का घोर आर्थिक नुकसान हो रहा है अपितु गैर–ईसाई समुदाय के ऐसे लोगों का भी धार्मिक विकास एवं आस्था, श्रद्धा अवरुद्ध हो रही है, जिनका विश्वास चर्च ऑफ इण्डिया मत पर आधरित है। यही नहीं, बल्कि क्राइस्ट चर्च की वर्तमान प्रबंधसमिति ने कालेज प्रबन्धन से आधिपत्य समाप्त होने के भय से एक साथ कूट रचित तरीके से सन् 1970 से सन् 2010 तक की समस्त औपचारिकताओं/कार्यवाहियों का नवीनीकरण करा लिया जो कि सोसाइटी अधिनियम की मूल भावना के विरुद्ध है। इनकी सदस्य/पदाधिकारियों की सूची में ऐसे व्यक्ति भी सम्मिलित करके दर्शाये गये हैं जोकि तत्तसमय जीवित भी नहीं थे। अभी विगत वर्ष की दिनांक 30.10.2013 को माननीय उच्चतम न्यायालय ने अपने एक महत्वपूर्ण निर्णय सिविल अपील सं0 8800–8801/2013 (विनोद कुमार एम0 मालवीय आदि बनाम मगनलाल मंगलदास गमेटी एवं अन्य) में चर्च ऑफ नार्थ इण्डिया के गठन को अवैधानिक घोषित कर दिया है।

माननीय सर्वोच्च न्यायालय के उक्त निर्णय से चर्च ऑफ नार्थ इण्डिया (सी0एन0आई0) का न केवल हजरतगंज, लखनऊ स्थित क्राइस्ट चर्च कालेज से विधितः आधिपत्य समाप्त हो गया है बल्कि सम्पूर्ण भारतवर्ष में स्थित चर्च ऑफ इण्डिया ;ब्च्ठब्द्ध के आधिपत्य में होने वाली समस्त अचल सम्पत्तियों पर से चर्च ऑफ नार्थ इण्डिया के अप्राधिकृत कब्जे भी मुक्त किये जाने योग्य हो गये हैं। चूंकि माननीय सवोच्च न्यायालय के उक्त निर्णय से चर्च ऑफ नार्थ इण्डिया के गठन को अवैधानिक घोषित कर दिया गया है इसलिए क्राइस्ट चर्च कालेज, लखनऊ पर से इस संस्था का विगत सन् 1970 से चला आ रहा अप्राधिकृत कब्जा स्वतः समाप्त हो गया है और सर्वाधिक महत्वपूर्ण विधिक तथ्य यह है कि क्राइस्ट चर्च मैकानेगी स्कूल सोसाइटी के मूल उपविधियों ;ठलम.ळूंद्ध के अनुसार

चर्च ऑफ इण्डिया (बर्मा एवं सीलोन) जो कि अब चर्च ऑफ इण्डिया (पाकिस्तान, बर्मा, सीलोन) कहा जाता है, का दावा एवं अधिकार सक्रिय हो गया है।

अतः क्राइस्ट चर्च मैकानेगी स्कूल सोसाइटी की वर्तमान अवैध प्रबंधसमिति को निरस्त करते हुए चर्च ऑफ इण्डिया ;ब्च्ठब्द्ध द्वारा प्रस्तुत प्रबंधसमिति एवं सदस्य

पदाधिकारियों की सूची को पंजीकृत करने की कृपा करें।

महान कृपा होगी।

दिनांक :– प्रार्थी

संलग्नक : हस्ताक्षर अपठनीय

1- प्रबंधसमिति की सूची वर्ष

2013–14 एवं 2014–15 (मो0 रेव्ह जॉन ऑगस्टीन)

2- चुनाव कार्यवाही की प्रतिलिपि अध्यक्ष

3- श्शपथ पत्र मेट्रोपोलिटन चर्च ऑफ इण्डिया

4- साधारण सभा की सूची ;ब्च्ठब्द्ध

5- जजमेन्ट की प्रतिलिपि बिशप लखनऊ डायसिस

64. A bare perusal of the aforesaid undated application reflects that the "subject' of the aforesaid application as well as "prayer' of the aforesaid application is to disapprove/cancel the existing Committee of Management and to register the list of members of the Committee of Management submitted by the CIPBC. In the aforesaid application, the appellant had admitted the fact that since the formation of CNI i.e. since 1970, the respondent no.1/Society has been controlled and managed by the members of the CNI.

65. The Deputy Registrar, Lucknow, had considered undated application submitted by the appellant and while exercising his powers under Section 4 and 4-B of the Act, 1860, the Deputy Registrar had considered the genesis of the Churches right from the period prior to promulgation of the Indian Churches Acts of 1927, Churches of England in India Act, and the British Statutes (Application to India) Repeal Act, 1960 etc. and also considered the judgment of the Apex Court rendered in **Vinod Kumar M. Malviya (supra)** and opined that as per the dictum of **Vinod Kumar M. Malviya (supra)**, the formation of CNI was declared illegal and its occupation over the immovable properties of Church of India had ceased consequent to the said dictum and provisions/rules of CNI are not applicable to the respondent no.1/Society, hence the Church of India (subsequently CIBC and thereafter CIPBC), which was still in existence, in view of saving Clause-3 of the Act, 1860, was entitled to control and manage the affairs of the respondent no.1/Society in view of the contents of its bylaws which refer CIBC but nowhere refers CNI. The Deputy Registrar had also referred the object of the Society as enumerated in the bylaws and the provisions contained therein, wherein the Bishop of Lucknow was to be its ex officio Chairman, and further opined that appellant was the Bishop of Lucknow, Diocese of the CIPBC and his election/appointment thereon was valid, therefore, he was entitled to function as Chairman of the Society and accordingly, the Deputy Registrar accepted the lists submitted by the appellant and and rejected those lists submitted by the respondent no.2. It appears that the rejection of the list submitted by the respondent no.2 was based on deficiencies therein as they were not in conformity with the provisions of the bylaws as lists of office bearers submitted by the respondent no.2 for the year 2007-08, 2008-09 and 2009-2010 mentioned 13, 14 and 14 members, respectively, whereas bylaws permitted only a maximum of 12 members and the inclusion of Vinod B. Lal Legal Advisor and Deniel Subhan as ex officio members was contrary to bylaw 3. In these backgrounds, the Deputy Registrar directed the appellant to constitute the Committee of

Management of the Society as per its bylaws and submit the same vide order dated 07.02.2015.

66. The aforesaid order of the Deputy Registrar dated 07.02.2015 was challenged by the respondents no. 1 and 2 by filing Misc. Single No. 406 of 2015. The learned Single Judge, after hearing the learned Counsel for the parties and gone through the record, allowed the writ petition vide judgment and order dated 28.05.2015 by quashing the order of the Deputy Registrar dated 07.02.2015, which is impugned in the instant special appeal.

67. The first limb of argument of the learned Counsel for the appellant is that the Deputy Registrar has lawfully exercised statutory jurisdiction vested in it as the complaint filed by the appellant was within the ambit of enquiry under Section 4B of the Act, 1860 and the Deputy Registrar has rightly passed the order dated 07.02.2015 but the learned Single Judge erred in arriving its conclusion that the Deputy Registrar, while adjudicating the application of the appellant, had exceeded its jurisdicion. According to him, no election was held in the Society till 2003 and the registration of the Society was renewed on the basis of list of office bearers and proceedings of election on 16.04.2002 but the learned Single Judge did not consider the matter in this aspect and erred in allowing the writ petition by means of the impugned order.

68. It is pertinent to mention that forming a Society for collectively promoting some cause with a common object is a voluntary act of any member of the Society at large. The Societies Registration Act, 1860 has been enacted by Central Legislature not with a view to create any control or supervision or superintendence over the functions of a Society by the State or its authorities. Purpose of such a legislation is only to provide aid to the members of the Society so that objects of the Society are achieved and the Society functions smoothly. With this object alone there are certain powers and functions vested in the Registrar (which includes the Deputy Registrar as well) under the Societies Registration Act, 1860. The relevant provisions which concern this matter contained in the Societies Registration Act, 1860 are Sections 4, 4-A, 4-B and 25, which are reproduced as under :-

"4. Annual List of managing body to filled:- (1) Once in every year on or before the fourteenth day succeeding the day on which, according to the rules of the society, the annual general meeting of the society is held, or; if the rules do not provide for an annual meeting, in the month of January, a list shall be filled with the Registrar, of the names, addresses and occupations of the Governor's council, directors, committee, or other governing body then entrusted with the management of the affairs of the society.

Provided that if the managing body is elected after the last submission of the list, the counter signatures of the old members, shall as far as possible, be obtained on the list. If the old office bearers do not countersign the list, the Registrar may, in his discretion, issue a public notice or notice to such persons as he thinks fit inviting objections within a specified period and shall decide all objections received within the said period.

(2) Together with list mentioned in Sub-section (1), there shall be sent to the Registrar a copy of the memorandum of association including any alteration,

extension, or abridgement of purposes made under Section 12, and of the rules of the society corrected up to date and certified by not less than three of the members of the said governing body to be a correct copy and also a copy of the balance sheet for the preceding year of account.

4A. Charges etc., in rules to be intimated to Registrar.- A copy of every changes made in rules of the society and intimation of every change of address of the society, certified by not less than thee of the members of the governing body shall be sent to the Registrar within thirty days of the change."

4-B. (1) At the time of registration/renewal of a society, list of members of General Body of that society shall be filed with the Registrar mentioning the name, father's name, address and occupation of the members. The Registrar shall examine the correctness of the list of members of the General Body of such society on the basis of the register of members of the General Body and minutes book thereof, cash book, receipt book of membership fee and bank pass book of the society.

(2) If there is any change in the list of members of the General Body of the society referred to in sub-section (1), on account of induction, removal, resignation or death of any member, a modified list of members of General Body, shall be filed with the Registrar, within one month from the date of change.

(3) The list of members of the General Body to be filed with the Registrar under this section shall be signed by two office-bearers and two executive members of the society.

12. Societies enabled to alter, extend or abridge their purposes.- Whenever it shall appear to the governing body of any Society registered under this Act, which has been established for any particular purpose or purposes, that it is advisable to alter, extend, or abridge such purpose to or for other purposes within the meaning of this Act, or to amalgamate such society either wholly or partially with any other Society, such governing body may submit the proposition to the members of the society in a written or printed report, and may convene a special meeting for the consideration thereof according to the regulations of the society;

but no such proposition shall be carried into effect unless such report shall have been delivered or sent by post to every member of the Society ten days previous to the special meeting convened by the governing body for the consideration thereof, nor unless such proposition shall have been agreed to by the votes of three-fifths of the members delivered in person or by proxy, and confirmed by the votes of three-fifths of the members present at a second special meeting convened by the governing body at an interval of one month after the former meeting.

25. **Disputes regarding election of office-bearers:**- The prescribed authority may, on a reference made to it by the Registrar or by at least one fourth of the members of a society registered in Uttar Pradesh, hear and decide in a summary manner any doubt or dispute in respect of the election or continuance in office of an office bearer of such society, and may pass such orders in respect thereof as it deems fit.

Provided that the election of an office bearer shall be set aside where the prescribed authority is satisfied.

(a) that any corrupt practice has been committed by such office bearer; or

(b) that the nomination of any candidate has been improperly rejected; or

(c) that the result of the election in so far it concerns such office bearer has been materially affected by the improper acceptance of any nomination or by the improper reception, refusal or rejection of

any vote or the reception of any vote which is void or by any non compliance with the provisions of any rules of the society.

Explanation I.-A person shall be deemed to have committed a corrupt practice who, directly or indirectly, by himself or by any other person:

(i) induces, or attempts to induce, by fraud, intentional misrepresentation, coercion or threat or injury, any elector, to give or to refrain from giving a vote in favour of any candidate, or any person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate the election.

(ii) With a view to inducing any elector to give or to refrain from giving a vote in favour of any candidate, or to inducing any person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate at the election, offers or gives any money, or valuable consideration, or any place or employment, or holds out any promise of individual advantage or profit to any person;

(iii) Abets (within the meaning of the Indian Penal Code) the doing of any of the Acts specified in Clauses (i) and (ii);

(iv) Induces or attempts to induce a candidate or elector to believe that he, or any person in who he is interested, will become or will be rendered an object of divine displeasure or spiritual censure;

(v) Canvases on grounds of caste, community, sect or religion;

(vi) Commits such other practice as the State Government may prescribe to be a corrupt practice.

Explanation II- A 'promise of individual advantage or profit to a ' person' includes a promise for the benefit of the person himself, or of any one in whom he is interested.

Explanation III- The State Government may prescribe the procedure for hearing and decision of doubts or disputes in respect of such elections and make provision in respect of any other matter relating to such elections for which insufficient provision exists in this Act or in the rules of the society.

(2) Where by an order made under Sub-section (1), an election is set aside or an office-hearer is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office bearer of a society has not been held within the time specified in the rules of that society, he may call a meeting of the general body of such society for electing such office bearer or office bearers, and such meeting shall be presided over and be conducted by the Registrar or by any officer authorized by him in this behalf, and the provisions in the rules of the society relating to meetings and elections shall apply to such meeting and election with necessary modifications.

(3) Where a meeting is called by the Registrar under Sub-section (2), no other meeting shall be called for the purpose of election by any other authority or by any person claiming to be an office bearer of the society.

Explanation:-For the purposes of this section, the expression prescribed authority means an office or Court authorized in this behalf by the State Government by notification published in the official Gazette"

69. Section 4 of the Act provides and obligate for filing annual list of managing body to be filled once in every year on or before the fourteenth day succeeding the day on which, according to the rules of the society, the annual general meeting of the society is held, and if the rules do not provide for an annual meeting, in the month of January, a list is to be filled with the Registrar, giving therein the names,

addresses and occupations of the incumbents entrusted with the management of the affairs of the society. A proviso has been added to the Section provided that if the managing body is elected after the last submission of the list, counter signatures of the old office bearers do not countersign the list, the Registrar may, in his discretion, issue a public notice or notice to such persons as he thinks fit inviting objections within a specified period and shall decide all objections received within the said period. Section 4A obligates that every changes made in rules of the society has to be informed within thirty days of the change.

70. Section 4-B of the Act, 1860 has been enacted by the State Legislature with an object of avoiding a situation where the membership of a Society becomes subject matter of a dispute on account of non-existence of correct list of the members of the General Body of the Society with the Registrar. Object of this amendment further is to check that illegal persons are not able to claim themselves to be the members or office bearers of such Society. In order to avoid these situations, Section 4-B of the Act, 1860 has been enacted. Section 4-B of the Act, 1860 requires filing of list of members of the General Body with the Registrar at the time of registration and also at the time of renewal. It further mandates that on filing of the list of the members of the General Body of the Society, the Registrar shall examine the correctness of the list of the members of such Society on the basis of certain documents and records mentioned therein. Sub-section (2) of Section 4-B further requires that if there is any change in the list of members of the General Body of the Society on account of various exigencies, namely, induction, removal, registration or death of any member, a modified list of members is to be filed with the Registrar within one month from the date of change. Sub-section (3) of Section 4-B mandates that list of members of the General Body to be filed with the Registrar needs to be signed by two office bearers and two executive members of the Society.

71. The object and purpose of Section 25 of the Act, 1860 is to provide for forum to decide disputes regarding election of office-bearers of registered Societies. A careful reading of Section 25(1) of the Societies Registration Act reveals that the Prescribed Authority envisaged therein assumes jurisdiction to decide any doubt or dispute in respect of the election or continuance in office of an office-bearer of a Society only in two situations i.e. (1) on a reference to be made to it by the Registrar and (2) on a reference to be made to the Prescribed Authority by at least one-fourth members of the Society. In absence of any of the aforesaid two modes of references, the Prescribed Authority or Sub Divisional Officer even in terms of the Notification dated 28.10.1975, will have no jurisdiction to entertain any application from any one in relation to any doubt or dispute as referred to in Section 25(1) of the Societies Registration Act. The very assumption of the jurisdiction by the Prescribed Authority/Sub Divisional Officer under Section 25(1) of the Societies Registration Act is dependent on either of the two conditions or situations enumerated therein i.e. to say, the Prescribed Authority will assume jurisdiction to proceed under Section 25(1) of the Societies Registration Act only in case of availability of reference before him from the Registrar or in a case of reference to be made by one-fourth members of the Society. In absence of fulfillment of either of these two

conditions, the Prescribed Authority/Sub Divisional Officer cannot assume jurisdiction on his own on a mere application made by any member of a Society provided such application/reference is not made by one-fourth members of the Society.

72. Sub-Section (2) of Section 25 of the Act, 1860 comes into operation after the election is set aside, or an office bearers is held no longer entitled to continue in office. The satisfaction of the Registrar that any election of office bearers of Society has not been held within the time specified to the Rules of that Society is to be arrived in accordance with the provisions in Bye-laws of the Society, to which the members have subscribed. If there is no provision in the Bye-laws for holding the elections after the expiry of the tenure of the executive committee or office-bearers, the Registrar may intervene to fill in the gap and to provide for such any eventuality by calling the meeting of the general body of the Society for electing office-bearers. Where the election of the office-bearers of the Society has been set aside under sub-section (1) and the time limit of holding election has expired the Registrar may step in and provide for holding elections. However in cases where the Bye-laws of the Society do not provide for any such eventuality the Registrar does not get authority to call any meeting of the general body of the Society to elect executive committee or office-bearers and to preside over such meeting or to authorizes any officer in that behalf. The Rules of the Society have to take precedence, except where they are inconsistent of the provision of the Act.

73. The expression "Prescribed Authority" has been defined in the explanation appended to Sub-section (3) of Section 25 of the Societies Registration Act to mean an officer or court authorized in this behalf by the State Government by notification to be published in the Official Gazette. The State Government by means of notification published in the Official Gazette dated 28.08.1975 has authorized the Sub Divisional Officers within their respective jurisdictions to act as "Prescribed Authority'. The Prescribed Authority is, thus, a creation of the Act, 1860 for the purposes of exercising his jurisdiction under Section 25(1) of the Act, 1860. Any statutory authority created under an enactment or Legislation has to act within the four-corners or bounds of the enactment or the Legislation under which it is created. Such statutory authority is empowered to exercise his jurisdiction only in accordance with the provisions contained in the Act or the Legislation which confers such jurisdiction. Accordingly, the Prescribed Authority being creation of the Societies Registration Act is also empowered to exercise his jurisdiction only in accordance with the provisions contained in Societies Registration Act, more specifically Section 25 of the said Act and not otherwise. It is the Statute or the Legislation which confers the nature of jurisdiction to be exercised by a statutory authority. In any circumstance, such a statutory authority conferred with certain statutory functions cannot be permitted to go beyond the prescriptions available in the Statute. Accordingly, the Prescribed Authority under Section 25 of the Act, 1860 is also bound by the statutory prescriptions available therein.

74. From the aforesaid provisions, it is quite clear that the object and scope of the provisions of Section 4 and 25 of the Act, 1860 are quite separate and distinct.

75. In the instant case, the controversy starts from the undated application of the appellant, which was received in the office of the Deputy Registrar on 14.08.2014, as reproduced hereinabove. It reflects that the appellant and his associates had neither been in control and management of the respondent no.1/Society for the last 34 years nor the appellant was an ordinary or a life member of the respondent no.1/Society either prior to or after 1970. The "subject' of the aforesaid application as well as "prayer' made therein shows that the appellant sought relief before the Deputy Registrar to disapprove/cancel the "existing' illegal Committee of Management and to register the Committee of Management and its members/officer-bearers as presented by CIPBC. To substantiate his claim, the appellant presented himself before the Deputy Registrar as part of CIPBC and its Bishop of Lucknow and claimed the management of the respondent no.1/society in the light of the dictum of the Apex Court in **Vinod Kumar M. Malviya (Supra).** It was not the case of the appellant before the Deputy Registrar through the aforesaid application that rival groups of the same society had submitted two lists of office bearers of the Society but the appellant and his associates putforth his claim before the Deputy Registrar by enclosing the alleged list of office bearers, who appears to be not members of the Society since 1970 by claiming the members of CIPBC. It is an admitted fact that prior to filing the aforesaid application i.e. 14.08.2014, the appellant and his associates never laid any claim to the management or membership of the respondent no.1/Society. The claim of the appellant, through the aforesaid application, was not the case before the Deputy Registrar that he and his associates were original members of the respondent no.1/society prior to 1970. In these backgrounds, the learned Single Judge has rightly opined that appropriate course for the appellant/respondent no.3 and his associates was to get their rights to manage the respondent no.1/Society declared by appropriate forum either under Section 25 (1) of the Act, 1860 or better in regular proceedings by a civil Court and the Deputy Registrar should not have initiated the proceedings on the basis of the application of appellant as the appellant appears to be a stranger.

76. As stated hereinabove, the entire claim of the appellant as enumerated in the aforesaid application was based on the dictum of **Vinod Kumar Malviya (supra)**. The learned Single Judge, after going through the facts and circumstances of the Vinod Kumar Malviya's case, has opined that the merger of Church of India (CIBC) and validity of the formation of CNI were not in issue in the said case nor did the Apex Court declare the creation of CNI to be illegal. This Court is of the opinion that dictum of **Vinod Kumar Malviya's case** is not applicable in the instant case and the learned Single Judge has rightly rejected the plea of the appellant by observing that the merger of CIBC and validity of formation of CNI were not in issue in the said case nor did the Apex Court declare the creation of CNI to be illegal and the Deputy Registrar has wrongly interpreted the aforesaid judgment of the Apex Court.

77. The learned Single Judge also noted the fact that the issue of the validity of succession of CNI to CIBC is pending consideration before Hon'ble Delhi High Court in various suits transferred to it by the Apex Court including the suits filed by the appellant and CNI, which manages the properties of CNI is a party to the suit and the relief of declaration of title over the

properties mentioned in Schedule to the plaint and permanent injunction has been claimed. Therefore, the learned Single Judge recorded finding that the Deputy Registrar, while passing the order dated 07.02.2015, did not consider aforesaid fact and erred in proceeding on the assumption that the Apex Court had declared the formation of CNI to be illegal which was apparently erroneous as already discussed earlier. In these backdrops, the learned Single Judge has rightly opined that the Deputy Registrar has exceeded its jurisdiction in considering and deciding the issue as the issue as to the existence or otherwise of the CIBC based on various provisions of Act, 1927, 1960 etc. and holding that it was very much in existence as per law and was entitled to control and manage the respondent no.1/society. This finding, in our view, has rightly been recorded by the learned Single Judge as under Section 4-B of the Act, 1860, the Registrar is not supposed to make adjudication of dispute of correctness of membership like a Court but whenever a list is submitted or there is any change in the list of members and any objection is raised or otherwise, the Registrar has to prima facie satisfy himself that change has been made in accordance with the provisions of bye-laws and prima facie genuine. For this purpose, the Registrar may examine agenda, minutes of meeting and other relevant steps taken by the Society. To this extent, an inquiry can be made by the Registrar to find out whether list of members or change in list of members is correct or not. If the dispute in respect of the elections of the office bearers or their continuance, qua a registered Society, such dispute must necessarily be referred to the Prescribed Authority under Section 25(1) of the Act, 1860, and therefore, the Registrar, Firms, Societies and Chits, Lucknow could not have interfered in the matter.

78. So far as the plea of the appellant that CNI has no role to play in the management of the respondent no.1/Society in view of the dictum of the Apex Court in Vinod Kumar M. Malviya (supra) and further the CNI is not the successor of Society and also not entitled to manage the affairs of the Society, are concerned, it transpires from the judgment of Apex Court in **Vinod Kumar M. Malviya (Supra)** that the genesis of the **Vinod Kumar M. Malviya (supra)** was a dispute challenging the said merger of FDCB by filing objections by members of FDCB Gujrat Chapter before the Charity Commissioner regarding change of reports, before the Charity Commissioner under the Bombay Port Trusts Act. The questions before the Charity Commissioner were (i) whether the change was legal, (ii) whether the said change reports or any of the change reports are liable to be allowed. The Charity Commissioner answered both the questions in affirmative and dismissed the objections raised against the change reports, allowed the properties vested in FDCB to be vested in CNI. Against the order of the Charity Commissioner the objectors preferred an application before the City Civil Court, Ahmedabad under Section 72 of the BPT Act alleging that there was no lawful merger of the trust and the property vested with the Property Committee continued to exist with it. The questions which arose before the learned City Civil Judge were as under:-- (i) Whether the society is dissolved and secondly, whether the Trust i.e. FDCB is also dissolved ?; (ii) Whether CNI is successor of the Trust i.e. FDCB?; and (iii) Whether by mere merger of FDCB into various other churches, the properties are by rules and regulations of the society ipso

facto vested in CNI, without having to perform any other legal obligation or formality?. The learned City Civil Court opined that FDCB had not been dissolved as there was no proper proof of the same. Furthermore, as a trust and society are creations of statutes, they must be dissolved accordingly and the question of merger is a factual one, wherein the merging trust continues to exist unless specifically dissolved under the statute. Furthermore, without following Section 50-A of the BPT Act which deals with the dissolution of trust, FDCB property cannot be vested with CNI. Thus, the learned Civil Court Judge quashed and set aside the order of the Charity Commissioner. The matter went to the High Court of Gujarat. The basic issue before the learned Single Judge of the Hon'ble High Court of Gujarat was to determine whether CNI is the successor and legal continuation of FDCB or not. The Gujrat High Court dismissed the appeal and confirmed the order of the Civil Court. In these backdrops, the matter went up to the Supreme Court which was decided in Vinod Kumar M. Malviya's case (supra). The primary issue enumerated in paragraph 13 of the said judgment for consideration before the Apex Court was 'whether the alleged unification of the First District Church of Brethren with Church of North India is correct or not and the same would answer all the ancillary issues raised before the Supreme Court'. The Apex Court held that FDCB being a Society registered under Act, 1860 also a trust under the BPT Act it could only be dissolved/merged as per the provisions of the said Acts and not otherwise. It also held that unless the properties vested in FDCB are divested in accordance with the provisions of the Act, 1860 and BPT Act, merely by filing change reports CNI cannot claim merger of trust and thereby the properties would vest in them. The passing of the resolution in the year 1970 in this regard was nothing but an indication to show the intention to merge and nothing else. The Supreme Court upheld the judgment of the City Civil Court and the High Court on the ground that there was no dissolution of the society and further the merger was not carried out in accordance with the provisions of law. It further held that the society and the trust being creatures of the statute, have to resort to the modes provided by the statute for amalgamation and the so called merger cannot be treated or cannot be given effect to the dissolution of the trust without taking any steps in accordance with the provisions of law, the effect of resolutions or deliberations is not acceptable in the domain of law. Thus, from the facts and circumstances of the instant case, it is quite clear that the dictum of the Apex Court in Vinod Kumar M. Malviya (supra) is not applicable in the instant case and the learned Single Judge had rightly came to the conclusion that neither the status of the respondent no.1/Society nor the validity of merger of Church of India (CIBC) with CNI was an issue nor was it decided by the Apex Court, hence the Deputy Registrar wrongly presumed that the Apex Court declared the creation of CNI as illegal. In fact the aforesaid issue is pending consideration before the Hon'ble Delhi High Court in various suits including the suit filed on behalf of the appellant. Hence the plea of the appellant in this regard has no substance and it is rejected accordingly.

79. In regard to the plea of the Saving Clause in British Statutes (Application to India) Repeal Act, 1960, the learned Single Judge has opined that the British Statutes (Repeal) Act, 2004 received the assent of the President of India on 20.02.2004 and con-joint reading of the provisions of

Section 3 of Repeal Act, 1960, sub-sections (1), (2), (3) and (4) of Section 1 of the Act, 1949 as well as Repeal Act, 2004 shows that what was saved by Section 3 of the Act, 1960 was the application of any statute repealed by it in relation to India and to persons and things in any way belonging to or connected with India, in any country to which India (Consequential Provision) Act, 1949 extended, therefore, assuming that the said provision saved the application of the Indian Church Act, 1927, the same stood repealed w.e.f. 20.02.2004 but this aspect of the matter was not considered by the Deputy Registrar. Moreover, the Deputy Registrar did not at all consider the question as to whether the CIBC was in existence defacto or not and further neither the appellant nor any other person claiming under CIBC or CIPBC had staked any claim to the management of the respondent no.1/society since 1970, hence their defacto existence was seriously questionable. In our view, these findings recorded by the learned Single Judge have substance as the aforesaid points are relevant for proper adjudication of the case and the Deputy Registrar has erred in not considering the aforesaid fact. Thus, the learned Single Judge has rightly remanded back the matter to the Deputy Registrar to take a decision afresh in the light of Section 4 and 4-B of the Act, 1860 keeping in mind the directions of the Apex Court in case of the **A.P. Aboobaker Vs. District Registrar (G) Kozhikode and others : (2004) 11 SCC 247** and the observations made in the body of the judgment subject to any order or declaration by any court in favour of appellant in a pending or fresh suit, if filed by him or his associates.

80. The learned Single Judge has also clarified that the discussions made in the impugned judgment are only for the purpose of adjudicating the validity of the order of the Deputy Registrar and any observations made shall be prejudice the rights of the parties pending adjudication in any proceedings before any Court. Thus, the plea of the appellant that the observation of the learned Single Judge that the appellant was a stranger and if this finding of the learned Single Judge is not set-aside, the appellant shall suffer irreparable loss in a pending issue, has no substance and is also rejected.

(F) Conclusion

81. In view of the aforesaid discussions, this Court is of the considered opinion that there is no illegality or infirmity in the impugned judgment and order dated 28.05.2015 passed by the learned Single Judge.

82. The intra Court appeal lacks merit and is, accordingly, **dismissed.**

(2022)07ILR A347
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.02.2022

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Writ A No. 24045 of 2020

Sunil Kumar Srivastava ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Vikas Singh

Counsel for the Respondent:
C.S.C.

A. Service Law - Uttar Pradesh Development Authorities Centralised

Services Rules, 1985 - Rule 33-challenge to-adverse entry-Increment of the Petitioner withheld-Petitioner was a Junior Engineer-Charges leveled against the petitioner against two other employees were identical to the charges leveled against the Petitioner-Petitioner's reply to the charge sheet is almost identical to that of other two employees-the Petitioner has been discriminated in the matter of imposition of penalty-Hence, the Petitioner is entitled to parity-the order passed by the Respondent cannot be sustained.(Para 1 to 46)

B. The requirement of recording reasons by every quasi judicial or even in administrative authority entrusted with the task of passing an order adversely affecting an individual and communication thereof to the affected person is one of the recognized facets of the rules of natural justice and violation thereof has the effect of vitiating the order passed by the authority concerned.(Para 35)

C. It is well settled that the prosecution has to prove the charges by producing documents through witnesses and placing such witnesses to be cross examined by the charged Government servant. Even in the absence of the charged Government servant, the Inquiry Officer is obliged to examine the evidence presented by the Department to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved.(Para 26)

The writ petition is allowed. (E-6)

List of Cases cited:

1. St. of Uttaranchal & ors. Vs Kharak Singh (2008) 8 SCC 236

2. Roop Singh Negi Vs PNB & ors. (2009) 2 SCC 570

3. St. of U.P. & ors. Vs Saroj Kumar Sinha (2010) 2 SCC 772

4. Brij Bihari Singh Vs Bihar St. Finance Corp. (2015) 17 SCC 541

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. The order dated 04.08.2020 passed by the State of Uttar Pradesh whereby one increment of the Petitioner has been withheld with cumulative effect and an adverse entry has been ordered to be made in his character roll is under challenge in the present writ petition.

2. The Petitioner is a member of the Uttar Pradesh Development Authorities Centralised Services created under the Uttar Pradesh Urban Planning and Development Act, 1973. He was initially appointed to the post of Junior Engineer on 08.08.1986 and was posted at Ghaziabad Development Authority. From there he was transferred to Allahabad Development Authority. In the year 2005, he was transferred to Lucknow Development Authority (for short the "Authority'). It appears that in the Gomti Nagar Extension Scheme, under the River View Apartment Phase-1, the Authority had constructed 1245 flats known as Ganga, Yamuna, Saraswati, Sharda and Vanasthali Apartments through the agency of Larsen & Toubro Limited. The construction of the said Apartments was started in the year 2008 and was completed in October, 2011. After almost three years thereafter, on 06.07.2014, the Chief Minister of the State made a surprise inspection of the 'Saraswati Apartments'. During his visit, the allottees inter alia made a complaint regarding water logging in the basement of the Apartment. In this regard the 'River View Jan Kalyan Samiti', an association of the residents of the River View Apartments also submitted a representation to the District Magistrate, Lucknow.

3. On 06.07.2014, the then Vice Chairman of the Authority submitted a report to the

Principal Secretary to the Chief Minister. In his report, the Vice Chairman stated that at the time of inspection on 06.07.2014 the water logging in the basement of the Apartment was on account of the faulty construction carried out by the construction agency. It was also stated that engineers namely, S.N. Tripathi, R.N. Singh, D.S. Chauhan and Kailash Singh continued to remain in the said project from the time the construction started till the time of its completion. On 16.07.2014, the Vice Chairman again submitted a report in which it was reiterated that water logging in the basement was due to the defective design and certain short comings in the construction work carried out by the construction agency. The name of the Vice Chairman, Secretaries and the engineers who were posted in the said project was also mentioned. The name of engineers and the duration of their posting in the said project as indicated in the said letter is extracted below: -

क्रम	अभियन्ता का नाम	दिनांक
1	श्री एस0एन0 त्रिपाठी, मुख्य अभियंता	27.05.2009 से 21.11.2011
2	श्री आर0एन0 सिंह, अधि0 अभियन्ता	27.05.2009 से 21.11.2011
3	श्री डी0एस0 चौहान, सहायक अभियंता	27.05.2009 से 21.11.2011
4	श्री कैलाश सिंह, अवर अभियंता	27.05.2009 से 21.11.2011
5	श्री सुनील श्रीवास्तव, अवर अभियंता	27.05.2009 से 16.05.2011

4. On the basis of the information furnished by the Vice Chairman of the Authority, the State Government vide letter dated 23.07.2014 instituted disciplinary proceedings against S.N. Tripathi (Retd.), the then Chief Engineer, R.N. Singh, the then Executive Engineer, Dhirendra Singh Chauhan, Assistant Engineer, Kailash Singh, Junior Engineer and the Petitioner. The Commissioner, Lucknow Division, Lucknow was appointed as Inquiry Officer. On 23.07.2014, the Petitioner was placed under suspension in contemplation of a departmental inquiry.

5. On 13.10.2014, a charge-sheet dated 24.09.2014, containing three charges, was served upon the Petitioner. The relevant portion of the charge-sheet dated 24.09.2014 is extracted below: -

"आरोप संख्या–1

आपके द्वारा गोमती नगर विस्तार योजना के अन्तर्गत रिवर व्यू अपार्टमेन्ट फेज–1 के सरस्वती अपार्टमेन्ट का निर्माण कराया गया था। मा0 मुख्यमंत्री जी द्वारा दिनांक 06.07.2014 को किये गये आकस्मिक निरीक्षण के समय भवनों के बेसमेन्ट में स्थित पार्किंग एरिया मे जल भराव पाया गया, जिसका मुख्य कारण बेसमेन्ट की दीवारों एवं छतों में हो रहे जल रिसाव तथा बेसमेन्ट में तीन मोटर/पम्प, जो कि निश्चित स्थान पर स्थापित किये जाने थे, समय रहते नहीं किये गये। फलस्वरूप जल भराव की समस्या से आवंटियों को कठिनाई का सामना करना पड़ा, जिसके कारण प्राधिकरण की जनसामान्य में छवि धूमिल हुई, जिसके लिए आप दोषी है।

उक्त आरोप के समर्थन में निम्नलिखित साक्ष्य पठनीय हैः–

1. मा0 मुख्यमंत्री जी को सम्बोधित रिवर व्यू जन कल्याण समिति के प्रत्यावेदन दिनांक 06.07.2014 की प्रति।

2. जिलाधिकारी, लखनऊ की बैठक दिनांक 12.08.2014 का कार्यवृत्त।

आरोप संख्या–2

गोमती नगर विस्तार योजना के अन्तर्गत रिवर व्यू अपार्टमेन्ट फेज–1 के सरस्वती अपार्टमेन्ट के आवंटियों को कब्जा दिये जाने से पूर्व अवर अभियन्ता के रूप में आपका यह दायित्व था कि सीवर निकासी की समुचित व्यवस्था हेतु कार्यवाही की जाये। स्थल पर आवंटियों को कब्जा दिये जाने से पूर्व यह व्यवस्था सुनिश्चित न होने के फलस्वरूप आवंटियों को सीवर बैकफ्लो के रूप में बेसमेन्ट के जल भराव का सामना करना पड़ा, जिसके कारण जनसामान्य में प्राधिकरण की छवि धूमिल हुई जिसके लिए आप दोषी है।

उक्त आरोप के समर्थन में निम्नलिखित साक्ष्य पठनीय हैः–

1. मा0 मुख्यमंत्री जी को सम्बोधित रिवर व्यू जन कल्याण समिति के प्रत्यावेदन दिनांक 06.07.2014 की प्रति।

2. जिलाधिकारी, लखनऊ की बैठक दिनांक 12.08.2014 का कार्यवृत्त।

आरोप संख्या–3

गोमती नगर विस्तार योजना के अन्तर्गत रिवर व्यू अपार्टमेन्ट फेज–1 के सरस्वती अपार्टमेन्ट के आवंटियों द्वारा शिकायत की गयी कि जगह–जगह बेसमेन्ट की दीवारों एवं छतों पर क्रैक्स दृष्टिगोचर हुए है जिससे जल रिसाव हुआ है। इसके अतिरिक्त सर्कुलेशन एरिया में किये गये कार्यों में असमान

1. मा0 मुख्यमंत्री जी को सम्बोधित रिवर व्यू जन कल्याण समिति के प्रत्यावेदन दिनांक 06.07.2014 की प्रति।

2. जिलाधिकारी, लखनऊ की बैठक दिनांक 12.08.2014 का कार्यवृत्त।"

6. On 22.10.2014, the Petitioner submitted a detailed reply to the charge-sheet denying the charges levelled against him. On 12.01.2015, the Petitioner as well as R.N. Singh, Dhirendra Singh Chauhan and Kailash Singh were summoned by the Inquiry Officer. The Inquiry Officer put some questions to the Petitioner and secured his answers to the same. Thereafter, the Petitioner was asked to leave.

7. The record reveals that the Inquiry Officer submitted a separate report dated 08.06.2015 to the Disciplinary Authority with regard to R.N. Singh and D.S. Chauhan exonerating them of the charges levelled against them. The said report was not accepted by the State Government and by an order dated 20.08.2015, the Housing Commissioner, U.P. Awas and Vikas Parishad was directed to hold an inquiry with regard to two issues (a) how did the water get into the basement and (b) the engineers who failed to install pumps of adequate capacity. The relevant portion of the order dated 20.08.2015 is reproduced below: -

''3. आयुक्त, लखनऊ मण्डल, लखनऊ द्वारा अपने पत्र दिनांक 08 जून, 2015 के साथ श्री आर0एन0सिंह, तत्कालीन अधिशासी अभियन्ता (सिविल) सम्प्रति मुख्य अभियन्ता (सिविल) एवं श्री डी0एस0चौहान, सहायक अभियन्ता (सिविल) के सम्बन्ध में जांच आख्या उपलब्ध कराई गई। आयुक्त द्वारा उपलब्ध कराई जांच आख्या में उक्त दोनो अभियन्ताओं के विरूद्ध लगाये गये आरोप सिद्ध नहीं पाये गये। उक्त जांच आख्या के आधार पर निर्णय लेने हेतु पत्रावली मा0 मुख्यमंत्री जी को प्रस्तुत की गयी।

4. इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि उक्त के सम्बन्ध में मा0 मुख्यमंत्री जी द्वारा यह जानकारी चाही गई है कि बेसमेंट में पानी कैसे आया और इसके लिए पर्याप्त क्षमता के पम्प न लगाये जाने हेतु जिम्मेदारी सम्बन्धित अभियन्ताओं की है। मा0 मुख्यमंत्री जी द्वारा पूरे प्रकरण की पुनः जांच कर जिम्मेदारी निर्धारित करते हुये प्रस्ताव उपलब्ध कराये जाने के आदेश दिये गये हैं। अतः कृपया तद्नुसार पूर्ण प्रकरण की पुनः जांच कर आख्या/प्रस्ताव शासन को एक सप्ताह के अन्दर निश्चित रूप से उपलब्ध कराने का कष्ट करें।''

(emphasis supplied)

8. The Housing Commissioner after holding an inquiry submitted his report dated 09.02.2016. With regard to the first issue M/s Kailash Singh, Junior Engineer, Manoj Kumar Upadhyaya, Assistant Engineer and Shri Rohit Khanna, Executive Engineer were held responsible and with regard to the second issue the Housing Commissioner held the construction agency (Larsen & Toubro) responsible. The two issues in regard to which the inquiry was held by the Inquiry Officer and the conclusion drawn by him are extracted below: -

''वांछित जॉच आख्या के सदर्भ में दो बिन्दु विचारणीय हैंः–

1– बेसमेन्ट में पानी कैसे आया?

2– इसके लिये पर्याप्त क्षमता के पम्प लगाये जाने हेतु जिम्मेदारी सम्बन्धित अभियन्ताओं की है।''

' ' ' ' '

''बिन्दु सं0–1

निष्कर्ष–

सचिव, लखनऊ विकास प्राधिकरण द्वारा अपने पत्र के बिन्दु सं0–13 में स्पष्ट रूप से उल्लेख किया गया है कि पाईपों की लीकेज ठीक कराने का कार्य मेसर्स एल0एण्डटी0 लि0 द्वारा ही कराया जाना था। परिसर की सुरक्षा एवं अनुरक्षण हेतु प्राधिकरण द्वारा तैनात फर्म को मात्र सिक्योरिटी गार्ड, साधारण सफाई, जलापूर्ति व्यवस्था एवं डी0जी0 सेट के संचालन आदि का कार्य ही कराया जाना था। परिसर को मेसर्स एल0एण्डटी0 लि0 द्वारा प्राधिकरण को हस्तान्तरित न किये जाने के कारण निर्माण कार्यों सम्बन्धी मेन्टीनेन्स का कार्य मेसर्स एल0एण्डटी0 लि0 द्वारा ही कराया जा रहा था। पत्र में उपलब्ध कराये गये संलग्नक–6 में अनुरक्षण हेतु मेसर्स एल0एण्डटी0 लि0 द्वारा उपलब्ध कराये गये विस्तृत प्रोग्राम में डक्टिंग क्लोंजिग, वाटर प्रूफिंग एवं बोर पैंकिग हेतु दिनांक 05.09.2014 की तिथि प्रस्तावित की गयी थी, जिससे स्पष्ट है कि उक्त कार्य मेसर्स एल0एण्डटी0 लि0 द्वारा कराया जाना था। परन्तु यथासमय उक्त कार्य सम्पादित न करने एवं अनुरक्षण पर उचित ध्यान न देने के लिये मेसर्स एल0एण्डटी0 लि0 उत्तरदायी है। अभिलेखों से यह स्पष्ट है कि बेसमेन्ट में पानी कुछ स्थानों पर सीपेज/लीकेज तथा बेसमेन्ट में लगे हुये सीवर के पी0वी0सी0 पाइप में कुछ स्थानों में लीकेज होने के कारण भरा। यदि अनुरक्षण हेतु तैनात प्राधिकरण स्टाफ द्वारा भी इस पर ध्यान दिया जाता और तत्समय ही उक्त कार्य के लिए उत्तरदायी फर्म (मैसर्स एल0एण्डटी लि0) को बताया जाता तो कदाचित यह स्थिति उत्पन्न नहीं होती। अस्तु अनुरक्षण के कार्य हेतु देखरेख की जिम्मेदारी प्राधिकरण के सम्बन्धित अधिकारियों द्वारा समुचित प्रकार से नहीं निभायी गयी, जिसके लिए अनुरक्षण हेतु तत्समय तैनात श्री कैलाश सिंह, अवर अभियन्ता, श्री मनोज कुमार उपाध्याय, सहायक अभियन्ता एवं श्री रोहित खन्ना, अधिशासी अभियन्ता भी आंशिक रूप से उत्तरदायी प्रतीत होते हैं।'''

* * *

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''बिन्दु सं0–2

निष्कर्ष–

दिनांक 25.08.2015 को अधोहस्ताक्षरी के निरीक्षण के समय यह पाया गया कि बेसमेन्ट के पानी की निकासी हेतु विभिन्न स्थानों पर डक्ट बनाये गये हैं जिनमें पम्प स्थापित कर पानी बाहर निकाला जाना था। सचिव, लखनऊ विकास प्राधिकरण द्वारा उपलब्ध करायी गयी सूचना में उल्लेख किया गया है कि निरीक्षण के समय 0.5 एच0पी0 के 03 पम्प लगे थे, जिन्हें हटाकर वर्तमान में 2.5 एच0पी0 के 03 पम्प मेसर्स एल0एण्डटी0 लि0 द्वारा लगाये गये हैं। अभिलेखों के परिशीलन से यह स्पष्ट है कि निर्माण संस्था द्वारा संस्थापित किये जाने वाले पम्पों की क्षमता के सन्दर्भ में कोई परिकल्पना स्वीकृत नही करायी गयी है वर्तमान में एल0एण्डटी0 द्वारा बेसमेन्ट में आने वाले बरसाती पानी के सम्बन्ध में एक अहस्ताक्षरित गणना सीट उपलब्ध करायी गयी है, जिसमें तीन एल0पी0एस0 डिस्चार्ज को 10 मीटर हेड के साथ पम्प डिजाइन किये जाने का उल्लेख किया गया है, परन्तु पम्प की क्षमता हेतु कोई गणना नहीं की गयी है। एल0एण्डटी0 द्वारा उपलब्ध कराये गये उल्लिखित डेटा के आधार पर तीन एल0पी0एस0 डिस्चार्ज के साथ 10 मीटर हेड के साथ पम्पिंग हेतु पम्प की क्षमता हेतु परिषद स्तर से गणना करायी गयी है, जिसमें प्रत्येक सम्प हेतु 0.5 हार्स पावर की क्षमता का पम्प लगाया जाना उचित पाया गया है जिससे स्पष्ट है कि मात्र बरसाती पानी आने पर 0.5 हार्स पावर के पूर्व स्थापित पम्प पानी निकासी हेतु पर्याप्त थे, परन्तु उनके क्रियाशील न होने एवं अन्य माध्यमों से बेसमेन्ट में पानी आने के कारण जल भराव की स्थिति उत्पन्न हुई। चूंकि पानी निकासी से सम्बन्धित अनुरक्षण का दायित्व एल0एण्डटी0 का ही था। अतः जल भराव की स्थिति हेतु प्रथम दृष्टया निर्माणकर्ता फर्म मेसर्स एल0एण्डटी0 लि0 दोषी प्रतीत होती हैं।'''

(emphasis supplied)

9. On 09.06.2016, the Petitioner was served with a show cause notice dated 16.05.2016 along with a copy of the inquiry report dated 04.09.2015. In his report, the Inquiry Officer found Charges 1 and 2 proved and Charge 3 was found to be partly proved against the Petitioner.

10. On 23.06.2016, the Petitioner submitted his reply to the show cause notice dated 16.05.2016. On 12.03.2019, in connection with the show cause notice, the State Government called the Petitioner for personal hearing. On 12.03.2019, the Petitioner again submitted a representation. Thereafter, the order impugned in the present writ petition was passed.

11. Shri Vikas Singh, learned counsel for the Petitioner has raised the following four contentions:

a. No oral enquiry, whatsoever, was held against the Petitioner.

b. Copies of the documents relied upon by the Inquiry Officer in his inquiry report were not supplied to the Petitioner.

c. The order impugned is a non-speaking order and cannot be sustained.

d. The Petitioner has been discriminated in the matter of punishment inasmuch as for the same charge the other officers have been exonerated whereas the Petitioner has been punished.

12. Shri Ajay Kumar Singh, learned Additional Chief Standing Counsel appearing for the State-Respondent has supported the impugned order.

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

14. The service condition of the Petitioner is governed by the Uttar Pradesh Development Authorities Centralised Services Rules, 1985. As per Rule 33 of the said Rules, the rules regarding disciplinary proceedings, appeals and representations against punishments, as are applicable to the Government Servants apply to the officers and other employees of the service, subject to such modifications as the Government may make from time to time.

15. In exercise of the power conferred by the proviso to Article 309 of the Constitution, the Rules known as the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (for brevity "the Rules'), have been framed by the Government of Uttar Pradesh. The Rules prescribe the detailed procedure to be followed in the matters of enforcing discipline and imposing penalty/punishment against Government servants and in appeals in case of proven misconduct.

16. Rule 3 of the Rules specifies the minor and major penalties which can be imposed on a Government servant. Withholding of increments with cumulative effect is one of the major penalties which can be inflicted upon a Government servant.

17. The procedure and the manner in which an inquiry has to be conducted before imposing any major penalty on a Government servant is laid down in Rule 7 of the Rules. Sub-rule (v), (vi), (vii) & (x) of Rule 7 being relevant are being extracted below for ready reference:-

7. Procedure for imposing major penalties. - Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner:

(i) to (iv) (omitted as unnecessary)

(v) The charge-sheet, along with the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government Servant personally or by registered post at the address mentioned in the official records. In case the charge-sheet could not be served in aforesaid manner, the charge-sheet shall be served by publication in a daily newspaper having wide circulation:

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charge Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government servant appears and admits charges, the Inquiry Officer shall submit his report to the Disciplinary Authority on the basis of such admission.

(vii) Where the charged Government servant denies the charge the Inquiry

Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charge Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidences, the Inquiry officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence:

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) & (ix) (omitted as unnecessary)

(x) Where the charged government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the inquiry officer shall proceed with the inquiry ex parte. In such a case the inquiry officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged government servant.

(xi) to (xii) (omitted as unnecessary)"

(emphasis supplied)

18. Rule 8 of the Rules provides that after the inquiry is completed, the Inquiry Officer shall submit his inquiry report to the Disciplinary Authority along with all the records of the inquiry. Rule 9 of the Rules prescribes the procedure to be adopted by the Disciplinary Authority after receiving the inquiry report.

19. With regard to the first contention, it is alleged that after the Petitioner submitted his reply to the charge-sheet, the Petitioner, alongwith R.N. Singh, D.S. Chauhan and Kailash Singh was summoned by the Inquiry Officer on 12.01.2015. The Inquiry Officer put some questions to the Petitioner, and after obtaining his answers to the same, the Petitioner was asked to leave. In Paragraph 12 of the writ petition, the Petitioner has categorically stated that no oral inquiry, whatsoever, was held by the Inquiry Officer against the Petitioner; no evidence was led by the Respondents and the charges were not proved. The Respondent's Reply to the above assertions can be found in Paragraph 15 of the counter affidavit. Paragraph 12 of the writ petition and Paragraph 15 of the counter affidavit are being reproduced below for ready reference: -

PARAGRAPH 12 OF THE WRIT PETITION

"12. That the petitioner begs to submit that after submission of reply to the charge-sheet denying the charges by the delinquent officer, it is the obligation upon the inquiry officer before calling the delinquent officer to prove his innocence to ask the department to prove the charges against the delinquent and thereafter the delinquent be given an opportunity to rebut the same in order to prove his innocence and any departure from this requirement is in violation of the principle of the natural justice. In the present case, the inquiry officer never fixed any date for the department to prove the charges levelled against the petitioner or any of the three officers mentioned above. For the first time, after submission of the reply of the petitioner on 22.10.2014 to the charge-sheet dated 04.10.2014, the inquiry officer summoned on 12.01.2015 not only the petitioner but also three other officers namely S/Shri R.N. Singh Executive Engineer, D.S. Chauhan Assistant Engineer, Kailash Singh Junior Engineer for conducting inquiry and on 12.01.2015, only the petitioner along with three above mentioned chargesheeted officers were present before the inquiry officer but no

one on behalf of the department was present on that date before the inquiry officer to prove the charges against the petitioner on the basis of only two documentary evidence in support of the above charges. Except on 12.01.2015, no other date was fixed by the inquiry officer to hold inquiry in respect of the chargesheet dated 04.10.2014 by the inquiry officer against the petitioner."

(emphasis supplied)

PARAGRAPH 15 OF THE COUNTER AFFIDAVIT

"15. That the contents of paragraphs 8 to 18 of the writ petition needs no comments.

20. Thus, it is not in dispute that no oral inquiry, as provided in sub-rule (vii) of Rule 7 of the Rules, was held by the Inquiry Officer.

21. By a catena of decisions, the Apex Court has laid down the principles regarding the manner in which disciplinary proceedings are to be conducted and the procedure to be followed therein. It is not necessary to refer to all these decisions. Suffice it to refer to a few decisions on this topic.

22. In State of Uttranchal and others v. Kharak Singh, (2008) 8 SCC 236, after referring to some leading decisions on the issue, the Apex Court consolidated the principles to be followed in disciplinary proceedings. Paragraphs 15 (relevant portion) and 17 of the said report are being extracted below:

"15. From the above decisions, the following principles would emerge:

(i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(ii) omitted

(iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged and give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

* * *

17. On the other hand, one Mr P.C. Lohani, Dy. Divisional Forest Officer, Nandhaur acting as an enquiry officer after putting certain questions and securing answers submitted a report on 16-11-1985. No witnesses were examined. Apparently there was not even a presenting officer. A perusal of the report shows that the enquiry officer himself inspected the areas in the forest and after taking note of certain alleged deficiencies secured some answers from the delinquent by putting some questions. It is clear that the enquiry officer himself has acted as the investigator, prosecutor and judge. Such a procedure is opposed to principles of natural justice and has been frowned upon by this Court."

(emphasis supplied)

23. In *Roop Singh Negi v. Punjab National Bank & Ors., (2009) 2 SCC 570*, the Apex Court reiterated that charges levelled against the charged Government servant must be proved by leading cogent evidence. Paragraph 14 of the said report is reproduced below: -

"Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled against the delinquent officer must be found to have been proved. *The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof.* Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence."

and then in paragraph 23 of the said decision, the Apex Court held as follows: -

".....The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the Enquiry Officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."

(emphasis supplied)

24. In *State of U.P. and others v. Saroj Kumar Sinha, (2010) 2 SCC 772*, where the delinquent employee had not even submitted his reply to the charge-sheet, while considering the impact of Rule 7 of the Rules, the Apex Court observed as under: -

"27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved."

(emphasis supplied)

25. In Brij Bihari Singh v. Bihar State Financial Corpn., (2015) 17 SCC 541 the Apex Court observed as under: -

"9. It is well settled that a person who is required to answer a charge imposed

should know not only the accusation but also the testimony by which the accusation is supported. The delinquent must be given fair chance to hear the evidence in support of the charge and to cross-examine the witnesses who prove the charge. The delinquent must also be given a chance to rebut the evidence led against him. A departure from this requirement violates the principles of natural justice. Furthermore, the materials brought on record pointing out the guilt are required to be proved. If the enquiry report is based on merely ipse dixit and also conjecture and surmises, it cannot be sustained in law.'

(emphasis supplied)

26. Thus, it is well settled that the prosecution has to prove the charges by producing documents through witnesses and placing such witnesses to be cross examined by the charged Government servant. Even in the absence of the charged Government servant, the Inquiry Officer is obliged to examine the evidence presented by the Department to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved.

27. A perusal of the charge-sheet would show that all the three charges are based on the alleged complaint dated 06.07.2014 of the Jan Kalyan Samiti addressed to the Chief Minister and the proceeding of the meeting dated 12.08.2014. Admittedly, the Petitioner had given a detailed reply to the charge-sheet denying the charges levelled against him. However, the Inquiry Officer did not hold any oral inquiry and has given his report only on the basis of the reply submitted by the Petitioner. Sub-rule (vii) of Rule 7 of the Rules mandates that in all cases where the charged Government servant denies the charges, the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in the presence of the charged Governmnet servant, who shall then be given an opportunity to cross-examine such witness. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined, the documents cannot be said to have been proved, and could not have been relied upon to hold the Petitioner guilty in the matter. In the absence of any oral inquiry, no amount of reasoning given by the Inquiry Officer is going to validate the proceeding. In view of the above, this Court is constrained to hold that the inquiry proceedings stands vitiated for not following the mandatory provisions of sub-rule (vii) of Rule 7 of the Rules.

28. The second contention of the learned counsel for the Petitioner also has merit. As already mentioned above, the Petitioner was summoned by the Inquiry Officer on 12.01.2015. On the said date, after eliciting the Petitioner's reply to the questions put by the Inquiry Officer, no further proceedings were held. A perusal of the inquiry report shows that after 12.01.2015, the Inquiry Officer entered into correspondence with the Vice Chairman of the Authority and thereafter submitted his report after taking into account the information furnished by the Vice Chairman. The relevant portion of the inquiry report, to which attention of this Court was drawn by the learned counsel for the Petitioner, is extracted below: -

"3- अपचारी अवर अभियन्ता द्वारा दिनांक 22.10.2014 को अभिलेखीय साक्ष्यों सहित आरोप–पत्र का उत्तर प्रस्तुत किया गया। तत्पश्चात् अपचारी अवर अभियन्ता को दिनांक 12.01.2015 को व्यक्तिगत सुनवाई का अवसर प्रदान किया गया। दिनांक 12.01.2015 को व्यक्तिगत सुनवाई के समय अपचारी अवर अभियन्ता

द्वारा उक्त आरोपों के सम्बन्ध में अपना टंकित अभिकथन भी प्रस्तुत किया गया।

4- सचिव, लखनऊ विकास प्राधिकरण को इस कार्यालय के पत्र संख्या–1280/28–79 (2013–2014) दिनांक 13.01.2015 द्वारा निम्नलिखित बिन्दुओं पर आख्या की अपेक्षा की गयीः–

1 जव 7 omitted

तत्पश्चात् अनुस्मारक पत्र संख्या–1344/28–79(2013–2014) दिनांक 15.01.2015 द्वारा उक्त विभागीय कार्यवाही से सम्बन्धित निम्नलिखित बिन्दुओं पर विस्तृत सूचना एवं सुसंगत अभिलेख उपलब्ध कराये जाने की अपेक्षा की गयीः–

1 to 5 omitted

5- सचिव, लखनऊ विकास प्राधिकरण, लखनऊ के पत्र संख्या–797ईई/प्प, दिनांक 14.01.2015 द्वारा निम्नलिखित आख्या एवं इससे सम्बन्धित अभिलेखों की छायाप्रतियां उपलब्ध करायी गयीः–

1 to 7 omitted

6– तत्पश्चात् सचिव, लखनऊ विकास प्राधिकरण, लखनऊ के पत्र संख्या–833/एए2–3/15, दिनांक 28.01.2015 द्वारा उक्त बिन्दुओं के सम्बन्ध में निम्नानुसार आख्या एवं इससे सम्बन्धित कतिपय अभिलेखों की छायाप्रतियाँ उपलब्ध करायी गयीः–

1 to 3 omitted

अपचारी अवर अभियन्ता द्वारा प्रस्तुत किये गये उत्तर– स्पष्टीकरण तथा पत्रावली पर अभिलेखीय साक्ष्यों के आधार पर आरोपवार विस्तृत जॉच आख्या निम्नवत् हैः–

omitted

(emphasis supplied)

* * * *

29. The supply of copies of the documents sought to be relied upon by the authorities to prove the charges levelled against a Government servant are necessarily required to be provided to the delinquent employee. The Apex Court, through numerous judgments, has clearly laid down the rationale for the rule. The proposition of law that a Government employee facing a departmental enquiry is entitled to all the relevant statements, documents and other materials to enable him to have a reasonable opportunity to defend himself in the departmental enquiry against the charges is too well established to need any further reiteration. In Kashinath Dikshita v. Union of India, (1986) 3 SCC 229, the importance of access to relevant documents which are to be used against the Government servant was explained. It was held that access to such documents is necessary for the Government servant to effectively meet the charges against him. In the said case, the enquiry proceedings had been challenged on the ground that non-supply of the statements of the witnesses and copies of the documents had resulted in the breach of rules of natural justice. The appellant therein had requested for supply of the copies of the documents as well as the statements of the witnesses at the preliminary enquiry. The request made by the appellant was turned down by the disciplinary authority. The Apex Court observed as follows: -

"10. ... When a government servant is facing a disciplinary proceeding, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner. And no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies, how can the concerned employee prepare his defence, cross-examine the witnesses, and point out the inconsistencies with a view to show that the allegations are incredible?"

(emphasis supplied)

30. In the case at hand, the Inquiry Officer has, admittedly, taken into account a large number of documentary evidences furnished by the Authority behind the back of the Petitioner and utilised them against the Petitioner, but copies thereof were never supplied to the Petitioner. Thus the

Petitioner was denied an opportunity to make an effective representation against the charges levelled against him. In these circumstances, the inquiry proceeding, which has been held in violation of the principles of natural justice stands vitiated.

31. This brings this Court to the third submission of the learned counsel for the Petitioner. The impugned order has been assailed on the ground of the same being a non-speaking order.

32. In the impugned order, the State Government has stated some facts and extracted the charges levelled against the Petitioner, the reply submitted by the Petitioner to the said charges, the findings recorded by the Inquiry Officer in connection with the respective charges and, thereafter, without even adverting to the submissions made by the Petitioner, the findings recorded by the Inquiry Officer have been upheld by a cryptic order. The relevant portion of the order pertaining to Charge 1 is extracted below: -

''मौखिक सुनवाई दिनांक 12.03.2019 को श्री श्रीवास्तव द्वारा मौखिक कथनों के अतिरिक्त लिखित विवेचन भी उपलब्ध कराया गया। सुनवाई के दौरान उक्त अभियन्ताओं द्वारा लिखित रूप से उपलब्ध कराये गये विवरण में, इसी प्रकरण में अन्तर्ग्रस्त अन्य अभियन्ता श्री आर0एन0सिंह, तत्कालीन अधिशासी अभियन्ता व श्री बी0एस0 चौहान तत्कालीन सहायक अभियन्ता के विरूद्ध अधिरोपित आरोपों के सम्बन्ध में जांच अधिकारी के अभिमत को उल्लिखित करते हुए श्री श्रीवास्तव द्वारा स्वयं को आरोपों से मुक्त किये जाने का उल्लेख किया गया है। चूंकि किसी प्रकरण में अवर अभियन्ता, सहायक अभियन्ता एवं अधिशासी अभियन्ता के कार्य एवं दायित्व भिन्न भिन्न प्रकार के हो सकते हैं, अतएव उन पर अधिरोपित आरोपों के सम्बन्ध में जांच अधिकारी के निष्कर्ष भिन्न भिन्न हो सकते हैं। अतः श्री श्रीवास्तव द्वारा उन पर अधिरोपित आरोपों के सम्बन्ध में कहे गये कथन एवं स्वयं को निर्दोष बताया जाना समीचीन नहीं है।''

(emphasis supplied)

Charges 2 and 3 have also been dealt with in a similar manner.

33. The necessity of giving reasons by a body or authority in support of its decision has come up for consideration before the Apex Court in several cases.

34. In *Union of India v. Mohan Lal Kapoor*, (1973) 2 SCC 836, the Apex Court has held as under:-

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial. The should reveal a rational nexus between the facts considered and the conclusions reached."

35. In G. Valli Kumar v. Andhra Education Society, 2010 (2) SCC 497, the Apex Court observed as under: -

"that the requirement of recording reasons by every quasi judicial or even in administrative authority entrusted with the task of passing an order adversely affecting an individual and communication thereof to the affected person is one of the recognized facets of the rules of natural justice and violation thereof has the effect of vitiating the order passed by the authority concerned."

36. In the case at hand, the Petitioner had submitted a detailed reply to the show-cause notice. However, the submissions made by the Petitioner have been brushed aside by the State Government by making a cryptic observation that in a case the work and responsibility of a Junior Engineer,

Assistant Engineer and Executive Engineer could be different.

37. A perusal of the impugned order passed by the State Government would only reveal the total non-application of mind by the State Government and is liable to be set aside on this ground alone.

38. Coming to the last contention raised on behalf of the Petitioner, it is a matter of record that the charges levelled against R.N. Singh and Dhirendra Singh Chauhan were identical to the charges levelled against the Petitioner. Both the said officers and the Petitioner had submitted their reply to the respective charges. The reply submitted by them were identical to the one submitted by the Petitioner. As already mentioned above, with respect to R.N. Singh and Dhirendra Singh Chauhan, the Inquiry Officer submitted his separate report dated 12.01.2015 exonerating them of the charges levelled against them. The findings recorded by the Inquiry Officer with respect to the charges levelled against the Petitioner and R.N. Singh are extracted below: -

FINDING OF THE INQUIRY OFFICER IN HIS INQUIRY REPORT DATED 4.9.2015 IN CASE OF THE PETITIONER	FINDING OF THE INQUIRY OFFICER IN HIS INQUIRY REPORT DATED 8.6.2015 IN CASE OF R.N. SINGH
Charge 1	Charge 1
"..... पत्रावली में उपलब्ध साक्ष्यों सेविदित होता है कि उक्त अपार्टमेन्ट कानिर्माण वर्ष 2011 में पूर्ण किया गया है।जैसा कि यह उल्लिखित किया गयाहैकि अपचारी अभियंता दिनांक 27.05. 2009से 16.05.2011 की अवधि में उक्तपरियोजना में कार्यरत रहा। इस प्रकारअपचारी अभियंता का यह दायित्व था किवह उक्त कार्यों को मानके अनुसारसम्बन्धित निर्माण एजेन्सी से करवाने हेतुअपने दायित्वों का सम्यक निर्वहन करता,किन्तु उसके द्वारा इस सम्बन्ध में शिथिलता बरती गयी, जिसके कारण उक्तआवश्यक कार्य या तो किये ही नहीगये या फिर मानक के अनुसार नहीं किए गए। सर्विस डक्ट का खुला रहना, दीवारो में रिवाव होना, फर्श की ढाल ठीक न होना, पम्पों के पर्याप्त क्षमता का न होनाआदि कारणों से बेसमेन्ट में जल भराव कीस्थिति उत्पन्न हुई। उक्त परियोजना मेअवर अभियंता के रूप में तैनात होने ककारण अपचारी अभियंता ही प्रारम्भिक स्तरपर उक्त कार्यों की देखरेख आदि के लिएउत्तरदायी था।अतः उक्त तथ्यों,साक्ष्यों एवं परिस्थितियों के दृष्टिगत यह आरोप अपचारी अभियंता के विरूद्ध प्रमाणित होता है।"	"..... अपचारी अभियन्ता द्वारा सरस्वती अपार्टमेन्ट के बेसमेन्ट की रिटेनिंग वाल में केबिल, अर्थिंग आदि सर्विसेज पाइप के सहारे हो रहे रिसाव के सम्बन्ध में विभिन्न छायाचित्र भी प्रस्तुत किये गये हैं, जबकि कुछ छायाचित्र केबिल ट्रेंच से सम्बन्धित हैं। अपचारी अभियन्ता द्वारा उपलब्ध कराये गये साक्ष्यों एवं लखनऊ विकास प्राधिकरण द्वारा प्रस्तुत आख्या से यह विदित होता है कि उपरोक्त अपार्टमेन्ट का कब्जा सम्बन्धित निर्माणकर्ता फर्म से लखनऊ विकास प्राधिकरण द्वारा प्राप्त नहीं किया गया है, बल्कि निर्माणकर्ता फर्म से सम्बन्धित आवंटियों को सीधे हस्तगत कराया गया है। इसके साथ ही बेसमेन्ट स्थित पार्किंग एरिया में हुए जलभराव का कारण प्रथम दृष्टया केबिल, अर्थिंग आदि की समुचित ग्राउटिंग न किये जाने के फलस्वरूप हुआ है। जहां तक बेसमेन्ट में मोटर पम्प स्थापित न किये जाने का उल्लेख है, उपाध्यक्ष लखनऊ विकास प्राधिकरण द्वारा प्रेषित आख्याओं से भी यह स्पष्ट है कि पूर्व से पम्प स्थापित था और उनके स्थान पर 2 एच0पी0 क्षमता के दो नये पम्प स्थापित किये गये है। अपचारी अभियन्ता का यह कथन सही प्रतीत होता है कि इतनी लम्बी अवधि के पश्चात् बेसमेन्ट में हुए जलभराव तथा जिसका कारण निर्माण सम्बन्धी कमी नही है। अतएव उसे दोषी ठहराया जाना न्यायसंगत नहीं है। उक्त तथ्यों, साक्ष्यों के विवेचनोपरान्त प्रथम आरोप अपचारी अभियन्ता पर प्रमाणित नहीं होता है।"
Charge 2	Charge 2
"-..... यहॉ यह	"..... उपरोक्त साक्ष्यों से

उल्लेखनीय है कि अपचारी अभियंता उक्त परियोजना में दिनांक 27.05.2009 से 16.05.2011 तक अवर अभियंता के रूप में कार्यरत रहा। उक्त अवधि में ही उक्त परियोजना पूर्ण हो गयी थी इसके पश्चात आवंटियों को कब्जा दिया जाना था। इसलिए अवर अभियंता का यह दायित्व था कि वह उक्त परियोजना की पूर्णता के स्तर पर उसके सीवर की नेटवर्किंग से जुड़े होने और चालू होने के सम्बन्ध में सावधानीपूर्वक समयबद्ध कार्यवाही सुनिश्चित की गयी होती, तो ऐसी स्थिति उत्पन्न न होती। अतः उपरोक्त तथ्यों एवं परिस्थितियों के विवेचन के परिप्रेक्ष्य में यह आरोप अपचारी अभियंता पर प्रमाणित होता है।"

यह विदित होता है कि उक्त अपार्टमेन्ट के आवंटियों को कब्जा देने के पूर्व सीवर लाइन से पम्पिंग करने की व्यवस्था की गयी थी। बाद में सीवर की नेटवर्किंग पूर्ण होने पर उसे सुचारू रूप से चलना था, किन्तु इसे समय से पूर्ण न किये जाने एवं इसका समुचित रख–रखाव न करने तथा दूसरे ट्रंक सीवर लाइन के चालू न होने के कारण बैकफ्लो की स्थिति उत्पन्न हुई। अपचारी अभियन्ता के कार्यकाल में चूंकि 50–60 आवंटियों को ही कब्जा दिलाया गया। कदाचित उस समय एवं उतने आवंटियों के उपयोग हेतु व्यवस्था पर्याप्त थी, किन्तु भविष्य में अधिक संख्या में आवंटियों अध्यासन के फलस्वरूप सुचारू व्यवस्था न किये जाने के कारण ऐसी स्थिति उत्पन्न होना स्वाभाविक है। इस स्थिति में इसके लिए अपचारी अभियन्ता को उत्तरदायी माना जाना उचित प्रतीत नहीं होता है और उल्लिखित परिस्थितियों में यह आरोप उस पर प्रमाणित नहीं होता है।"

Charge 3

Charge 3

"--..... उक्त आरोप में कई बिन्दु हैं। जैसे बेसमेन्ट की दीवारों एवं छतों में क्रैक्स, सर्कुलेशन एरिया में किए गए कार्यों में असमान ढाल, भवनों में कारीडोर सेजल निकासी की समुचित व्यवस्था नहोने, बरसात का पानी लिफ्ट शाफ्ट में नजाने की व्यवस्था न किये जाने तथा दरवाजे एवं खिड़की की क्वालिटी घ्टयास्तर की होने का बिन्दुसम्मिलितहै।अपचारी अभियंता द्वारा यह कहा गया हैकि दीवारों एवं छतों में क्रैक्स होने केसम्बन्ध में न तो जन कल्याण समिति द्वाराअपने प्रत्यावेदन में उल्लेख किया गया हैऔर न हीकिसी निरीक्षण आख्या याशिकायत में ऐसा उल्लेख किया गया है।उसके द्वारा यह भी कहा गया है किसर्कुलेशन एरिया में असमान ढाल कीस्थिति नहीं थी। जिलाधिकारी, लखनऊकी अध्यक्षता में उक्त परियोजना केआवंटियों की समस्याओं के निराकरण केसम्बन्ध में सम्पन्न हुई बैठक दिनांक 12.08.2014 के कार्यवृत्त के बिन्दु–3 मेंउल्लिखित है कि वर्षा का पानी बेसमेण्टऔर फ्लोर पर कामन एरिया में लेवल कीसमस्या के कारण जमा हो जाता है। इसपर लखनऊ विकास प्राधिकरण केअधिकारियों द्वारा अवगत कराया गया किसम्पूर्ण कामन एरिया का पुनः लेवल सर्वे कराकर नये सिरे से

"-..... उक्त आरोप में कई बिन्दु हैं, जैसे बेसमेंट की दीवारों एवं छतों में क्रैक्स, सर्कुलेशन एरिया में किये गये कार्यों में असमान ढाल, भवनों में कॉरीडोर से जल निकासी की समुचित व्यवस्था न होने, बरसात का पानी लिफ्ट शाफ्ट में न जाने की व्यवस्था न किये जाने तथा दरवाजे एवं खिड़की की क्वालिटी घटिया स्तर की होने का बिन्दु सम्मिलित है। जैसा कि अपचारी अभियन्ता द्वारा यह कहा गया है कि दीवारों एवं छतों में क्रैक्स होने के सम्बन्ध में न तो जन कल्याण समिति द्वारा अपने प्रत्यावेदन में उल्लेख किया गया है और न ही किसी निरीक्षण आख्या या शिकायत में ऐसा उल्लेख किया गया है। उसके द्वारा यह भी कहा गया है कि सर्कुलेशन एरिया में असमान ढाल की स्थिति नहीं थी तथा अपार्टमेन्ट के कारीडोर सीढ़ी के अतिरिक्त सभी ओर से बन्द होने के कारण स्पाउट की आवश्यकता नहीं है। इसके साथ ही दो वर्षों से फ्लैट पुनर्वासित है तथा लिफ्ट में पानी जाने की कोई शिकायत नहीं थी। उसके द्वारा यह भी कहा गया है कि यदि ऐसी कोई आवश्यकता पायी गयी थी तो उसे सम्बन्धित

ट्रिमिक्सिंग करायीजा रही है।ऐसोसिएशन के पदाधिकारियोंद्वारा बताया गया कि वर्षा का पानी फ्लोरमें तथा लिफ्ट में आ जाता है। इस प्रकार यह स्पष्ट है कि कामन/सर्कुलेशन एरियामें असमान ढाल की स्थिति रही,जिसकेकारण इसका पुनः लेवल सर्वेकराकर ट्रिमिक्सिंग कराया जा रहा है। अतः इसबिन्दु पर अपचारी अभियंता काउत्तर/कथन निराधार है। उक्त केअतिरिक्त जहां तक दरवाजे वखिड़कियोंमें प्रयुक्त लकड़ियों में प्रयुक्त लकड़िया की गुणवत्ता का सम्बन्ध में इस बारे में उल्लेख किया है कि इनके परीक्षण हेर्तु स्थल पर ही लैब भी स्थापित कीगयी थी। अतः उल्लिखित परिस्थितियों में आरोप संख्या–3 अपचारी अभियंता पर आंशिक रूप से प्रमाणित होता है।"

निर्माण एजेंसी से सही कराया जा सकता था, क्योंकि निर्माण एजेंसी की धनराशि रू0 1,71,25,000/– जो दिनांक 24.01.2013 को तत्कालीन अधिशासी अभियन्ता श्री ओ0पी0मिश्र की इस टिप्पणी के बाद वापस की गयी है कि मेरे द्वारा स्थल निरीक्षण किया गया यानि तत्समय इस सम्बन्ध में कोई भी शिकायत होने का उल्लेख टिप्पणी में नहीं किया गया। उक्त के अतिरिक्त अपचारी अभियन्ता एवं लखनऊ विकास प्राधिकरण द्वारा उपलब्ध करायी गयी आख्या एवं उसके साथ संलग्न साक्ष्यों से यह विदित होता है कि विभिन्न कार्यों के सम्बन्ध में जिसमें दरवाजे व खिड़कियों की गुणवत्ता के सम्बन्ध में परीक्षण भी सम्मिलित है, विभिन्न प्रतिष्ठित संस्थाओं के माध्यम से कराया गया था और नियमानुसार परीक्षण हेतु कार्य स्थल पर ही लैब भी स्थापित की गयी थी। अपचारी अभियन्ता द्वारा यह भी कहा गया है कि उक्त अपार्टमेन्ट का निर्माण कार्य मेसर्स एल0 एण्ड टी0 को टर्न की आधार पर दिया गया था, अतः गुणवत्ता का प्रथम दायित्व मेसर्स एल0 एण्ड टी0 का था, किन्तु उसके विरूद्ध कोई कार्यवाही नहीं की गयी, बल्कि उसे पारा में प्रस्तावित कबीर नगर योजना के निर्माण कार्य के लिए अनुबन्धित भी किया गया है। इसी प्रकार वास्तुविद के विरूद्ध भी कोई कार्यवाही नहीं की गयी है, जिससे स्पष्ट है कि उक्त भवनों में किसी प्रकार की कमी नहीं थी। अतः इसके लिए अपचारी अभियन्ता को उत्तरदायी माना जाना उचित प्रतीत नहीं होता है और उल्लिखित परिस्थितियों में आरोप संख्या–3 अपचारी भियन्ता पर प्रमाणित नहीं होता है। उपरोक्त आरोपों की विवेचना से यह भी विदित होता है कि अपचारी अभियन्ता उक्त योजना में दिनांक 27.05.2009 से 21.11.2011 तक तैनात रहा। योजना से सम्बन्धित अपार्टमेन्ट में सितम्बर, 2011 से कब्जा दिया जाना प्रारम्भ हुआ और अपचारी अभियन्ता के कार्यकाल में लगभग 50–60 फ्लैटों पर ही कब्जा दिया गया था। वर्तमान मे सचिव, लखनऊ विकास प्राधिकरण द्वारा उपलब्ध करायी गयी आख्या दिनांक 14.01.2015 के अनुसार कुल 319 फ्लैटों में से 284 फ्लैटों का कब्जा दिया गया है। दिनाक 21.11.2011 को अपचारी अभियन्ता के उक्त योजना से हटने तथा मा0 मुख्यमंत्री जी के निरीक्षण दिनांक 06..07.2014 तक के मध्य की लम्बी अवधि ढाई वर्ष से अधिक के दौरान उक्त योजना का कार्य देख रहे अभियन्ताओं/अधिकारियों का दायित्व था कि वे उक्त अपार्टमेण्ट का अनुरक्षण करते, किन्तु कदाचित् इस सम्बन्ध में सम्यक कार्यवाही नहीं की गयी। अतः यह बिन्दु भी विचारणीय थे।"

The findings recorded in the case of Dhirendra Singh Chauhan is similar to one recorded in the case of R.N. Singh.

39. In his representation dated 12.03.2019 to the State Government, the Petitioner had specifically stated that the charges levelled against him, R.N. Singh and Dhirendra Singh Chauhan were identical and the reply given by them were also the same but despite the said fact, the other officers were exonerated by the Inquiry Officer but on the same charges the Petitioner was found guilty. Paragraphs 10 and 11 of the representation dated 12.03.2019 is extracted below: -

"10. उपरोक्त प्रस्तर संख्या–9 से यह स्पष्ट रूप से विदित होता है कि पूर्व जांच अधिकारी महोदय ने समान आरोप में श्री आर0एन0सिंह, तत्कालीन अधिशासी अभियंता व श्री डी0एस0 चौहान, तत्कालीन सहायक अभियंता व प्रार्थी द्वारा जांच अधिकारी के समक्ष प्रस्तुत समान तथ्यों के आधार पर विस्तारपूर्वक एक समान उत्तर दिये जाने के उपरान्त कतिपय अन्य कारणों से श्री आर0एन0 सिंह, व श्री डी0एस0 चौहान को जांच में बरी कर दिया जबकि प्रार्थी को दोषी ठहरा दिया गया है इस प्रकार स्पष्ट है कि प्रार्थी के साथ विभेदीकरण किया गया है।

11. यहां यह भी उल्लेखनीय है कि कार्य के अन्तिम भुगतान के समय तैनात तत्कालीन अभियन्ताओं की संस्तुति पर प्राधिकरण की निविदा समिति द्वारा इन कार्यों का समापन करने की संस्तुति की गयी थी तथा तत्कालीन उपाध्यक्ष महोदय द्वारा इसका अनुमोदन किया गया था। कार्य पूर्ण होने के उपरान्त ही उस वक्त तैनात अभियंता सर्वश्री आर0एन0सिंह तत्कालीन अधिशासी अभियंता, श्री डी0एस0 चौहान तत्कालीन सहायक अभियंता द्वारा सम्बन्धित ठेकेदार को अन्तिम भुगतान तभी किया गया होगा जब उस वक्त कार्य को संतोषजनक पाते हुए तथा उस कार्य में कोई कमी न पाते हुए अपनी आख्या प्रस्तुत की होगी (संलग्नक–7)। परन्तु जांच अधिकारी द्वारा श्री आर0एन0सिंह व श्री डी0एस0 चौहान को जांच में बरी करते हुये प्रार्थी को दोषी ठहरा दिया गया है।"

(emphasis supplied)

40. In the impugned order, the State Government has failed to give any reason or justification as to why the basis for exoneration of other two employees is inapplicable to the case of the Petitioner. Simply stating that the responsibility of the Engineer could be different is insufficient, especially where the specific responsibility of the Petitioner has not even been determined. The Petitioner's reply to the charge sheet is almost identical to that of other two employees, namely, R.N. Singh and Dhirendra Singh Chauhan and there does seem any reason to treat them differently. More so, when the Petitioner had been posted at the site in question for a much shorter time and even left much before the other two employees.

41. In *Bongaigaon Refinery & Petrochemicals Ltd. v. Girish Chandra Sarma, (2007) 7 SCC 206* while dealing with discrimination in imposition of punishment the Apex Court has stated as under: -

18. After going through the report and the finding recorded by the Division Bench of the High Court, we are of opinion that in fact the Division Bench correctly assessed the situation that the respondent alone was made a scapegoat whereas the decision by all three Committees was unanimous decision by all these members participating in the negotiations and the price was finalised accordingly. It is not the respondent alone who can be held responsible when the decision was taken by the Committees. If the decision of the committee stinks, it cannot be said that the respondent alone stinks; it will be arbitrary. If all fish stink, to pick one and say only it stinks is unfair in the matter of unanimous decision of the Committee.

(emphasis supplied)

42. In yet another case in State of U.P. and others v. Raj Pal Singh, (2010) 5 SCC 783 , the Apex Court has observed as under: -

"5. Though, on principle, the ratio in aforesaid cases would ordinarily apply, but in the case in hand, the High Court appears to have considered the nature of charges leveled against the 5 employees who stood charged on account of the incident that happened on the same day and then the High Court came to the conclusion that since the gravity of charges was the same, it was not open for the disciplinary authority to impose different punishments for different delinquents. The reasonings given by the High Court cannot be faulted with since the State is not able to indicate as to any difference in the delinquency of these employees.

6. It is undoubtedly open for the disciplinary authority to deal with the delinquency and once charges are established, to award appropriate punishment. But when the charges are same and identical in relation to one and the same incident, then to deal with the delinquents differently in the award of punishment, would be discriminatory. In this view of the matter, we see no infirmity with the impugned order requiring our interference under Article 136 of the Constitution."

(emphasis supplied)

43. In Tata Engineering and Locomotive Co. Ltd. v. Jitendra Prasad Singh and others, (2001) 10 SCC 530 the Apex Court has upheld the finding recorded by the High Court by observing as under: -

"Since as many as three workmen on almost identical charges were found guilty of misconduct in connection with the same incident, though in separate proceedings, and one was punished with only one month's suspension, and the other was ultimately reinstated in view of the findings recorded by the Labour Court and affirmed by the High Court and the Supreme Court, it would be denial of justice to the appellant if he alone is singled out for punishment by way of dismissal from service."

44. A Division Bench of this Court in *Vinod Kumar Srivastava v. Secretary, Public Works Department and others*, 2012 (4) ADJ 272 while dealing with the issue of discrimination in imposing the punishment observed as under: -

"13. The finding of the enquiry officer is that on account of traffic congestion the old road is found to be damaged in sufficient length and at the same time two rainy seasons intervened. It has been further stated that no final payment has yet been made and only running payment has been made and the contract is not yet complete.

14. There appears to be no dispute about the fact, from the facts stated above that in respect to the same project, same length/period of the road all the three i.e. the petitioner, D. P. Roy and Sunil Kumar were together. There is further no dispute that no maintenance grant was there for about two years and two rainy seasons intervened upon which slight damage, if any, to the work in question can be duly noticed. The work contract was still not complete and only running payment was made. In view of the circular issued by the department itself (annexure no. 4 to the rejoinder affidavit) about lepan/painting work of the road Junior Engineer is responsible to the extent of 30% and the

Assistant Engineer to the extent of 15%. *It appears to be a case where after about two years of the initial work the Minister concerned just visited the site while going on the way and he reported the matter to the competent official, upon which impugned exercise was undertaken. Another Assistant Engineer and another Junior Engineer engaged with the petitioner were not found at fault.*

15. *Above mentioned facts leads to a situation that no action against two officers has been taken, although in different enquiries, in relation to the same project, same site, same length, period of the road nothing adverse by lapse of time and for various other reasons so stated in the enquiry officer's report dated 24.9.2004 (annexure no. 3 to rejoinder affidavit), is found then why the petitioner alone is to be punished. The Junior Engineer has been exonerated on the ground that nothing wrong on merit of charge was found. Factum of lapse of two years, two rainy seasons have intervened, no maintenance grant being there and as such it is a case where same factual premises can apply to the petitioner also. All these aspects were stated by the petitioner in his representation (annexure no. SA-2) but nothing has been taken into account and the impugned order has been passed."* (emphasis supplied)

45. For the reasons stated above, it is apparent that the Petitioner has been discriminated in the matter of imposition of penalty. In the facts and circumstances of the case, the Petitioner is entitled to parity quo - R.N. Singh and Dhirendra Singh Chauhan. Accordingly, the impugned order dated 4.8.2020 passed by the Respondent cannot be sustained.

46. The result is that the writ petition is allowed. The impugned order dated 04.08.2020 is hereby quashed.

47. There shall be no order as to costs.

(2022)07ILR A364
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2017

BEFORE

THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 29130 of 2014

Surendra Kumar Verma ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ravi Sahu, Sri Piyush Shukla

Counsel for the Respondents:
C.S.C., Sri Anoop Trivedi

A. Contract Law – Allotment of plot – Auction – Right of highest bidder, having been deposited the amount of Rs. 4,83,000/- – Auction cancelled without giving any reason – Validity challenged – Power to accept or reject the bid, how far is vested with the Vice Chairman of the Development Authority – Contract, when can be said to be completed – Held, Acceptance and confirmation of the highest bid by the Auction Committee having not been done, it cannot be said that any right accrues to the petitioner warranting interference by this Court to issue a mandate to force the authority to sell the plot in question to the petitioner even if the price bid by him has been found non-competative by the Authority – Communication of acceptance of the highest bid is necessary for concluding the contract and it cannot be said that the auction process has been finalised until a contract follows it. (Para 7 and 9)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Laxmi Kant & ors. Vs Satyawan & ors.; 1996 SCC (4) 208

2. U.P. Avas Evam Vikas Parishad & ors. Vs Om Prakash Sharma; 2013 (5) SCC 182

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

1. This writ petition has been filed praying for issuance of a writ in the nature of certiorari for quashing the orders dated 01.02.2012 and 14.09.2012 passed by the Vice Chairman, Kanpur Development Authority, Kanpur and for issuance of a writ in the nature of mandamus directing the Kanpur Development Authority to allot Plot No. 85, Govind Nagar, District Kanpur in favour of the petitioner.

2. The facts as argued by the learned counsel for the petitioner are that the Kanpur Development Authority had published an auction notice on 25.12.2011 in "Amar Ujala" a daily newspaper for allotment of plots in residential areas.

3. In pursuance of the said notice, the petitioner deposited registration fee and requested for allotment of plot No. L-85, Govind Nagar, Kanpur and a proposal was also prepared for allotment of the said plot to the petitioner. On 01.02.2012 the Vice Chairman, Kanpur Development Authority, the Respondent No. 2 herein, rejected the allotment. But the petitioner was not informed. Unaware of the order dated 01.02.2012 that had already been passed, the petitioner filed a writ petition No. 10424 of 2012 which was disposed of by this Court on 28.02.2012 with a direction that petitioner's representation be considered and decided by the Respondent No. 2.

4. The Respondent No. 2 thereafter has rejected the representation on 14.09.2012. This writ petition has, therefore, been filed challenging the orders dated 01.02.2012 and 14.09.2012.

5. It has been submitted that petitioner's bid was the highest in auction. The auction notice dated 25.12.2011 had fixed Rs.9,522/- per sq. fit as reserved price of plot in question and the petitioner had proposed Rs.11,200/- per sq. fit in his bid. His being the highest bid, the petitioner had also deposited Rs.4,83,000/- on 12.01.2012 but by the impugned orders the auction itself for allotment of Plot No. L-85, Govind Nagar, Kanpur has been cancelled without giving opportunity of hearing to the petitioner.

6. Shri Anoop Trivedi, Advocate, has appeared for Kanpur Development Authority and he has relied upon his counter affidavit wherein it has been averred that in the brochure it has been stipulated that the power to accept or reject a bid would vest in the Vice Chairman of the Kanpur Development Authority and his decision would be final. After the auction was completed the Auction Committee while analyzing the bids had found that two persons - Petitioner and one another had colluded amongst themselves and both these bidders were related to each other and only two bids were filed for Plot No. L-85 with a difference of only Rs. 100/- per sq. fit. No other person had bid for the Plot No. L-85 and the two bids being found collusive and non-competitive, the Respondent No. 2 had cancelled the auction with respect to Plot No. L-85 and it was proposed to re-auction the same. This decision was duly communicated to the petitioner by a letter dated 29.02.2012 written by Tehsildar, Kanpur Development Authority, Zone - 3, Kanpur. Detailed reasons have also been given by the Respondent No. 2 while deciding the

representation of the petitioner in his order dated 14.09.2012.

7. We have perused the impugned order and we find that reasons have been given in detail therein. Moreover, this Court is aware that the rights of the highest bidders are governed by the Statutory Rules, if any, and the conditions of auction. The brochure issued by the Kanpur Development Authority had clearly stipulated that the Authority was not bound to accept the highest bid tendered. The Authority having reserved its right to reject even the highest bid and also the right to withdraw the plot itself from the auction in spite of the highest bid, no right accrues to the highest bidder. Acceptance and confirmation of the highest bid by the Auction Committee having not been done, it cannot be said that any right accrues to the petitioner warranting interference by this Court to issue a mandate to force the authority to sell the plot in question to the petitioner even if the price bid by him has been found non-competative by the Authority.

8. The Hon'ble Supreme Court in the case of **Laxmi Kant and others Vs. Satyawan and others**, 1996 **SCC** (4) 208 has found that the conditions of auction are mentioned in the tender document. The bidder participating in an auction on the basis of such conditions cannot question the same on the ground that it was not open to the Authorities to prescribe such conditions. On the contrary, the principle of acquiescence and estopple would prevent them from doing so. It would not be open to a participant to the auction proceeding to question the conditions at a later stage or as an afterthought.

9. The aforesaid judgment of the Hon'ble Supreme Court has been relied upon again in the case of **U.P. Avas Evam Vikas Parishad and others Vs. Om Prakash Sharma:** 2013 (5) **SCC** 182 wherein the Supreme Court has considered several earlier precedents and come to the conclusion that bidders participating in the tender process have no other right except the right to equal and fair treatment. No contract comes into existence merely by submission of the highest bid until it is accepted. Mere deposit of 20 per cent or part payment of the bid amount by the highest bidder at the fall of the hammer does not amount to acceptance of the bid. Communication of acceptance of the highest bid is necessary for concluding the contract and it cannot be said that the auction process has been finalised until a contract follows it.

10. In view of the facts as mentioned in the impugned order and the law settled by Hon'ble Supreme Court we are of the considered opinion that merely because petitioner's bid was the highest and above the reserved price fixed by the Respondent No. 2, it cannot be said that any right accrued to the petitioner to entail a Mandamus to be issued by this Court.

11. The writ petition being devoid of merits is dismissed.

(2022)07ILR A366
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.06.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE OM PRAKASH TRIPATHI, J.

Writ- C No. 3858 of 2022

Smt. Asiya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ashish Kumar Shukla

Counsel for the Respondents:
C.S.C., Dr. Arjun Singh

A. Civil Law – Scrutiny of caste certificate – Power of District Level Scrutiny Committee – Demand made for reference to Vigilance Cell in the light of Kumari Madhuri Patil's case, but the Scrutiny Committee rejected the objection relying on GOs. dated 02.07.1994 and 05.01.1996 – Validity challenged – High Court found difference in approach of the two Division Benches in the cases of Nasrin Bano's case and Mairaj Ahmed's case and hence referred the matter to the Hon'ble Chief Justice to constitute a Larger Bench formulating two questions – High Court also directed the petitioner to approach the District Level Scrutiny Committee and place all the relevant facts with regard to the validity of the Caste Certificate. (Para 5, 16 and 17)

Writ petition disposed of. (E-1)

List of Cases cited :-

1. Kumari Madhuri Patil & anr. Vs Additional Commissioner, Tribal Development & ors., AIR 1995 SC 94

2. Writ C No. 3338 of 2022; Mohd. Israr Khan Vs St. of U.P. & ors.

3. M.B. No. 36397 of 2018; Nasrin Bano Vs St. of U.P. & ors.

4. Writ Petition No. 1611 (MB) of 2008; Taramuni Tharu Vs St. of U.P. & ors. decided on 23.09.2010

5. PIL No. 1396 of 2011; Tharu Shakti Samiti & anr. Vs St. of U.P. & ors. decided on 12.01.2011

6. Hizwana Bano Vs St. of U.P. & ors.; 2011 (1) ADJ 441

7. Writ C No. 160 of 2019; Mairaj Ahmed Vs St. of U.P. & ors.

8. Rasheed Ahmad Vs St. of U.P. & ors.; 2009 (7) AJD 385

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J. & Hon'ble Om Prakash Tripathi, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel appearing for the State-respondents.

2. Sri Dr. Arjun Singh, learned counsel appearing for the opposite party no. 6, has raised a preliminary objection regarding maintainability of the writ petition and submitted that the order impugned is an interlocutory order and the petition is not maintainable against such order. The petitioner should wait for final order to be passed whereafter a statutory remedy of filing appeal will be available before Divisional Level Committee.

3. This writ petition has been filed challenging the order dated 08.06.2022 passed by the respondent no.2 District Level Caste Scrutiny Committee.

4. Learned counsel for the petitioner submits that in terms of a judgment rendered by the Supreme Court in the case of ***Kumari Madhuri Patil and Another vs. Additional Commissioner, Tribal Development and Others, AIR 1995 SC 94***, where the Court has held that for examination of whether a candidate belongs a particular reserved category, the matter should be referred to the Vigilance Cell for conducting the inquiry for which it directed that each Directorate should constitute a Vigilance Cell consisting of Senior Deputy Superintendent of Police and such number of Police Inspectors to investigate into the claims for reservation, no enquiry by Vigilance Cell has been done.

5. The petitioner had filed an objection to complaint made against her. The District Level Scrutiny Committee

should have referred the matter of the petitioner for investigation to Vigilance Cell. The petitioner's objection has been rejected by means of impugned order passed by District Level Scrutiny Committee saying that the directions issued by the Supreme Court in the case of ***Kumari Madhuri Patil (Supra)*** have been incorporated in the Government Orders dated 02.07.1994 and 05.01.1996. There being no direction in the two Government Orders for referring the matter for investigation to the Vigilance Cell, the petitioner's objection is misconceived.

6. Learned counsel for the petitioner submitted that in similar case, a coordinate Division Bench of this Court has entertained a petition, namely, ***Writ-C No.3338 of 2022 (Mohd. Israr Khan vs. State of U.P. and others).*** The Court has found that the order impugned passed by the District Level Scrutiny Committee was in violation of judgment of Supreme Court in the case of Kumari Madhuri Patil (Supra) and therefore, the Court has entertained the petition and directed the Standing Counsel to seek instructions and stayed the order impugned till the next date of listing.

7. This Court has perused the interim orders dated 06.06.2022, 21.06.2022 and 26.06.2022 passed in said petition. It is apparent that initially this Court had granted time to Standing Counsel to seek instructions as to why the directions issued by the Supreme Court in the case of ***Kumari Madhuri Patil (Supra)*** were not followed in such matters. When no instructions were forthcoming, the District Level Committee was restrained from passing a final order till the next listing of the petition.

8. Sri Manish Mishra, learned counsel appearing for the State-respondents has relied upon a Division Bench judgment in the case of Nasrin Bano vs. State of U.P. and others, M.B. No.36397 of 2018, wherein the order of District Level Scrutiny Committee was challenged by the petitioners and mandamus was sought to the State-respondents to enquire the dispute regarding Caste Certificate through Vigilance Cell as per Government Order dated 05.01.1996 in which guidelines had been framed in the light of a judgment of the Supreme Court in ***Kumari Madhuri Patil (Supra)***. The Division Bench considered the arguments made by the learned counsel for the petitioners in Nasrin Bano (Supra) that Scrutiny Committee should have referred the matter to the Vigilance Cell and should not have conducted inquiry through Revenue Officials. The Division Bench in the case of ***Nasrin Baso (Supra)*** thereafter has considered in detail judgments rendered by two Division Benches of this Court in ***Taramuni Tharu vs. State of U.P. and others, Writ Petition No.1611 (MB) of 2008,*** decided on 23.09.2010 and PIL No.1396 of 2011, ***Tharu Shakti Samiti and another vs. State of U.P. and others***, decided on 12.01.2011, wherein this Court had observed that State Government had constituted only one Scrutiny Committee and there was no appellate authority over such Scrutiny Committee for verification of Caste Certificate. Therefore, the Divisional Level Committee has been constituted by the Government Order dated 27.01.2011.

9. The Division Bench in ***Nasrin Bano (Supra)*** observed that after judgment rendered in ***Tharu Shakti Samiti (Supra)***, the State Government had issued another Government Order dated 28.02.2011 where scrutiny of Caste Certificate was to be done by the Committee of District Level and then Appeal was provided to the Divisional

and State Level Committees. The Division Bench in Nasrin Bano (Supra) also considered the observations made by the Division Bench in the case of Hizwana Bano vs. State of U.P. and others, reported in 2011 (1) ADJ 441 and came to the conclusion that the Government Orders issued by the State Government on 05.01.1996, 27.01.2011 and 28.02.2011 had taken into account the observations made by the Supreme Court in the case of Kumari Madhuri Patil (Supra) and also by the Division Benches of this Court in ***Taramuni Tharu (Supra)*** and ***Tharu Shakti Samiti (Supra)*** and constituted a valid mechanism for investigation of Caste Certificates issued by the Revenue Officials. It had dismissed the writ petition of Nasrin Bano on 17.12.2018 finding that the relevant Government Orders had sufficiently complied with the observations made by the Supreme Court in ***Kumari Madhuri Patil (Supra)*** and by the judgments of earlier Division Benches of this Court.

10. In view of the submission made by Sri Manish Mishra, learned Standing Counsel, this Court finds that there is no good ground to give parity to the petitioner of the case of Mohd. Israr Khan and to give benefit of interim order granted by the Division Bench, which was passed only because the Standing Counsel could not produce relevant instructions, although, time had already been granted to him to do so.

11. Learned counsel for the petitioner in rejoinder has pointed out a Division Bench judgment of this Court in the case of ***Mairaj Ahmed vs. State of U.P. and others, Writ-C No. 160 of 2019.*** It has been submitted that the said writ petition was allowed by the Court and the impugned order had been set-aside giving a direction to the District Level Scrutiny Committee to adopt the procedure as given in the case of Kumari Madhuri Patil (Supra) to decide the validity of the Caste Certificate of the petitioner therein in accordance with the observations made by the Supreme Court in the case of ***Kumari Madhuri Patil (Supra).***

12. This Court has carefully perused the Division Bench judgment dated 16.01.2019 and finds that the order challenged in the said writ petition was an appellate order passed by the Divisional Level Scrutiny Committee. The Court had considered the observations made by the Supreme Court in the case of ***Kumari Madhuri Patil (Supra)*** and the arguments raised by the learned counsel for the petitioner that guidelines framed therein were not followed. It had also referred to the facts of the writ petition wherein the petitioner being "Thathera" (Tinker of vessels) had alleged to be a Backward Caste at Serial No.59 of Schedule-1 of Uttar Pradesh Public Services (Reservation for Scheduled Castes, Schedules Tribes and Other Backward Classes) Act, 1994. However, after such certificate was issued to him and he contested the Election for the post of President of Nagar Panchayat, Sahanpur allegation of fraud was made by the private respondents saying that the petitioner was ***"Sheikh"*** and not a member of Backward Class of ***"Thathera"***.

13. The Division Bench referred a judgment rendered in ***Rasheed Ahmad vs. State of Uttar Pradesh and others*** reported in 2009 (7) AJD 385, where considering a similar case the Division Bench had observed that only because the name is prefixed by the word "Sheikh", the class of a person cannot be determined. The question as to whether a person belongs to

upper caste or not is required to be decided on the basis of other relevant evidence.

14. It is apparent from the perusal of the judgment rendered in the case of ***Mairaj Ahmed (Supra)*** that Division Bench had not noticed the earlier Division Bench judgments rendered in the case of ***Nasrin Bano (Supra)***. Without noticing binding precedents of this Court or relevant Government Orders, the Division Bench had passed the order dated 16.01.2019 placing reliance only upon the question of fact relating to the ancestors of the petitioner prefixing their names with the word "Sheikh", cannot be said to be upper caste as per judgment rendered in the case of ***Rasheed Ahmad (Supra).***

15. The judgment in the case of ***Mairaj Ahmed (Supra)*** cannot said to be rendered after considering all the relevant Government Orders and the Scheme framed therein in compliance of the judgment rendered by the Supreme Court in the case of ***Kumari Madhuri Patil (Supra)*** and the Division Bench judgments of this Court in the cases of ***Taramuni Tharu (Supra)*** and ***Tharu Shakti Samiti (Supra).***

16. This writ petition is disposed of with a direction to the petitioner to approach the District Level Scrutiny Committee and place all the relevant facts with regard to the validity of the Caste Certificate claimed by the petitioner.

17. Since this Court is sitting in Division Bench and has considered the judgments rendered by earlier coordinate Benches and finds that there is a difference in approach of the two Division Benches in the cases of ***Nasrin Bano (Supra)*** and ***Mairaj Ahmed (Supra).*** The matter is referred to the Hon'ble Chief Justice to constitute a Larger Bench for considering the following questions:

(i) "Whether the Government Orders dated 05.01.1996, 27.01.2011 and 28.02.2011 have been issued in exercise of executive jurisdiction by the State Government after considering the directions issued by the Supreme Court in the case of ***Kumari Madhuri Patil (Supra)?****"*

(ii) "Whether the judgment rendered in the case of Mairaj Ahmed (Supra) can be considered to have laid down a valid proposition of law that the District Level Scrutiny Committee should not have ignored the observations made by the Supreme Court in the case of **Kumari Madhuri Patil (Supra)** *for verification of Caste Certificate by a Vigilance Cell moved by Police Officers ?".*

(2022)07ILR A370
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ-C No. 10123 of 2021

Palika Towns LLP, Lucknow ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manu Khare, Sri Navin Sinha (Senior Adv.)

Counsel for the Respondents:
C.S.C., Anjali Upadhya, Sri Ramendra Pratap Singh

A. Company Law – Insolvency and Bankruptcy Code 2016 – Sections 7 & 33(2) – Insolvency Resolution process – After auction, the bid was accepted and

confirmed by the NCLT – GNIDA, the lessor, claimed the arrears of rental and interest thereon – Liability of auction purchaser to pay it – As per the sale certificate, the plot, in question was sold on *'As is where is' , 'As is what is', 'Whatever there is', and 'No recourse'* basis – Auction purchaser, the petitioner accepted the condition. He was a signatory of Transfer Memorandum – Effect – Held, the petitioner stepped into the shoes of the Creditor Debtor and also got itself bound to honor the contractual obligation – He was bound to honor the commitments as laid down in the lease deed – Held further, the petitioner being a beneficiary of a transfer is bound to honor the contractual obligation as contained in the Transfer Memorandum. [Para 19(ii), 21, 60, 66 and 67]

B. Constitution of India – Article 226 – Writ of mandamus – Contractual obligation – Scope of interference – Solitary relief sought for refund of amount claimed to be deposited under protest, how far can be granted – Held, resiling and wriggling from contractual obligations are not within the realm of the writ proceedings – Writ petition, seeking the solitary relief of mandamus without assailing any order, is not maintainable – Cases of Suganmal and Salonah Tea Company Ltd. relied upon. (Para 68, 79 and 82)

C. Transfer of Property Act, 1882 – Section 3 – Doctrine of constructive notice – Doctrine of Caveat Emptor – Meaning and scope – Caveat Emptor means 'let the buyer beware' – This doctrine puts the duty on the purchaser to carry out all necessary inspection of the property before entering into an agreement. If the purchaser fails to conduct such an inspection, then later, on identification of defects in the property may not be a ground to revoke or claim damages under the contract – High Court held the words 'As is where is' finds its root in the common law doctrine of 'Caveat Emptor'. (Para 31 and 32)

D. Defects in property – Latent defect and patent defect – Meaning – Liability of purchaser to inspect the defect, how far exist before purchasing the property – Difference between latent defect and patent defect – Latent defects are such type of defects which are unlikely to be discovered by a purchaser during investigation. On the other hand, the second category is patent defects, which are discoverable if the buyer would have carried out inspection – High Court held the conditions shown in sale certificate is the defect falls under the second category i.e patent defect. (Para 34)

E. Lease – Leasehold and freehold – Difference – Right of lessor over the land leased out, which is being put to liquidation – Held, lessor has a paramount interest over the property so sought to be leased to the lessee as there is a marked difference between leasehold and freehold as in the case of former only possession is transferred and not the ownership or title, however, in the later ownership and possession stands transferred. (Para 40 and 43)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Al Champdandy Industries Ltd. Vs Official Liquidator & anr.; (2009) 4 SCC 486

2. Rana Girders Ltd. Vs U.O.I. & ors.; (2013) 10 SCC 746

3. Haryana State Electricity Board Vs Hanuman Rice Mills Dhanauri & ors.; (2010) 9 SCC 145

4. St. of Karn. & anr. Vs Shreyas Papers (P) Ltd. & ors.; (2006) 1 SCC 615

5. Telangana State Southern Power Distribution Comp. Ltd. & anr. Vs Srigdhaa Beverages; (2020) 6 SCC 404

6. Raman Roadways Pvt. Ltd. Vs St. of Mah. & ors.; 2021 SCC Online Bom 534

7. Sales Tax Officer, Banaras & ors. Vs Kanhaiya Lal Makund Lal Saraf; AIR 1959 SC 135

8. U.T. Chandigarh Administration & anr. Vs Amarjeet Singh & ors.; 2009 (4) SCC 660

9. Punjab Urban Planning & Development Authority & ors. Vs Raghu Nath Gupta & ors.; 2012 (8) SCC 197

10. Rajasthan State Industrial Development & Investment Corp. & anr. Vs Diamond & Gem Development Corp. Ltd. & anr.; 2013 (5) SCC 470

11. U.O.I. Vs Official Liquidator & ors.; 1994 (1) SCC 575

12. Phatu Rochiram Mulchandani Vs Karnataka Industrial Area; 2015 (5) SCC 244

13. Stressed Assets Stabilization Fund Vs West Bengal Small Industries Development Corp.; 2019 (10) SCC 148

14. St. of U.P. Vs U.O.I.; 2016 (2) SCC 757

15. Delhi Development Authority Vs Karam Department of Finance Investment (India) Pvt. Ltd. & ors.; 2020 (4) SCC 136

16. K. Madhu & ors. Vs Dugar Finance India Ltd. & ors.; (2008) 145 Comp Case 277 (Mad)

17. R.N. Gosain Vs Yashpal Dhir; (1992) 4 SCC 683

18. Shyam Telelink Ltd. Vs U.O.I.; (2010) 10 SCC 165

19. Cauvery Coffee Traders, Mangalore Vs Hornor Resources (International) Company Limited; (2011) 10 SCC 420

20. Sri Gangai Vinayagar Temple & anr. Vs Meenakshi Ammal & ors.; (2015) 3 SCC 624

21. R. K. Mittal & ors. Vs St. of U.P. & ors.; 2012 (2) SCC 232

22. Har Shankar & ors. Vs The Dy. Excise and Taxation Commercial & ors.; 1975 (1) SCC 737

23. M/s Radhakrishna Agarwal & ors. Vs St. of Bihar & ors.; 1977 (3) SCC 457

24. Premji Bhai Parmar & ors. Vs Delhi Development Authority & ors.; 1980 (2) SCC 129

25. Divisional Forest Officer Vs Bishwanath Tea Co. Ltd.; 1981 (3) SCC 238

26. Barielly Development Authority & anr. Vs Ajay Pal Singh & ors.; 1989 (2) SCC 116

27. Noida Entrepreneur Assc. Vs U.P. Financial Corporation & anr.; 1994 Supp (2) SCC 108

28. Improvement Trust Ropar Through Its Chairman Vs Tejinder Singh Gujral & ors.; 1995 Supp (4) SCC 577

29. State of Orissa Vs Narain Prasad & ors.; AIR 1997 S.C. 1493

30. Orissa State Financial Corporation Vs Narsingh Ch. Nayak & ors.; 2003 (10) SCC 261

31. Suganmal Vs St. of M.P.; AIR 1965 SC 1740

32. Salonah Tea Comp. Ltd. & ors. Vs Superintendent of Taxes Nowgong & ors.; 1988 (1) SCC 401

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Navin Sinha, learned Senior Counsel assisted by Sri Manu Khare, learned counsel for the petitioner, Sri Ramendra Pratap Singh, learned counsel for the respondent no. 2 (Greater Noida Industrial Development Authority) and Smt. Subhash Rathi, learned Standing Counsel who appears for the State.

EPILOGUE

"The extent and the scope of judicial intervention in writ jurisdiction in the matter of contractual obligation embodied in the commercial contract is a subject matter of present petition."

2. Factual matrix of the case as worded in the present petition are that the petitioner claims itself to be a Partnership firm registered u/s 12 (I) of Limited Liability Partnership Act 2008 with Government of India Ministry of Corporate Affairs having its registered office at D.S.C.- 319 DLF South Court Saket New Delhi 110017. As per the pleadings set forth in the petition one Moser Baer India

Private Ltd. (hereinafter referred as Corporate Debtor) was allotted a commercial plot no. 66 admeasuring 2,70,201 square meters at Udyog Vihar Greater NOIDA, District Gautam Budh Nagar by the respondent no. 2 Greater NOIDA Industrial Development Authority (hereinafter referred as GNIDA) for a period 90 years. Record further reveals that initially the lease deed was executed on 26.06.2001 between GNIDA on one part and Corporate Debtor on the other part setting out the terms and the conditions (covenants) of the leased land in question. It is further pleaded in the petition that an application purported to be u/s 7 of the Insolvency and Bankruptcy Code 2016 (hereinafter referred to as IBC Code) was instituted by a Financial Creditor being M/s Alchemist Assets Reconstruction Company Limited bearing no. I.B.378 (P.B.) 2017 for initiating Insolvency Resolution Process against Carporate Debtor. The said application was admitted on 14.11.2017 by National Company Law Tribunal (NCLT) and one Mr. Debendra Singh was appointed as Interim Resolution Professional (hereinafter referred to as IRP).

3. Eventually, NCLT by virtue of its order dated 20.09.2018 allowed the application preferred by IRP u/s 33(2) IBC Code while orderding Liquidation of Coroprate Debtor. In furthrance thereof the Liquidator made a public announcement on 24.09.2018 under Regulation 12 of the Insolvency and Bankruptcy (Lilquidation Process) Regulation 2016 (hereinafter referred as to 2016 Regulation) inviting claims owed and due to Corporate Debtor giving details and description of the assets of Corporate Debtor such as location of the land and buildings so constructed thereon along with the plant and machinery embodied thereon. An advertisement/sale notice of the assets of the Corporate Debtor was published on 08.03.2019 by the Liquidator wherein not only details and description of the assets including the land and the buildings was mentioned which was put to auction but reserve price of auction being bieng 145.67 crores and the earnest money to be deposited being 14.57 crores was also reflected. The petitioner as per its own showing, participated in the auction so conducted and the bid of the petitioner was found to be commensurate to the expectation of the Liquidator. Consequently, the NCLT accepted the offer of the petitioner on 16.07.2019 and the petitioner thereafter received the acceptance letter dated 16.07.2019 of the Liquidator. According to the petitioner, full and final payment of Rs. 145.75 crores was made by it and on 11.09.2019 and a Certificate of Sale under Regulation 33 of 2016 Regulation was issued in favour of the petitioner. Consequent to the issuence of the sale certificate on 11.09.2019 the petitioner approached GNIDA on 30.01.2020 followed on 11.09.2020 for issuance of Transfer Memorandum. It has come on record that on 11.09.2020 GNIDA corresponded with the Liquidator claming arrears of past lease rentals of Rs. 4,71,40,620/- as principal dues and interest towards lease rentals of Rs. 6,26,86,769/-. Record further reveals that the liquidator replied to the said letter on 08.10.2020 coming with the stand that as the demised land had already been subject matter of public auction as per the IBC Code- 2016, objections were invited to file claims for getting registered by the creditors and as GNIDA did not get registered its claim so, the auction proceedings were concluded and the same was also confirmed by NCLT hence the request so acceded by the GNIDA cannot be accepted. It has been further averred in para 14 of the writ

petition that the petitioner wanted to start with its project and thus under extreme pressure of the GNIDA, the petitioner deposited the arrears of lease rent and interest thereon beng Rs. 5,80,28,025/- for issuance of Transfer Memorandum on 27.10.2020 under protest. In support of the said contention petitioner has appended as annexure- 10 a letter sent by it addressed to GNIDA which is being termed as protest letter along with details of the deposits so sought to be made by it.

4. According to the petitioner finally the Transfer Memorandum was issued by GNIDA on 24.12.2020, a copy whereof has been appended at page 79 of the writ petition.

5. Lamenting quiescent demeanor in non refund of the amount which has been deposited under protest the petitoner is before this court by means of the present writ petiton seeking following reliefs:-

"I. issue a writ, order or direction in the nature of mandamus directing the respondent no. 2 to refund the amount of Rs. 5,80,28,025/- along with intrest @ 18% per annum from the date of deposition till date of refund.

II. issue any other writ, order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

III. Award cost of the petition to the petitioner."

6. Contesting the claim of the petitioner, a counter affidavit has been filed on behalf of GNIDA sworn by respondent no. 3 on 13.06.2021 wherein following averments have been made in paragraph nos. 12, 13, 14, 15 which are quoted as under:-

"12. That the contents of para 10 of the writ petition are not admitted hence specifically denied. The petitioner has not annexed the lease deed which was executed between Greater Noida Authority and M/s Moser Bear. Without prior permission of the Greater Noida Autority M/s Moser Baer cannot sale the leae property. The M/s Moser Baer should have informed the Aurthority that they have become bankrupt and they cannot pay the lease rent of the plot allotted to them. No information has been given to the Greater Noida Authority by the M/s Moser Baer. Moreover lease rent has not been paid and the Greater Noida Authority will charge transfer charges as per policy of the Greater Noida Authority from the petitioner company, then only name of the company can be recorded in the Authority's record.

13. That the contents of para 11, 12 and 13 of the writ petition are not admitted hence specifically denied. As per the liquidation of the company of M/s Moser Baer and petitioner compoany that was between them and not with the Greater Noida Authority. In case, any amount due against the plot, the Greater Noida Authority is liable to realize it from the lesee/allottee/purchaser. The Greater Noida Authority has nothing to do with the letter dated 30.09.2020. The company has to pay the transfer charges and all the dues including lease rent of the plot. It is further stated that the dues which are pending against, the Greater Noida Authority is laible to realize from the allottee/purchaser. Moreover, the petitioner company and M/s Moser Baer have flouted the terms and condition of the lease deed.

14. That the contents of para 14 and 15 of the writ petition are not admitted hence specifically denied. The petitionr company was require to deposit lease rent and transfer charges of the polot. The

Greater Noida Authority has transfer the plot in the name of the petitioner company by issuing the transfer memorandum dated 24.12.2020. 11 conditions have been given in the transfer memorandum.
15. That the contents of para 16, 17, 18, 19 and 20 of the writ petition are not admitted hence specifically denied. The M/s Moser Baer shojld have taken prior permission from the Greater Noida Authority and they should have informed that the company has becomebankrupt and they are going to insolvency. Since the petitioner company purchased the plot should have also inquire from the Authority what are the dues are pending agianst the plot. Since the petitioner compay has entered in the shoes of M/s Moser Baer, hence they have to clear all the deus. It is specifically denied that petitioner is not entitle for any refund of the amount of Rs. 5,80,33,025/-."

7. In nutshell, the stand taken by the GNIDA in their counter affidavit is that GNIDA was at no point of time apprised of the fact that Corporate Debtor lessee became bankrupt and proceedings were drawn under IBC Code- 2016 against it culminating into auction of the demised land and transfer of the same, therefore, auction in favour of the petitioner is illegal. It has been further alleged in the counter affidavit that once the petitioner stepped into the shoes of the Corporate Debtor lessee then as per the covenant contained in lease deed so executed from time to time and Transfer Memorandum the petitioner is liable to make good the arrears of the lease rentals and interest thereon.

8. Rejoiner affidavit has also been filed by the petitioner in reply to the counter affidvit so filed by the GNIDA retereating their stand in the writ petition.

9. A supplementary counter affidavit has been filed by GNIDA on 10.11.2021 sworn by respondent no. 3 annexing copy of the lease deed dated 26.06.2001 so executed between GNIDA on one part and the Corporate Debtor on the other part.

10. A supplementary rejoinder affidavit has been filed in reply of the supplementary counter affidavit. An impleadment application has been filed by the petitioner on 10.2.2022 seeking impleadment on M/s Moser Baer India Private Limited Company in Liquadation for making him as a party respondent no. 4. A supplementary affidavit and compilation of judgments have been filed by petitioner.

RELEVANT EXTRACT OF DOCUMENTS AND INSTRUMENTS EXECUTED BETWEEN THE PARTIES:-

11. THE LEASE DEED MADE on the 26th day of June in the year TWO THOUSAND ONE between Greater Noida Industrial Development Authority, a body corporate constituted under Section 3 read with Section 2(d) of the U.P. Industrial Area Development Act, 1976 (U.P. Act 6 of 1976) (hereinafter called the "Lessor which expression shall, unless the context does not so admit, include its successor and assigns) of the one part AND

1.Sri.....aged.....
.Years.....
S/o.....
R/o.....

2.
Sri.....aged.....Years.
.....
S/o.....
R/o.....

3.Sri.....aged.....
.Years.....
S/o.....
R/o.....

4.Sri.....aged.....
.Years.....
S/o.....
R/o.....

5.Sri.....aged.....
.Years.....
S/o.....
R/o.....

hereinafter called the lessee which expression shall unless the context does not admit, include his/her/their/it's heirs, executors, administrators, representatives and permitted assigns/it's successors and permitted assigns of the other part.

A. Partnership Firm /Proprietorship Firm/Company functioning in the name of M/s. Moser Baer Indi Ltd.- Having its Registered Office Situated at 63, Ring Rutid. Through its Director Sri N.K. Chaudhary aged.48 years S/O Sri Raj Mangal Chaudhary I-11 Sector 27 Noida he reinafter called the lessee which expression shall, unless the context does not admit, include his/he:/their/it's heirs, executors, administrators, representatives and permitted assigns/it's successors and permitted assigns) of the other part.

II (a).....

Provided that the interest shall be computed at the rate mentioned above on the total amount of the balance outstanding from time to time from the date of allotment and shall be payable half yearly (As per payment plan enclosed with allotment latter) on the schedule mentioned above. Provided that if the installments together with the interest accruing thereon are not paid by tor on the due date. Interest at the rate of 15% compounded at six monthly shall be charged for delayed payment for delayed period.

(b) The payments made by the Lessee shall be first adjusted towards the interest due. If any, and thereafter towards the premium. If any, and the balance. If any, shall be appropriated towards the lease rent not withstanding any directions/request of the lessee to the countrary.

(c) If Lessee makes default in payment of premium and interest for two consecutive installments the Lessor shall have a right to determine the Lease and to resume possession.

(9) (i) That the lessee, may transfer, relinquish, mortgage or assign its interest in the demised premises or the building constructed thereon or both provided that no transfer shall be allowed/permitted in respect of a unit where a functional certificate has not been obtained.

Provided also that the lessee may with the previous permission in writing of the lessor (whose decision shall be binding on the lessee and which permission shall not be unreasonably withheld) relinquish mortgage or assign its interest in the demised premises or the building constructed thereon or both.

(ii) Every transfer, assignment, relinquishment, mortgage or subletting as referred to above shall be subject to and the beneficiary thereof shall be bound by all the covenants and conditions contained in this deed and be answerable to the lessor in all respect in the same manner as the original lessee.

10 (a) Whenever the title of the Lessee in the demised premises is transferred in any manner whatsoever the transferor and

the transferee shall within one month of such transfer, give notice of such transfer in writing to the Lessor.

(b) In the event of the death of the Lessee the person on whom the titles of the deceased devolves shall within three months of such devolution give notice of such devolution to the Lessor.

(c) The transferee or the person on whom the titles devolves as the case may be shall supply to the Lessor certified copies or the document evidencing the transfer or devolution.

15.....

The Lessor may require the successor in interest of the Lessee to abide by and faithful carry out the terms, conditions, stipulations provisions and agreements herein contained.

IV. AND IT IS HEREBY FURTHER AGREED AND DECLARED BY AND BETWEEN THE PARTIES TO THESE PRESENTS AS FOLLOWS

(A) Upon the happening of any one or more of the under mentioned contingencies.

(a) If the lessee or any other person(s) claiming through or under such lessee commits breach of any of the covenants or conditions contained in this Deed and such breach is not remedied following receipt of a written notice from the lessor specifying the nature of breach and providing the lessee reasonable opportunity to remedy the breach:

(b) If the lessee or any other person(s) claiming through or under such lessee fails and/or neglects to observe punctuality and/or perform any of their/its/his/her obligations stipulated under this Deed:

(c) If the lessee or any other person(s) claiming through or under such lessee whether actually or purportedly transfers, creates, alienates, extinguishes, relinquishes, mortgages or assigns the whole or any part of his right, title or interest whether in whole or any part thereof, except in the manner stipulated in this Lease Deed.

(3) (a) That the Lessor and the Lessee hereby agree that all sums due under this deed from the Lessee on account of premium rent, interest or damages for use and occupation or any other account whatsoever shall on the certificate of the Lessor which shall be final, conclusive and binding on the Lessee be recoverable as arrears of land revenue.

(b) That the lessor shall have first charge upon the demised premises for the amount of unpaid lease rent and interest thereon and other dues of Authority.

SALE CERTIFICATE DATED 30.07.2021

AND WHEREAS the official Liquidator within his ambit and powers conferred under Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, In view of NCLT's order dated 16-07-2019, has sold the leasehold rights of plot no 66 admeasuring 270201.16 sqm, Greater Noida, Distt Gautam Budh Nagar, UP along with buildings constructed (Map Enclosed) thereupon (hereinafter referred to as "PROPERTY") as per terms contained in e-auction process document dated 08-03-2019.and as per order of Honble NCLT order dated 16-07-2019. The Liquidator issued the sale certificate dated 11-09-2019 in respect of the captioned property which is an integral part of this document and is also attached herewith. Consequently, the Transferor has transferred the fease hold rights for the said Property unto) the

TRANSFEREE by virtue of the aforesaid sale certificate and the TRANSFEREE has also agreed to acquire the same for the sale consideration of Rs. 1,45,75,00,000/- (Rupees One Hundred Forty Five Crores and Seventy Five Lakh Only).

AND WHEREAS the Transferor has already applied and obtained the TRANSFER MEMORANDUM from the Greater Noida Industrial Development Authority, vide TRANSFER MEMORANDUM No. GNIDA/2020/1750dated 24-12-2020 in favour of the Transferee, in respect of the lease hold rights for the said property l.e. Plot No. 66, Greater Noida, U.P. having total area admeasuring 2,70,201 Sq. Mtrs.

4. That the Transferor has assured and undertakes the Transferee that the said property is free from all sorts of encumbrances such as mortgage, sale, gift, lien, agreement, dispute, tigation injunctions, banks or private loans, securities, guarantees, attachment with any decree of any Hon'ble court of law from lower to higher jurisdiction in the all over India or abroad being sale as per the provisions of the IBC Codeand NCLT Orders.

7. That the Transferee shall be bound by the terms and conditions of the earlier Lease Deeds executed between the Transferor and the Greater Noida specifically the original lease deeds in respect of the said property and the supplementary lease deed dated 28th November 2007 subject to the changes mentioned in the transfer memorandum and otherwise from time to time.

11. That if the Transferee does not abide by the terms and conditions of allotment/leases and building regulation and direction or any other rules framedby the authority, the lease may be cancelled by the GNIDA and possession of the demised premises may be taken over by the GNIDA and the Transfereein such an event will not be entitled to claim any compensation in respect thereof.

ग्रेटर नोएडा औद्योगिक विकास प्राधिकरण

भूखण्ड संख्या-01, सैक्टर-के० पी०-4, ग्रेटर नोएडा सिटी, जिला गौतमबुद्ध नगर

पत्रांकः ग्रेनो/उद्योग/हस्तांतरण पत्र/2020/1760 दिनांक 24/12/2020

अन्तरण ज्ञापन

Transfer Memorandum.

आवंटन Ind	भूखण्ड संख्या 66
क्षेत्रफल 270201 वर्गमीटर	ब्लाक- Udyog Vihar
वास्तविक क्षेत्रफल- 270201 वर्गमीटर	सैक्टर-Ecotech-II,
अंतरक के पक्ष में M/s. Moser Baer India Ltd authorised- Anil Kohli पिता/पति का नाम- Ramesh Chandra Kohli अंतरक का पता K. G. Marg Cannaught place New Delhi	अंतरिकी के पक्ष में M/s. Palika Towns LLP authorised -Ashish Jain पिता / पति का नाम Dileep Kumar Jain अंतरिकी का पता A-3 SF House No 66 Bihari Nagar Ghaziabad

उपरोक्त अंतरण हस्तांतरण प्रपन्न दिनांक 18.12.2020 के क्रम में विशेष कार्याधिकारी महोदय के अनुमोदन के उपरांत निम्नलिखित नियम व शर्तों के साथ अनुमोदित किया जाता है

1. अंतरक / अंतरिकी को यह सुनिश्चित करना होगा कि उपरोक्त सम्पत्ति सभी प्रकार के भार से मुक्त है तथा कही बन्धक नहीं है । बन्धक पाये जाने की दशा में अंतरण अनुमति स्वतः निरस्त मानी जायेगी

2. अंतरिकी द्वारा इस पत्र के जारी होने की तिथि से 90 दिन के अन्दर निबन्धित अंतरण प्रलेख का निबन्धन सम्बन्धित उपनिबन्धक कार्यालय सेक्टर गामा चितवन एस्टेट) ग्रेटर नोएडा

सिटी में सुनिश्चित किया जाना चाहिए जिसकी प्रति ग्रेटर नोएडा कार्यालय में देनी होगी। अंतरण प्रलेख न कराने कि स्थिति में वर्तमान औद्योगिक नीति के अनुसार कार्यवाही की जायेगी।

3. अंतरण ज्ञापन अंतरण प्रलेख का अनिवार्य अंग होगा तथा अंतरण के साथ परिशिष्ट के रूप में निबन्धित किया जायेगा।

4. अंतरक एवं ग्रेटर नोएडा के मध्य निष्पादित पटटा प्रलेख दिनांक 28-08-2001 एवं अनुपूरक पटय प्रलेख दिनांक शून्य में वर्णित शर्तें एवं नियम एवं अंतरण ज्ञापन की शत अंतरिकी पर बाध्यकारी होगीं।

5अंतरिकी उपरोक्त औद्योगिक भवन का उपयोग दिनांक 28-08-2001 से केवल 90 वर्ष की अवधि के शेष भाग के लिये पटटे के रूप में करेगा। 5.

6. प्राधिकरण के अनुमोदित भवन नियमावली के नियम निदेशों उपबन्धी के विरुद्ध किये गये निर्माण कार्य के फलस्वरूप समस्त वयित्व स्वतः ही अंतरिकी में निहित समझे जायेंगे।

7. भूखण्ड हस्तान्तरण के बाद भी कोई देयता (जैसे प्रीमियम / लीज/ अतिरिक्त प्रतिकर आदि की गणना सम्परीक्षा के अधीन है) बनती है तो अंतरिकी को व्याज सहित देना होगा तथा अंतरिकी को भविष्य में देय पट्टा किराये का भुगतान निर्धारित तिथि को करना होगा।

8. टी०एम० जारी होने की तिथि से इकाई को एक वर्ष की अवधि में पुनः इकाई क्रियाशील घोषित किया जाना अनिवार्य होगा। उपरोक्त अवधि के पश्चात प्राधिकरण के नियमानुसार विलम्ब शुल्क के साथ समय विस्तरण अनुमन्य होगा।

9. इकाई द्वारा उक्त भूखण्ड का एकमुश्त लीजरेन्ट जमा करा दिया गया है। यदि प्राधिकरण द्वारा भविष्य में लीज रेन्ट की दरों में कोई परिवर्तन किया जाता है तो अंतरिकी बढी हुयी धनराशि को जमा करने हेतु बाध्यकारी होगा।

10. अंतरिकी द्वारा उक्त औद्योगिक भूखण्ड का उपयोग औद्योगिक योजना के अन्य प्रचलित नियम निर्देशों के अनुसार न करने की दशा में आवंटन निरस्तीकरण हेतु वाँछित कार्यवाही की जायेगी तथा अंतरिकी कोई अनुतोष पाने का अधिकारी न होगा। हस्तांतरण इस प्रतिबंध के साथ किया जा रहा है कि प्राधिकरण बोर्ड की स्वीकृति की

11. प्रत्याशा में लीजरेण्ट में देय ब्याज के सम्बन्ध में जो भी निर्णय लिया जाएगा हस्तान्तारी को मान्य होगा।

ARGUMENT OF PETITIONER

12. Sri Navin Sinha, learned Senior Counsel assisted by Sri Manu Khare, learned counsels for the petitioner have made manifolds submissions namely:-

(a). The petitioner being a bonafide auction purchaser, purchased immovable asscets consequent to the auction/sale held in pursuance of the orders of NCLT after paying the bid amount cannot be fastened with any monetory liability which was attached with Corporare Debtor under Liquidation.

(b). Once under the provisions of the IBC Code- 2016 claims were invited by Resolution Professional and GNIDA did not get his claim registered then it is estopped to claim the said amount as the same is hit by the doctrine of waiver and acquiescence.

(c). Even otherwise, the petitioner is liable to pay lease rentals and interest thereon and honour the contractual obligation and commitments so set out in the lease deed only from the date of the issuance of acceptance letter confirming the auction/execution of the Transfer Memorandum dated 24.12.2020 and not from a date anterior to it.

(d). Deposit of an amount of Rs. 5,80,28,025 was under protest and thus, the petitioner is entitled to refund of the same and the GNIDA being the instrumentality of the said State cannot withhold the said amount on the pretext that though the amount is not liable to be paid but was paid under protest.

13. Elaborating the said submissions, learned Senior Counsel has argued that the status of the petitioner is of a bonafide purchaser as the petitioner has participated in the bid which was conducted pursuant to the order passed by NCLT on 20.09.2018 wherey Corporate Debtor was declared as insolvant and the petitioner under bonafide belief that there was neither any latent or patent defect in the immovable property, which was to be put to auction participated in the same and thus once the petitioners

bid had been approved and it had deposited the entire amount, then the petitioner is not liable to clear the arrears of the lease rentals and the interest thereon which is being claimed by the GNIDA. Sri Sinha, has further invited the attention towards correspondence of the Liquidator to the GNIDA wherein it has been recited that despite due publication of invitation of the claims relatable to the dues owed to the Corporate Debtor, GNIDA did not either lodge or got registered its claim and thus, according to learned Senior Counsel GNIDA has forgone its right to claim the said amount as once the proceedings under the Code came to an end and the Corporate Debtor got liquidated then the dues so sought to be claimed by the GNIDA is not only unjustified besides being not backed by any of the provision of law.

14. Sri Navin Sinha, learned Senior Counsel in order to buttress his submission has relied to and referred to the several judgments so as to contened that the condition mentioned in the Certificate of Sale dated 11.09.2019 being "AS IS WHERE IS", "AS IS WHAT IS", "WHATEVER THERE IS" AND "NO RECOURSE" cannot be stretched so far as to include within its encompass a situation that the petitioner is liable to pay past dues of the company in liquidation. According to the learned Senior Counsel who appears for the petitioner harmonious interpretation is to be given so as to give literal meaning while personifying that only those dues which are legal and payable, are to be included and not those dues and liabilities which are not to be paid or discharged particularly when there was latent and patent defects in the property which is being put to auction and the liabilies so attached to it, was at no point of time apprised or confornted to the petitioner who is a bonafide auction purchaser. Learned Senior Counsel in support of the said submission has relied upon the following judgments:-

"1. Al Champdandy Industries Limited vs. Official Liquidator and Another reported in (2009) 4 SCC 486

2. Rana Girders Limited vs. Union of India and Others reported in (2013) 10 SCC 746

3. Haryana State Electricity Board vs. Hanuman Rice Mills Dhanauri and Others reported in (2010) 9 SCC 145

4. State of Karnataka and Another vs. Shreyas Papers (P) Ltd. and Others reported in (2006) 1 SCC 615

5. Telangana State Southern Power Distribution Company Limited and Another vs. Srigdhaa Beverages reported in (2020) 6 SCC 404

6. Raman Roadways Private Limited vs. State of Maharashtra and Others 2021 SCC Online Bom 534

7. Sales Tax Officer, Banaras and Others vs. Kanhaiya Lal Makund Lal Saraf AIR 1959 SC 135"

15. Learned Senior Counsel has further argued that the petitioner is not shying away from discharging the contractual obligation as engrafted in the lease deed so executed between the GNIDA on one part and Corporate Debtor on other part as though the petitioner has stepped into the shoes of the Corporate Debtor in pursuance of the Transfer Memorandum dated 24.12.2020 but the conditions are to be tailored in such a manner so as to give logical meaning as the petitioner is bound to honour the commitment so made either from the date of acceptance of auction or from the date of execution of Transfer Memorandum.

16. Sri Sinha has invited the attention of the Court towards paragraph no. 14 of

the writ petition so as to further contend that not only specific averments about deposit of past lease rentals along with interests under protest were made but the letter dated 27.10.2020 was also annexed giving details of the paymens made by it under protest. According to learned Senior Counsel even if assuming that the amount in question has been deposited voluntarily then to GNIDA being the instrumentality of the State, had no occassion or justification to retain the said amont on the guise that the petitioner has deposited the said amount for executation of Transfer Memorandum. The argument of the learned Senior Counsel is that once the amount is not liable to be paid and the GNIDA has received the same without any legal justification then in that contingency the amount is liable to paid back to the person who had extended the same.

ARGUMENT OF RESPONDENTS (ANSWERERS)

17. Sri Ramendra Pratap Singh, who appears for GNIDA has countered the submission of learned Senior Counsel while arguing that the petitioner is not entitled to any relief particularly in view of the fact that, might be the petitioner claims itself to be a bonafide auction purchaser but in view of the fact that the present case relates to auction of an immovable property being a lease land of which the GNIDA is the lessor then without there being any communication about the bankruptcy of the Creditor Debtor and the fact that insolvency proceeding got initiated culminating into passing of an order of 20.09.2018, the GNIDA is not only necessary party but also has substantial interest therein as according to the term and covenant contained in the lease deed not only the lease rentals has to be paid but also in case of subletting or assigning of the lease in favor of the third person concurrence and approval of GNIDA is/was necessary. Sri Singh in order to buttress his contention has sought to argue that the petitioner being auction purchaser and claiming interest over the lease land premises is liable to make the payment of the past lease rentals and interest of late payment and also honour the commitments so engrafted in the lease deed and Transfer Memorandum and petitioner cannot wriggle out from the contractual obligation and the dues so attached with the lease deed as the petitioner herein has stepped into the shoes of Corporate Debtor. It has been further argued that contractual obligation cannot be a subject matter of adjudication in the present proceedings particularly when the present petition is being sought to be filed for getting a judicial seal in resiling and wriggling from contractual obligation. Sri Singh further argued that in view of the contractual obligation set out in the lease deed in question executed with Corporate Debtor and by virtue of the Transfer Memorandum dated 24.12.2020 now the petitioner is bound by the covenants of lease deed of erstwhile lessee and thus, the petitioner cannot evade payment of arrears of lease rentals as well as of the interest thereon.

18. Smt. Shubhash Rathi, learned Additional Chief Standing Counsel who appears for respondent no. 1 has though not filed any counter affidavit but according to her the main contesting party is the respondent nos. 2, 3 and thus according to her she is adopting the argument of the counsel for the respondent nos. 2 and 3 and she has nothing to add except the fact that the writ petition so preferred by the petitioner is not maintainable as it tantamount to insisting the Court to give it

a licence to wriggle out from the contractual obligation.

REPLICATION OF THE PETITIONER (SUITOR)

19. The learned counsel for the petitioner in rejoinder affidavit had reiterated the argument, which he had made at the first instance while arguing the writ petition. However, the same is not being repeated, as the same is nothing but repetition of the argument, made at the time of arguing the petition.

QUESTION OF DETERMINATION

"(i) Whether under the the facts and circumstances of the case, the petitioner has any lawful right to claim refund of Rs. 05,80,28,025/- along with interest @ 18% per annum, deposited by him to get the lease of the disputed plot transferred in its name as per Transfer Memorandum dated 24.12.2020?

(ii) Whether payment of the dues attached to the disputed property can be questioned by the petitioner when as per sale certificate dated 11.09.2012, the disputed plot was sold on "AS IS WHERE IS", "AS IS WHAT IS", "WHATEVER THERE IS", AND "NO RECOURSE" basis and accepting the conditions, and the petitioner deposited the amount to get the lease transferred in its name?

(iii) Whether the claim of refund of the disputed amount is hit by the principle of approbate and reprobate?

(iv) Whether under the IBC, the petitioner as an auction purchaser of lease hold rights of the disputed plot, has protection under the IBC from payment of lease rent and other dues attached to the property, particularly when the right of the liquidated company in the disputed property was purchased by the petitioner on "AS IS WHERE IS", "AS IS WHAT IS", "WHATEVER THERE IS", AND "NO RECOURSE" basis?"

SYMPOSIUM

20. We have heard the submissions of learned counsel for the parties and perused the record.

21. Undisputedly, the petitioner herein is an auction purchaser who had purchased the lease hold rights of the Creditor Debtor through public bidding pursuant to a judicial order passed by NCLT in liquidation proceedings purported to be under IBC Code-2016. It is further not in dispute that GNIDA is the lessor and Creditor Debtor is/was a lessee. None of the parties have disputed the fact that the Creditor Debtor was in-dues with respect to lease rentals which also exposed it to penal interest. The only question which is to be decided in the present proceeding is as to whether the petitioner being the auction purchaser is liable to pay the arrears of rentals and interest thereon from a date anterior to the acceptance and confirming of bid by the NCLT/Execution of Transfer Memorandum on 24.12.2020. These questions are to be answered in the light of the question so framed by this Court for determination of the issue as extracted hereinabove. Ancillary and Incidental questions are to be answered which are interwoven with each other which are relatable to the import and the impact of the Transfer Memorandum dated 24.12.2020 viz a viz conduct of the petitioner and the scope of the writ petition in altering the covenants of the lease deed and the Transfer Memorandum in question.

22. To begin with the answer of **question no. (ii)** is to be first analyzed.

23. As per the lease deed so executed on 26.06.2001 between the GNIDA one part and the Corporate Debtor on the other part, the word lessee has been defined in such a manner that the expression shall unless the context does not admit include his/her/their/its heirs, executors, administrator, representative and permitted assignees. Further the lease deed itself provides that the same is for 90 years and the lessee has to pay 50% of the premium of the plot at the time of execution of the lease deed and residue 50% of the premium of the plot for the period from 30.12.2001 to 30.06.2006 and further nonpayment thereof within the stipulated period attracts interest @ 15% compounded six monthly.

24. Sub-clause (I) of Clause 9 itself provides that the lessee may transfer, relinquish, mortgage or assign its interest in the demise premises or building constructed thereon or both, however, the same is subject to prior permission/concurrence to be given by lessor by GNIDA. Clause 15 itself stipulates that the GNIDA being the lessor may require successor in the interest of the lessee to abide by and faithfully carry out the terms and conditions, stipulation, provisions and agreements therein contained.

25. Clause (a),(b) of Clause 3 under heading no. (IV) commencing with the word "AND IT IS HERE BY FURTHER AGREED AND DECLARED BY AND BETWEEN THE PARTIES TO THESE PRESENTS AND FOLLOWS" itself stipulates that lessee agrees that the sums dues under the deed on account of premium, rent interest or damage for use and occupation shall be paid by the lessee and the lessor shall have first charge upon the demise premises for the amount of unpaid lease rent and interest. Conjoint reading of the said covenants itself shows that the expression lessee itself encompasses to it the legal heirs, assignee, representative etc and the land being the lease land can only be transferred with prior permission to be accorded by the lessor for transfer. Nonetheless, by virtue of the lease deed the lessee is under obligation to pay the unpaid rentals and in case of delay the lessee gets automatically exposed to penal interest. Learned counsel for the parties have not disputed the fact that the lease deed dated 26.06.2001 executed between GNIDA and Corporate Debtor is in existence though subsequently other lease deeds were executed on 22.03.2002, 05.09.2002 and supplementary lease deed on 28.11.2007 wherein the terms and the conditions so mentioned in the lease deed dated 26.06.2001 stood intact and applicable.

26. Now the question arises how the words "AS IS WHERE IS", "AS IS WHAT IS", "WHATEVER THERE IS", AND "NO RECOURSE" as stipulated in certificate of sale issued by Liquidator on 11.09.2019 is to be interpreted. It is further not in dispute that the petitioner itself approached the GNIDA for grant of Transfer Memorandum and when the GNIDA insisted for payment of past rentals and interest thereon the same was paid by the petitioner under protest (though disputed by GNIDA) and eventually, on 24.12.2020 Transfer Memorandum was executed wherein in Clause 4 of the same the petitioner accepted the fact that he is bound by the terms and condition (covenant) as contained in the lease deed dated 26.06.2001 and further in Clause 7 of the same the fact that after transfer of the demise land in favour of the petitioner if there are any dues like premium/lease/additional possession then the petitioner being a lessee is bound by it. Under

Clause 11 the petitioner has also accepted the condition that in case of the Resolution of the Board, any liability with respect to interest on lease rent is being fastened then the petitioner is bound to pay it. Notably, the conditions mentioned in the Transfer Memorandum dated 24.12.2020 became the part and parcel of the Sale Certificate so executed and registered on 30.07.2021 in between Creditor Debtor (Transferor) and the petitioner (Transferee) wherein not only the reference of the lease deed so executed between GNIDA and the Creditor Debtor was taken into account but also the Transfer Memorandum dated 24.12.2020 issued by GNIDA in favour of the petitioner was also taken note of and was made basis for issuance of the sale certificate as apparent from internal page 3 of the sale certificate dated 30.07.2021. Clause 4 of the sale certificate dated 30.07.2021 itself reveals that the transferor being the Corporate Debtor has assured and undertook that the demised land is free from all sorts of encumbrances land as mortgage, sale, gift, lien, agreement, dispute, litigation, injunctions, banks or private loans, securities, guarantees, attachment with any decree of court of law.

27. In the light of the abovenoted instrument so executed from time to time, the present case is to be decided. The words "as is where is basis" has been subject matter of interpretation and consideration before the Hon'ble Apex Court umpty number of times in following decision:-

28. The Hon'ble Apex Court in the case of **U.T. Chandigarh Administration And Another Vs. Amarjeet Singh And Others** reported in **2009 (4) SCC 660** in paragraph nos. 19 and 20 observed as under:-

"19. In Lucknow Development Authority, it was held that where a developer carries on the activity of development of land and invites applications for allotment of sites in a developed layout, it will amount to `service', that when possession of the allotted site is not delivered within the stipulated period, the delay may amount to a deficiency or denial of service, and that any claim in regard to such delay is not in regard to the immovable property but in regard to the deficiency in rendering service of a particular standard, quality or grade. The activity of a developer, that is development of land into layout of sites, inviting applications for allotment by assuring formation of a lay out with amenities and delivery of the allotted sites within a stipulated time at a particular price, is completely different from the auction of existing sites either on sale or lease. In a scheme for development and allotment, the allottee has no choice of the site allotted. He has no choice in regard to the price to be paid. The development authority decides which site should be allotted to him. The development authority fixes the uniform price with reference to the size of plots. In most development schemes, the applications are invited and allotments are made long before the actual development of the lay out or formation of sites. Further the development scheme casts an obligation on the development authority to provide specified amenities. Alternatively the developer represents that he would provide certain amenities, in the Brochure or advertisement. In a public auction of sites, the position is completely different. A person interested can inspect the sites offered and choose the site which he wants to acquire and participate in the auction only in regard to such site. Before bidding in the auction, he knows or is in a position to ascertain, the condition and situation of the site. He knows about the

existence or lack of amenities. The auction is on `as is where is basis'. With such knowledge, he participates in the auction and offers a particular bid. There is no compulsion that he should offer a particular price. When the sites auctioned are existing sites, without any assurance/representation relating to amenities, there is no question of deficiency of service or denial of service. Where the bidder has a choice and option in regard to the site and price and when there is no assurance of any facility or amenity, the question of the owner of the site becoming a service provider, does not arise even by applying the tests laid down in Lucknow Development Authority or Balbir Singh.

20. Where there is a public auction without assuring any specific or particular amenities, and the prospective purchaser/lessee participates in the auction after having an opportunity of examining the site, the bid in the auction is made keeping in view the existing situation, position and condition of the site. If all amenities are available, he would offer a higher amount. If there are no amenities, or if the site suffers from any disadvantages, he would offer a lesser amount, or may not participate in the auction. Once with open eyes, a person participates in an auction, he cannot thereafter be heard to say that he would not pay the balance of the price/premium or the stipulated interest on the delayed payment, or the ground rent, on the ground that the site suffers from certain disadvantages or on the ground that amenities are not provided."

29. Following the said judgment the Hon'be Apex Court in the case of **Punjab Urban Planning and Development Authority And Others Vs. Raghu Nath Gupta And Others** reported in **2012 (8) SCC 197** in para 14 observed as under:-

"14. We notice that the respondents had accepted the commercial plots with the open eyes, subject to the above mentioned conditions. Evidently, the commercial plots were allotted on "as is where is" basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on "as is where is" basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage etc. If the allottees were not interested in taking the commercial plots on "as is where is" basis, they should not have accepted the allotment and after having accepted the allotment on "as is where is" basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage etc. were not provided by PUDA when the plots were allotted. Over and above, the facts would clearly indicate that there was not much delay on the part of PUDA to provide those facilities as well. As noted, the electrical works and health works were completed by 24.12.2002 and 22.11.2002 respectively and all the facilities like parking, lights, roads, water, sewerage etc. were also provided."

30. Yet in the case of **Rajasthan State Industrial Development And Investment Corporation And Another Vs. Diamond & Gem Development Corporation Limited And Another** reported in **2013 (5) SCC 470** in para 30 has observed as under:-

"The terms and conditions incorporated in the lease deed reveal that, the allotment was made on "as-is- where-is" basis. The same was accepted by the respondent-company without any protest, whatsoever. The lease deed further enabled the appellant to collect charges, in case it

decided to provide the approach road. Otherwise, it would be the responsibility of the respondent-company to use its own means to develop such road, and there was absolutely no obligation placed upon the appellant to provide to the respondent the access road. As the respondent-company was responsible for the creation of its own infrastructure, it has no legal right to maintain the writ petition, and courts cannot grant relief on the basis of an implied obligation. The order of the High Court is in contravention of clause 2(g) of the lease deed."

31. Apparently the words "AS IS WHERE IS" finds its root in the common law doctrine of "Caveat Emptor" which means "let the buyer beware'. This doctrine puts the duty on the purchaser to carry out all necessary inspection of the property before entering into an agreement. If the purchaser fails to conduct such an inspection, then later, on identification of defects in the property may not be a ground to revoke or claim damages under the contract. In such cases it is presumed that the purchaser had the notice of defects, if any.

32. Section 3 of the Transfer of Property Act 1882 incorporates the doctrine of constructive notice under Section 3 which is read as under:-

"A person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have know it.

Explanation II: Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof."

33. Nonetheless the Transfer of Property Act, 1882, also envisages the duty of the seller to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover. This is, however, subject to the presence of contract to contrary between the parties.

34. Now, another facet needs to be examined as to what are the types of defects which a buyer is expected to inquire into before purchasing the property. There are two types of defects namely latent defects and patent defects. Latent defects are such type of defects which are unlikely to be discovered by a purchaser during investigation. On the other hand, the second category is patent defects which are discoverable if the buyer would have carried out inspection. Here in the present case the defects falls under the second category, being patent defects as Court finds that on 24.09.2018 the public announcement was made by Liquidator inviting claims due from the Corporate Debtor wherein in item no. 5 the details of the demised premises in question was given. Further the sale notice for assets of the Corporate Debtor was also published which is annexure- 4 at page no. 45 wherein again description of the land was given. It is a matter of common knowledge that whenever a property is being sought to be sold through auction and the reserve price runs into crores of rupees (which in the present case is 145.67 crores) then it is clearly expected that purchaser might have got carried out inspection of the title deed as well as of the liabilities attached to it.

The petitioner herein is a registered liability partnership company duly registered with Government of India Ministry of Corporate Affairs and thus, it becomes highly implorable and inconceivable that the petitioner was not having knowledge about the liability of the Corporate Debtor. The present case can also be analyzed from another point of angle that the petitioner is not a illiterate person but the presumption is that legal option is freely accessible to it. It is not a case wherein the demised premises which is being put to auction is in remote part of the country or there is no via media of getting internal details of the Corporate Debtor and its liabilities particularly when it is a matter of common knowledge that once the demised land is leasehold then obviously an intending party would approach the lessor to get the details with respect to title and position of lease rentals. In other words, this Court cannot peep into mind of the petitioner so as to perceive as to whether any investigation was conducted at the level of intending party or to what extent.

35. This Court further finds that the defect, if any, falls under the category of patent defect which could have been easily discovered in case proper investigation of the property in question would have been done at the end of the petitioner. Moreover, an additional fact to be noticed at the stage is that the petitioner on 24.12.2020 itself became a signatory to the Transfer Memorandum clearly accepting the terms and conditions/covenant of lease deed in question which was executed on 26.06.2021 along with subsequent lease deeds and also the supplementary lease deed executed between the GNIDA and Corporate Debtor while stepping into the shoes of the Corporate Debtor. Transfer Memorandum dated 24.12.2020 as discussed above in particular clause 4, 5, 7 and 11 itself depicts that the petitioner is liable to pay the arrears of lease rentals and interest thereon. The terms and conditions of the Transfer Memorandum dated 24.12.2020 itself became a basis of the sale certificate executed between corporate debtor and the petitioner on 30.07.2021 as internal page 3 itself shows that the sale certificate was being issued in pursuance of the Transfer Memorandum dated 24.12.2020. Moreover, clause 4 of the sale certificate dated 30.07.2021 which is internal page 4 shows that after execution of the transfer memorandum dated 24.12.2020 the transferee being the corporate debtor has assured and undertaken that the demise premises in question is free from all encumbrance meaning thereby that even in fact the liabilities and the obligation so contained in the lease deed dated 26.06.2021 followed by subsequent lease deed so executed there on between the GNIDA and the Corporate Debtor was accepted by the petitioner while undertaking to comply with the terms and conditions and the obligations set out therein and the same became the basis of the sale certificate.

36. This Court finds that the words so employed in the sale certificate being "AS IS WHERE IS", "AS IS WHAT IS", "WHATEVER THERE IS" AND "NO RECOURSE" are to be interpreted in such a manner so as to give with a logical conclusion in the light of the instrument so executed between the parties while bounding the petitioner to clear the unpaid arrears of lease rentals as well as interest on delayed payment.

37. Answering to the **question no. (iv)** this Court has to bear in the mind the fact that the demise premise in question

which has been put to auction is a lease land as already discussed earlier and the contractual obligation so set out and settled between the GNIDA and the Corporate Debtor which has not been disputed by any of the parties. More so, the petitioner being an auction purchaser by virtue of Transfer Memorandum dated 24.12.2020 coupled with the sale certificate dated 30.07.2021 got itself bound with the contractual obligation as set out in the lease deed. The IBC Code-2016 may grant protection to the petitioner with respect to the purchase and the transfer of the demised land through auction, however, so far as the contractual obligations are concerned, they are governed by the underline agreements which are in the shape of lease deed so executed from time to time. The view of the Court further stands amplified from the execution of the Transfer Memorandum dated 24.12.2020 wherein the petitioner not only stepped into the shoes of the Corporate Debtor but also agreed to comply with the terms and conditions and covenant contained in the lease deed.

38. Nonetheless, the sale certificate dated 30.07.2021 itself pressed into service the contractual obligation as set out in the lease deed and Transfer Memorandum as these are the instruments which not only delivered the possession of the lease land but also created relationship of lessor and lessee. In the opinion of the Court the IBC Code 2016 only grants limited protection to the petitioner to be inducted by mode of stepping into the shoes of Corporate Debtor, however, in order to be a lessee the conditions so provided in the lease deed and the Transfer Memorandum are to be adhered to. This Court has also to bear in mind the fact that the petitioner rights as a lessee has not been created by any fiction of law, however, the same is to be governed by the obligation so contained in the lease deed. Thus, this Court is of the firm opinion that IBC Code-2016 does not grant any protection to the petitioner for possessing the status of an auction purchaser in such a manner so as to wriggle out from the contractual obligation of nonpayment of lease rents in the light of doctrine of "AS IS WHERE IS", "AS IS WHAT IS", "WHATEVER THERE IS" AND "NO RECOURSE"

39. The Hon'ble Apex Court in the case of **Union Bank Of India Vs. Official Liquidator and Others** reported in **1994 (1) SCC 575** had the occasion to consider the aspect relating to the guarantee or warranty of the official liquidator with regard to the title and encumbrances of the immovable property which are put to auction. The Hon'ble Apex Court in paragraph no. 14 has held as under:-

"14.When the Official Liquidator sells the property and assets of a companyin liquidation under the orders of the Court he cannot and does not hold out any guarantee or warranty in respect thereof. This is because he must proceed upon the basis of what the records of the company in liquidation show. It is for the intending purchaser to satisfy himself in all respects as to the title, encumbrances and so forth of the immovable property that he proposes to purchase. He cannot after having purchased the property on such terms then claim diminution in the price on the ground of defect in title or description of the property. The case of the Official Liquidator selling the property of a company in liquidation under the orders of the Court is altogether different from the case of an individual selling immovable property belonging to himself. There is, therefore, no merit in the application made

on behalf of Triputi that there should be a diminution in price or that it should not be made liable to pay interest on the sum of Rs 1 crore 98 lakhs. "

40. The right of the lessor over the land leased out which is being put to liquidation, has also been matter of consideration before the Hon'ble Apex Court in the case of **Phatu Rochiram Mulchandani Vs. Karnataka Industrial Area** reported in **2015 (5) SCC 244** wherein the Hon'ble Apex Court in paragraph nos. 31, 32, 33, 34, 35, 36, 37, 38 has observed as under:-

"31. As the Company had gone into liquidation and there was an order of winding up when the notice of cancelling the lease was given, the next question is as to whether prior permission of the Company Court was necessary before terminating the lease. Case of the appellant is that such prior permission is required under Section 537 of the Companies Act and the appellant has relied upon the judgment of Karnataka High Court in the case of Karnataka State Electronics Development Corporation Ltd. v. The Official Liquidator OSA No. 31 of 2004, decided on 21.06.2005. On the other hand, respondent stated that before terminating the lease no prior permission under the aforesaid provision of the Companies Act was needed and it was only for resuming the land that such a permission was required which led the Board to file an application for this very purpose. The respondents have relied upon the judgment of the Karnataka High Court in the case of Hanuman Silks Vs. Karnataka Industrial Areas Development Board, AIR 1997 Kar 134. It, therefore, becomes necessary to discuss these two judgments in the first instance.

32. In Karnataka State Electronics Development Corpn. Ltd. v. Official Liquidator OSA No. 31 of 2004, decided on 21.06.2005 (KAR) there was an allotment of industrial plot in favour of Anco by the Karnataka State Electronics Development Corporation (Corporation) on lease-cum-sale basis for which an agreement was executed. As per the said agreement, the Company was to establish its manufacturing unit within two years from the date of allotment of the Industrial Plot. In the meantime, the said Anco went into liquidation and winding up orders dated 8.6.2000 were passed. Much after the winding up orders, the corporation cancelled the lease-cum- sale deed on 28.6.2003 and took "paper possession" of the industrial plot. Thereafter, the Corporation filed the application in the Company Petition requesting the Company Judge to declare the Cancellation Order passed by the Corporation to be valid and direct the O.L. not to interfere with its paper possession. The Company Judge rejected the said application keeping in view the language employed in Section 537 of the Companies Act. The Corporation filed appeal which came to be dismissed by the Division Bench. The Division Bench was not impressed with the arguments that the Corporation was not aware of the winding up proceedings and for this reason it had resumed the possession of the industrial plot, after cancellation thereof, without obtaining the leave of the Court. Once the plea of ignorance was denounced, the court addressed the question as to whether the Corporation could have cancelled the allotment of industrial plot made in favour of the Company in liquidation and answered the same in the negative with the following observations:-

"11. Now the only question before us is, whether after an order was made by this

Court in winding up the respondent Company (Company in liquidation), the applicant Corporation could have ventured to cancel the allotment of industrial plot made in favour of the Company in liquidation? This could be answered only after noticing the provisions of Sec. 537 of the Act.

12. Section 537 of the Act, provides for avoidance of certain attachments, executions, etc. in winding up by or subject to supervision of Court. The winding up proceedings would commence from the date of presentation of the petition before this Court for winding up of the Company as envisaged under Section 433 of the Act and other similar provisions under the Act. Once such proceedings are initiated, any assets of the Company cannot be meddled without the leave of the Court. This settled legal proceedings, time and again is stated by various High Courts and also the highest Court. An elaboration of this settled legal principle, in our view, is wholly unnecessary.

In the present case, an order of cancellation of the lease- cum-sale agreement is passed by the applicant Corporation, after presentation of the Company Petition and after passing the winding up order, but without the leave of the Court, and in our opinion, any such action is void. A void order cannot be regularised and, therefore, rightly the learned Company Judge has not acceded to the request made by the applicant Corporation. We do not see any error in the order passed by the learned Company Judge and, therefore, no interference with the said order is called for. Accordingly, appeal requires to be rejected and is rejected. No order as to costs. Ordered accordingly."

33. Though the aforesaid observations give the impression that there cannot even be a cancellation of the allotment of industrial plot in respect of a Company in liquidation without the prior permission of the Company court, we are of the view that these observations are to be read in the factual context of the aforesaid case. As noted above, the Corporation had not only cancelled the lease but had even resumed the land by taking "paper possession". Further, in the application filed before the Company Court, it did not pray for permission to take possession. On the contrary, the Corporation took up the stand that it already had the possession which should be declared as validly taken and the prayer made was to direct the Official Liquidator not to interfere with the possession. It is in this context that the High Court held that same could not be done without the leave of the court. We are of the opinion that the observations are to be read giving restricted meaning that possession could not be taken without the prior leave of the court. It may not be correct to hold that the law requires that prior permission of the Company Judge is mandated even for cancellation of the lease. In fact, question of resumption of land or taking possession thereof could have arisen only after the cancellation of the lease. We will dilate on this aspect further after discussing the judgment in M/s. Hanuman Silks10.

34. In M/s. Hanuman Silks v. Karnataka Industrial Areas Development Board, AIR 1997 Kar 134 the said Company was allotted plots by the Board for which lease-cum-sale agreements were entered into on 18.8.1993 and 19.8.1993. The Company was to erect the factory within 12 months and to commence the production within 24 months (same conditions as in the instant case). The Company failed to commence the civil construction work and did not complete the

construction nor commenced production by these stipulated dates. Show cause notices were given by the Board and after that the plots allotted to the Company were resumed on 25.7.1995. The Company filed the petitions for quashing of the letters of resumption. The High Court formulated two questions which arose for consideration. We are concerned only with the first question which was couched in the following terms:- (AIR p. 137, para 10)

"10. (a) Whether the Board can take possession of the plots in the possession of its lessees, without having recourse to a civil suit for possession or to an eviction proceedings under the provisions of the Karnataka Public Premises (Eviction of unauthorized occupants Act), 1974".

35. After taking note of various provisions of the Act and discussing case law cited by both the parties, the Court concluded that no where does the Act provide for the Board taking back possession of leased plots from the lessee, without recourse to eviction proceedings, whatever be the circumstances. On the other hand, the Act contains a specific provision (Section 25) providing for application of Public Premises Act to premises leased by the Board. The absence of any provision enabling the Board to take possession from lessees and the express provision for making Public Premises Act applicable to the premises leased by the Board, leads to inescapable conclusion that termination of leases and eviction of lessees are left to be governed by contract and general law. Therefore, any act of forcible dispossession of a lessee by the Board will be an act otherwise than in accordance with law. The court further held that the power of re-entry and 'resumption' that is reserved by the Board in the lease-cum-sale agreement, does not authorize the Board to directly or forcibly resume possession of the leased land, on termination of the lease. It only authorizes the Board to take possession of the leased land in accordance with law. It could be either by having recourse to the provisions of the Public Premises Act or by filing a Civil Suit for possession and not otherwise.

36. It, thus, becomes clear that even though order of re-entry or resumption can be passed by the Board, but for taking possession the Board is supposed to have recourse to legal proceedings act in accordance with law. However, this was a case where the Company had not gone into liquidation and, therefore, the question of applicability of Section 537 of the Companies Act could not arise.

37. In the present case, we are confronted with a situation where Company is in liquidation. Thereafter, we have to understand the implication of the provisions of Section 537, which reads as under:

"537. Avoidance of certain attachments, executions, etc., in winding up by Tribunal.

(i) Where any Company is being wound up by Tribunal-

(a) any attachment, distress or execution put in force, without leave of the Tribunal against the estate or effects of the Company, after the commencement of the winding up; or

(b) any sale held, without leave of the Tribunal of any of the properties or effects of the Company after such commencement shall be void.

(2) Nothing in this Section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government.

38. It is clear from the above that prior permission of the Court is required in respect of any attachment, distress or execution put in force or for sale of the

properties or effects of the Company. We are of the opinion that the serving of cancellation notice simplicitor would not come within the mischief of this section as that by itself does not amount to attachment, distress or execution etc. No doubt, after the commencement of the winding up, possession of the land could not be taken without the leave of the Court. Precisely for this reason the Board had filed the application seeking permission. But according to us no such prior permission was required before cancelling the lease. In fact, it is only after the cancellation of the leases that the Board would become entitled to file such an application under Section 537 of the Act. Had the Board gone ahead further and taken the possession, after the cancellation and then approached the Company Judge, the situation which occurred in Karnataka State Electronics Development Corpn.Ltd. v. Official Liquidator OSA No. 31 of 2004, decided on 21.06.2005 (KAR) would have prevailed. On the other hand, it would have been premature on the part of the Board to approach the Company Judge for permission to resume the land without cancelling the lease in the first instance. "

41. The judgment in the case of Phatu Rochiram (Supra) has been followed recently in the case of Stressed Assets Stabilization Fund Vs. West Bengal Small Industries Development Corporation reported in 2019 (10) SCC 148 in paragraph nos. 12 and 13 has observed as under:-

"12. This Court is of the opinion that the reasoning and conclusion of the High Court do not call for interference. The finding that since the exercise by the lessor (WBSIDC) of its right to determine the lease attained finality. the mortgagee (represented by the appellant) could not claim rights superior to that of the lessee, is in consonance with settled law.

13. There can be no dispute, nor was it contended that a donee or a grantee (as the status of the lessee company in liquidation as in this case) can have no rights in excess of that possessed by the donor or the grantor. The mortgagee (whose shoes SASF has stepped into) of the lessee (Wellman) can have no right greater or better than that of the lessee in terms of the deed of lease. The observations in Phatu Rochiram Mulchandani³ apply to the facts of this case. The appeal, therefore fails and is dismissed, without order as to costs."

42. The Hon'ble Apex Court in case of **State of Uttar Pradesh Vs. Union Bank of India** reported in **2016 (2) SCC 757** in paragraph no. 23 has observed as under:-

"23. It is pertinent to mention here that the land in dispute being a Government property, the appellant-Bank cannot get any right over it. Moreover, neither the appellant-Bank is a lessee of the land in question nor any lease has ever been sanctioned by the Govt, of U.P. in its favour. Hence, the appellant is not entitled to get any right or to keep possession of the properties in question situated at 19, Clive Road and 10, Edmoston Road."

43. Applying the above judgments in the facts of the present case an inescapable conclusion stands drawn that lessor has a paramount interest over the property so sought to be leased to the lessee as there is a marked difference between leasehold and freehold as in the case of former only possession is transferred and not the ownership or title, however, in the later ownership and possession stands transferred.

44. Recently in the case of **Delhi Development Authority Vs. Karam Department of Finance Investment (India) Private Limited and Others** reported in **2020 (4) SCC 136** the Hon'ble Apex Court in paragraph no. 13, 14, 15, 16, 20, 21, 22, 23, 24 and 25 has observed as under:-

"13. In Perpetual Lease, granted to Shri Trilochan Singh Rana and Mrs. Rani Rana, one of the conditions provided that lessor may impose conditions to claim and recover a portion of the unearned increase in the value (i.e. the difference between the premium paid and the market value) of the residential plot at the time of sale, transfer, assignment or parting with the possession, the amount to be recovered being percent of the unearned increase. The relevant clause (4)(a) of the Perpetual Lease is as follows:-

"(4)(a) The Lessee shall not sell, transfer assign or otherwise part with the possession of the whole or any part of the residential plot except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute direction.

Provided that such consent shall not be given for a period of ten years, from the commencement of the Lease unless, in the opinion of the Lessor, exceptional circumstances exist for the grant of such consent.

Provided further that in the event of the consent being given, the Lessor may impose such terms and conditions as he thinks fit and the Lessor shall be entitled to claim and recover a portion of the unearned increase in the value (i.e. the difference between the premium paid and the market value) of the residential plot at the time of sale, transfer, assignment or parting with the possession, the amount to be recovered being fifty percent of the unearned increase and the decision of the Lessor in respect of the market value shall be final binding."

14. We have already noticed above that original lessee Trilochan Singh Rana entered into agreement of sale with M/s. Ocean Construction Industries Pvt. Ltd. dated 29.09.1988 to transfer the rights for a of Rs.76,00,000/-. Exercising power under Section 269UD of Income Tax Act, 1961, appropriate authority passed a purchase order dated 13.12.1988 of the property in question. After the aforesaid purchase order an amount of Rs.17,86,240/- towards payment of unearned increase was paid to the DDA by Income Tax Department. After the aforesaid purchase order, auction notice dated 20.03.1989 was issued giving details of the properties, which included the property in question.

15. In pursuance of the auction notice, the writ petitioner gave highest bid and was declared auction purchaser for an amount of Rs.1,08,05,000/-. The writ petitioner paid the full amount and was delivered the possession on 25.04.1989. Sale Deed was also executed in favour of writ petitioner on 25.09.1997. The petitioner made an application to the DDA for grant of freehold rights and also deposited amount of Rs.3,45,729/-. While processing the application for conversion of leasehold rights to free hold rights, DDA made a demand of Rs.1,43,90,348/- towards unearned increase, which was challenged by the writ petitioner. Whether writ petitioner was liable to pay unearned increase payment is the question to be answered.

16. We have already noticed the clause (4)(a) of the Perpetual Lease Deed dated 18.03.1970, which provided that in event sanction is given by lessor to the lessee for sale, transfer or assignment, lessor shall be

entitled to claim and recover a portion of the unearned increase in the value. The unearned increase being the difference between the premium paid and the market value. The object behind the said clause was that a lessee when is permitted to transfer the leasehold rights, the lessor should not be deprived of the difference between the premium paid and the market value. The clause was inserted in the Perpetual Lease to compensate the lessor. The present is not a case where lessee is making any transfer or seeking any permission from the lessor to give his consent.

20. Learned counsel for the petitioner has relied on Clauses 1 and 2 of the Sale Deed, which are to the following effect:-

"1. That in pursuance of the said auction and consideration of the sum of Rs. 1,08,05,000/- (Rs. One Crore Eight Lakh and Five Thousand only) already paid by the Vendor/Auction Purchaser to the Vendor as aforesaid, the receipt of which the Vendor hereby acknowledged, the Vendor hereby transfers, conveys and sells to the Auction Purchaser, the Vendee, by way of sale of that plot of land measuring 725 sq. yds. bearing No. 14 in Block A-2 in the lay out plan of Safdarjung Development Scheme, Ring Road, South Delhi (Villages Mohammadpur Munirka and Humayunpur Revenue Estate, together with all rights, titles, interests, appurtenances, easements, privileges in and pertaining to the aforesaid property in favour of the Vendee absolutely and forever, with the provisions of Section 269UE(1) of the Income Tax Act, 1961 and all the powers rights and interests vested in the Vendor with regard to the sale, transfer and conveyances of the aforesaid property to the Vendee hereto.

2. That on the execution of this sale deed, the Vendee has become the absolute and exclusive owner of the property hereby sold, conveyed and transferred to it and that the Vendee shall have absolute rights and title to the same and to deal with the property in any manner it likes. It is made clear that the Vendor has no right and is left with no interest, claim or title of any nature whatsoever into on upon the aforesaid property."

21. A plain reading of the above clauses does give impression that what was sold to the writ petitioner was all rights, titles, interests and appurtenances but when we read Clause 3 of the same Sale Deed, the said clause gives a different impression. Clause 3 of the Sale Deed is as follows:-

"3. That the Vendor hereby represents and assures to the Vendee that his right in the property hereby sold, transferred and conveyed is in terms of agreement for transfer dated 29-9-1988 between Mr. Trilochan Singh Rana and Mis, Rani Rana transferor and M/s. Ocean Construction Industries Pvt. Ltd. (through its Director Shri Jugal Kishore Malhan) transferee."

22. The principles of construction of documents are well settled. While construing the documents/intention of the parties have to be ascertained. In this context, reference is made to judgment of this Court in Sahebzada Mohammad Kamgarh Shah Vs. Jagdish Chandra Deo Dhabal Deb and Others, AIR 1960 SC 953. In Paragraph Nos. 12 and 13, following was laid down:-

"12. In his attempt to establish that by this later lease the lessor granted a lease even of these minerals which had been excluded specifically by Clause 16 of the earlier lease, Mr Jha has arrayed in his several well established principles of construction. The first of these is that the intention of the parties to a document of grant must be ascertained first and foremost from the words used in the disposition clause, understanding the

words used in their strict, natural grammatical sense and that once the intention can be clearly understood from the words in the disposition clause thus interpreted it is no business of the courts to examine what the parties may have said in other portions of the document. Next it is urged that if it does appear that the later clauses of the document purport to restrict or cut down in any way the effect of the earlier clause disposing of property the earlier clause must prevail. Thirdly it is said that if there be any ambiguity in the disposition clause taken by itself, the benefit of that ambiguity must be given to the grantee, the rule being that all documents of grants must be interpreted strictly as against the grantor. Lastly it was urged that where the operative portion of the document can be interpreted without the aid of the preamble, the preamble ought not and must not be looked into.

13. The correctness of these principles is too well established by authorities to justify any detailed discussion. The task being to ascertain the intention of the parties, the cases have laid down that that intention has to be gathered by the words used by the parties themselves. In doing so the parties must be presumed to have used the words in their strict grammatical sense. If and when the parties have first expressed themselves in one way and then go on saying something, which is irreconcilable with what has gone before, the courts have evolved the principle on the theory that what once had been granted next be taken away, that the clear disposition by an earlier clause will not be allowed to be cut down by a later clause. Where there is ambiguity it is the duty of the Court to look at all the parts of the document to ascertain what was really intended by the parties. But even here the rule has to be borne in mind that the document being the grantor's document it has to be interpreted strictly against him and in favour of the grantee."

23. This Court further in Paragraph No.14 has held that in cases of ambiguity, several parts of the document have to be examined to find out what was really intended by the parties. In Paragraph No. 14, following was laid down:-

"14. .....In cases of ambiguity it is necessary and proper that the court whose task is to construe the document should examine the several parts of the document in order to ascertain what was really intended by the parties. In this much assistance can be derived from the fourth condition of the conditions which were imposed by the lease as regards the grant of sub-leases. This condition provided inter alia that all such under- leases to be granted by the lessee shall be subject to the provisions of Clause 16 of the principal lease"

24. Before we construe the document, we need to first notice the auction notice by which the property was to auction. Auction notice, which has been brought on the record as Annexure-R1 indicate that details of four properties were given in the auction notice. It is useful to look into the details given as follows:-

Details of Properties	*Reserve Price*
1. Property No. B-6, Friends Colony Mathura Road, New Delhi. This is a lease hold residential plot measuring 195.097 sq. Mt. together with buildings and structure thereon and fixtures and fitting therein	*34.20 lacs*
2.Property No. 14,	*1.08 crores*

Block A-2, Safdarjung Development Area, New Delhi. *This is a lease hold residential plot measuring (725 sq. yds.) with a double storeyed building. The Ground Floor consists of drawing dining bed room, kitchen and a garage. The First Floor consists of 3 bed rooms, 3 bath rooms, store and a lobby over the garage. There are 2 floors each having a servant room W.O. and a cocking verandah.*	
3. Property No. A-8/23, Vasant Vihar, New Delhi. *This is a lease hold residential plot N. 23 in Street No. A-8 in the lay out plan of Vasant Vihar of the Servants Cooperative. House Building Society Ltd., and measuring 150 Sq. yds alongwith the super structure build thereon. (Covered area 1350 Sq. Ft).*	*36.60 Lacs*
4. Property bearing House No. E- 444 (Ground Floor), Greater Kailash Part-II, New Delhi-110048. *All rights, titles and Interests in the dwelling unit on ground floor, and mazanine floor of House No. E-444, Greater Kailash, Part-II, New Delhi, together with undivided. Indivisible and impartible ownership right of 35% in the land underneath of the said building and including the followings :-* *1. One drawing-cum-dining hall, three bed rooms with attached bath rooms, balcony, kitchen, storage space (servants Quarters) and servant's bath rooms on ground floor.* *2. Front lawn and back courtyard on the ground floor.* *Parking space for a Maruti Car in the Driveway.* *Ingress and Egress from the main gate to the dwelling unit.*	*25.60 lacs*

25. A perusal of the details of the properties indicate that property in question is included as Item No. 2, which is mentioned as "This is a lease hold residential plot". It is to be noticed that in so far as properties at Sl. Nos. 1, 2 and 3, the words mentioned are "leasehold residential plots" whereas with regard to property details given at Sl. No.4, it has been mentioned that "all rights, titles and interests in the dwelling unit", which, if

contrasted with details of properties given at Sl. Nos. 1, 2 and 3 contains the intendment. Thus, there cannot be any doubt that property in question, which was put in auction was a property as lease hold rights residential plots. When property is auctioned, the terms and conditions of auction are binding on both the parties. When petitioner submitted his bid in pursuance of the auction notice, he was bidding for lease hold residential plot with a double storied building. While interpreting the Sale Deed, the auction notice has to be looked into to find out the nature of transaction. The Sale Deed cannot be read divorced to the auction notice or to auction notice. Auction of a leasehold residential plot and auction of freehold residential plot carries different connotations. Leasehold rights are limited rights, which are subservient to freehold rights of a property. In giving bid for leasehold rights and freehold rights, different considerations are there. Clause 3 as noted above indicate that the property sold and transferred is in terms of the agreement dated 29.09.1988 between Trilochan Singh Rana and Mrs. Rani Rana to M/s. Ocean Construction Industries Pvt. Ltd. Trilochan Singh Rana and Mrs. Rani Rana were only lease holders. Thus, they could best transfer their right, which was conferred to them by the Indenture dated 18.03.1970."

45. Another aspect which needs to be considered is with respect to the fact that whether the claim so set up by the GNIDA can be negated on the ground that it had not lodged and got registered its claim in the proceeding under IBC Code. It has come on record that GNIDA did not get registered its claims in the proceedings purported to be under IBC Code-2016, however, this Court finds that merely because the claim has not been registered by GNIDA under IBC Code cannot be a ground to negate their claim particularly when the demised premises in question is leasehold and one of the condition for recognizing the petitioner being an auction purchaser as a lessee is making good the deficiency in the payment of lease rentals along with interest thereon. Learned Senior Counsel could not point out any of the provisions so as to fortify the legal submission that mere non-registration of the claim before the competent authority under IBC Code coupled with the fact that Transfer Memorandum and sale certificate has been executed therein denuded the GNIDA from claiming the arrears and interest thereon.

46. Nonetheless, Section 55 1 (g) of the Transfer of Property Act, 1882 reads as under:-

"(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing."

47. According to Section 55 1 (g) of the Transfer of Property Act, 1882 in absence of a contract to the contrary the buyer and the seller of immovable property respectively are subject to liabilities, and have the rights and the seller is bound to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then

existing. The determining factors are the words employed in Section 55 of the Transfer of Property Act being " in absence of a contract to the contrary".

48. Applying the said provision in the facts of the present case, this Court finds that there exist not only lease deed but also a Transfer Memorandum and sale certificate which excludes the general principle as enshrined in section 55 1(g) of the Transfer of Property Act.

49. The High Court of Madras in the case of **K. Madhu and Ors. Vs. Dugar Finance India Ltd. and Ors.** reported in **(2008) 145 CompCase 277 (Mad)** in paragraph no. 33 has observed as under:-

"23. A reading of the above judgments clearly shows that Section 55 (1) (g) of the Transfer of Property Act is absolute in its character, where there exists a covenant guaranteeing the non-existence of encumbrances irrespective of the fact that the same was discovered after the sale, the liability is that of the seller only. The purchaser making the payment on behalf of the vendor is entitled to the recoupment of the same. However, where there existed no such covenant to the contrary, there could arise no automatic invoking of Section 55(1)(g), to the benefit of the purchaser that there existed an implied condition that there was no encumbrance."

50. Learned Senior Counsel in support of the argument relatable to the question nos. (ii) and (iv) had relied upon the judgment in the case of **A.I. Champdany** (supra) so as to contend that the petitioner is not liable to pay lease rentals and interest thereon despite the stipulation contained "AS IS WHERE IS", "AS IS WHAT IS", "WHATEVER THERE IS" AND "NO RECOURSE". The said judgment is not of any aid or help as the said judgment relates to dues of the municipality which the Hon'ble Apex Court found not having charge over the property put to auction as even otherwise it did not come within the purview of the Crown Debt. The Hon'ble Apex Court in paragraph no. 27, 29 has observed as under:-

"27. Once the property is sold, the assets of the company are required to be distributed to the creditors in order of preference. As the respondent- Municipality was not a secured creditor, the impugned Judgment cannot be sustained.

29. Dues of the Municipality would also not even otherwise come within the purview of the crown debt. Even a crown debt could be discharged only after the secured creditors stand discharged. "

51. Sri Sinha next relied upon the judgment in the case of **Rana Girders Limited (supra)** in order to contend that the excise duty dues are not liable to be paid by the auction purchaser of the erstwhile company which was put to auction. The Hon'ble Apex Court in paragraph no. 23 observed as under:-

"23. We may notice that in the first instance it was mentioned not only in the public notice but there is a specific clause inserted in the Sale Deed/Agreement as well, to the effect that the properties in question are being sold free from all encumbrances. At the same time, there is also a stipulation that "all these statutory liabilities arising out of the land shall be borne by purchaser in the sale deed" and "all these statutory liabilities arising out of the said properties shall be borne by the vendee and vendor shall not be held responsible in the Agreement of Sale." As

per the High Court, these statutory liabilities would include excise dues. We find that the High Court has missed the true intent and purport of this clause. The expressions in the Sale Deed as well as in the Agreement for purchase of plant and machinery talks of statutory liabilities "arising out of the land" or statutory liabilities "arising out of the said properties" (i.e. the machinery). Thus, it is only that statutory liability which arises out of the land and building or out of plant and machinery which is to be discharged by the purchaser. Excise dues are not the statutory liabilities which arise out of the land and building or the plant and machinery. Statutory liabilities arising out of the land and building could be in the form of the property tax or other types of cess relating to property etc. Likewise, statutory liability arising out of the plant and machinery could be the sales tax etc. payable on the said machinery. As far as dues of the Central Excise are concerned, they were not related to the said plant and machinery or the land and building and thus did not arise out of those properties. Dues of the Excise Department became payable on the manufacturing of excisable items by the erstwhile owner, therefore, these statutory dues are in respect of those items produced and not the plant and machinery which was used for the purposes of manufacture. This fine distinction is not taken note at all by the High Court. "

52. The afore noted judgment is clearly distinguishable as the Excise dues does not create charge upon the property put to auction.

53. The next judgment as sought to be relied to and referred to by the learned Senior Counsel who appears for the petitioner is the case of **Haryana State Electricity Board Vs. (supra)** The said judgment is also of no assistance to the petitioner in view of the fact that the Hon'ble Apex Court had held that electricity arrears do not constitute a charge over the property and that is why a transferee of the premise cannot be made liable for payment of dues of the previous owner/occupier. The relevant extract of the judgment in paragraph nos. 10, 11, 12, 13 are quoted hereinunder:-

"10. The appellant relies on the subsequent decision of this court in Paramount Polymers (supra) to distinguish the decision in Isha Marbles. In Paramount Polymers (supra), the terms and conditions of supply contained a provision (clause 21A) providing that reconnection or new connection shall not be given to any premises where there are arrears on any account, unless the arrears are cleared. In view of the said express provision, this Court distinguished Isha Marbles on the following reasoning:

"15...This Court in Hyderabad Vanaspati Ltd. v. A.P. SEB [1998] 2 SCR 620 has held that the Terms and Conditions for Supply of Electricity notified by the Electricity Board under Section 49 of the Electricity (Supply) Act are statutory and the fact that an individual agreement is entered into by the Board with each consumer does not make the terms and conditions for supply contractual. This Court has also held that though the Electricity Board is not a commercial entity, it is entitled to regulate its tariff in such a way that a reasonable profit is left with it so as to enable it to undertake the activities necessary. If in that process in respect of recovery of dues in respect of a premises to which supply had been made, a condition is inserted for its recovery from a transferee of the undertaking, it cannot ex

facie be said to be unauthorized or unreasonable. Of course, still a court may be able to strike it down as being violative of the fundamental rights enshrined in the Constitution of India. But that is a different matter. In this case, the High Court has not undertaken that exercise.

16. The position obtaining in Isha Marbles (supra) was akin to the position that was available in the case on hand in view of the Haryana Government Electrical Undertakings (Dues Recovery) Act, 1970. There was no insertion of a clause like Clause 21A as in the present case, in the Terms and Conditions of Supply involved in that case. The decision proceeded on the basis that the contract for supply was only with the previous consumer and the obligation or liability was enforceable only against that consumer and since there was no contractual relationship with the subsequent purchaser and he was not a consumer within the meaning of the Electricity Act, the dues of the previous consumer could not be recovered from the purchaser. This Court had no occasion to consider the effect of clause like Clause 21A in the Terms and Conditions of Supply. We are therefore of the view that the decision in Isha Marbles (supra) cannot be applied to strike down the condition imposed and the first respondent has to make out a case independent on the ratio of Isha Marbles (supra), though it can rely on its ratio if it is helpful, for attacking the insertion of such a condition for supply of electrical energy. This Court was essentially dealing with the construction of Section 24 of the Electricity Act in arriving at its conclusion. The question of correctness or otherwise of the decision in Isha Marbles (supra) therefore does not arise in this case especially in view of the fact that the High Court has not considered the question whether Clause 21A of the terms and conditions incorporated is invalid for any reason."

11. In Paschimanchal Vidyut Vitran Nigam Ltd. v. DVS Steels & Alloys Pvt.Ltd. [2009 (1) SCC 210] this court held, while reiterating the principle that the electricity dues did not constitute a charge on the premises, that where the applicable rules requires such payment, the same will be binding on the purchaser. This court held:

"11...A transferee of the premises or a subsequent occupant of a premises with whom the supplier has no privity of contract cannot obviously be asked to pay the dues of his predecessor in title or possession, as the amount payable towards supply of electricity does not constitute a `charge' on the premises. A purchaser of a premises, cannot be foisted with the electricity dues of any previous occupant, merely because he happens to be the current owner of the premises....

12....When the purchaser of a premises approaches the distributor seeking a fresh electricity connection to its premises for supply of electricity, the distributor can stipulate the terms subject to which it would supply electricity. It can stipulate as one of the conditions for supply, that the arrears due in regard to the supply of electricity made to the premises when it was in the occupation of the previous owner/occupant, should be cleared before the electricity supply is restored to the premises or a fresh connection is provided to the premises. If any statutory rules govern the conditions relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfillment of the requirements of such rules and regulations. If the rules are silent, it can stipulate such terms and conditions as it deems fit and proper, to regulate its transactions and dealings. So long as such rules and regulations or the terms and conditions are

not arbitrary and unreasonable, courts will not interfere with them.

13...A stipulation by the distributor that the dues in regard to the electricity supplied to the premises should be cleared before electricity supply is restored or a new connection is given to a premises, cannot be termed as unreasonable or arbitrary. In the absence of such a stipulation, an unscrupulous consumer may commit defaults with impunity, and when the electricity supply is disconnected for non-payment, may sell away the property and move on to another property, thereby making it difficult, if not impossible for the distributor to recover the dues. Provisions similar to Clause 4.3(g) and (h) of Electricity Supply Code are necessary to safeguard the interests of the distributor."

12. The position therefore can may be summarized thus :

(i) Electricity arrears do not constitute a charge over the property. Therefore in general law, a transferee of a premises cannot be made liable for the dues of the previous owner/occupier.

(ii) Where the statutory rules or terms and conditions of supply which are statutory in character, authorize the supplier of electricity, to demand from the purchaser of a property claiming re-connection or fresh connection of electricity, the arrears due by the previous owner/occupier in regard to supply of electricity to such premises, the supplier can recover the arrears from a purchaser.

Position in this case

13. The appellant did not plead in its defence that any statutory rule or terms and conditions of supply, authorized it to demand the dues of previous owner, from the first respondent. Though the appellant contended in the written statement that the dues of Durga Rice Mills were transferred to the account of the first respondent, the appellant did not specify the statutory provision which enabled it to make such a claim. The decision in Paramount Polymers shows that such an enabling term was introduced in the terms and conditions of electricity supply in Haryana, only in the year 2001."

54. Another judgment so cited is the case of **Shreyas Papers (P) Ltd**. (supra), however, the said judgment is of no help to the petitioner as in the said case there was only transfer of individual assets of the defaulting company rather than the defaulting company being sold as a going concern and the Hon'ble Apex Court while interpreting Section 15 (1) of the Karnataka Sales Tax Act (1957) in paragraph nos. 17 and 22 observed as under:-

"17. In the present case, since it is not a matter of dispute that there was only the transfer of individual assets of the Defaulting Company, rather than the Defaulting Company being sold as a going concern, in light of our expressed views, Section 15 of the KST Act is not attracted. The first limb of Mr. Hegde's arguments must, therefore, fail.

22. In the present case, firstly, no provision of law has been cited before us that exempts the requirement of notice of the charge for its enforcement against a transferee who had no notice of the same. It remains to be seen, therefore, if in the facts of the present case, the First Respondent had noticeactual or constructiveof the charge. At the outset, in the advertisement/notice dated 17.3.1992 issued by the Corporation, mention is only made of the sale of the Defaulting Company's assets and there is no indication, whatsoever, of any sales tax arrears. Further, the bid offer made on behalf of the First Respondent on 5.6.1992

specifically excludes any statutory liabilities, including sales tax. This offer was accepted by the Corporation on 15.7.1992. Even at that stage, there was no mention of any sales tax arrears. The sale of the assets took place pursuant to the agreement dated 12.8.1992 in which a specific clause was inserted that the First Respondent would be liable to pay all property taxes, other taxes, electricity bills, water taxes and rents from the date of the agreement (i.e. 12.8.1992). For the first time, by letter dated 8.1.1993 of the Second Appellant to the Mandal Panchayath, Aloor Taluk, the issue of sales tax dues of the Defaulting Company was brought to the surface. This is further borne out by the correspondence between the First Respondent and the Corporation. Thus, it is evident that the First Respondent had no actual notice of the charge prior to the transfer. As to whether the First Respondent had constructive notice of the charge, no substantive argument on this issue was made, either before the High Court or at any rate before us. Hence, we cannot hold that the First Appellant had constructive notice of the charge. "

55. Similarly, so far as the case of **Telangana State Southern Power Distribution Company Ltd. (supra)** the Hon'ble Apex Court in paragraph nos. 16, 16.1, 16.2 has observed as under:-

"16. We have gone into the aforesaid judgments as it was urged before us that there is some ambiguity on the aspect of liability of dues of the past owners who had obtained the connection. There have been some differences in facts but, in our view, there is a clear judicial thinking which emerges, which needs to be emphasized:

16.1 . That electricity dues, where they are statutory in character under the Electricity Act and as per the terms & conditions of supply, cannot be waived in view of the provisions of the Act itself more specifically Section 56 of the Electricity Act, 2003 (in pari materia with Section 24 of the Electricity Act, 1910), and cannot partake the character of dues of purely contractual nature.

16.2 . Where, as in cases of the E-auction notice in question, the existence of electricity dues, whether quantified or not, has been specifically mentioned as a liability of the purchaser and the sale is on "AS IS WHERE IS, WHATEVER THERE IS AND WITHOUT RECOURSE BASIS", there can be no doubt that the liability to pay electricity dues exists on the respondent (purchaser)."

56. Perusal of the above noted paragraphs itself shows that the Hon'ble Apex Court has held that electricity dues are statutory in nature and as per terms and the condition of supply the same cannot be waved of. Infact the said judgment goes against

57. The next judgment cited is the case of **Raman Roadways Private Limited (supra)** the said judgment no where supports the case of the petitioner as the said judgment holds that property tax was merely a statutory dues without creating any encumbrances over the property and the same is not liable to be paid.

58. The judgments so cited by the learned Senior Counsel as referred to above are clearly distinguishable and do not apply in the present facts of the case particularly when there already exists specific Clause 3(b) under Chapter No. (IV) of the lease deed dated 26.06.2001 providing that the lessor shall have first charge upon the

demise premises for the amount of unpaid lease rents and interest thereon and other dues of authority. Moreover, as discussed above the petitioner herein has accepted the terms and covenant contained in the lease deed and also signatory to the Transfer Memorandum date 24.12.2020 which even in fact became the basis of the sale certificate dated 30.07.2021.

59. Addressing the question of refund of the amount so paid by the petitioner **being (i) and (iii)** they are interlinked and they are decided compositely.

60. In order to be entitled to be refunded the amount so deposited under protest the petitioner has to place relevant facts before the court as to how and by which manner it had been pressurized to deposit the amount and it deposited the same under protest. The Court finds that the petitioner himself was a signatory of Transfer Memorandum dated 24.12.2020 and the same became a basis of issuance of sale certificate on 30.07.2021. Further the petitioner stepped into the shoes of the Creditor Debtor and also got itself bound to honor the contractual obligation. Barring the allegations made in paragraph no. 14 of the writ petition and a letter so appended marked to the GNIDA dated 27.10.2020, there is nothing on record to show that any challenge/protest was made to the Transfer Memorandum dated 24.12.2020. As already noticed the petitioner was bound to honor the commitments as laid down in the lease deed and the petitioner paid the arrears of lease rentals and interest and thereafter, it became the lessee. More so, the conduct of the petitioner itself shows that it approbated and reprobated at the same time as though it on the basis of the Transfer Memorandum dated 24.12.2020 it, became a lessee while holding interest over the leased land but the petitioner is avoiding performance of contractual obligation while playing hot and cold at the same time.

61. The Hon'ble Apex Court in the case of **R.N. Gosain vs. Yashpal Dhir** reported in **(1992) 4 SCC 683** has observed as under:-

"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid any 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". [See: Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd., (1921) 2 R.B. 608, at p.612, Scrutton, L.J]. According to Halsbury's Laws of England, 4th Edn.,Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside". (para 1508)."

62. The Hon'ble Apex Court in the case of **Shyam Telelink Limited vs. Union of India**, reported in **(2010) 10 SCC 165** has observed as under:

"23. The maxim qui approbat non reprobat (one who approbates cannot reprobate) is firmly embodied in English Common Law and often applied by Courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying

with the latter. A person cannot approbate and reprobate or accept and reject the same instrument."

63. The Hon'ble Apex Court in the case of **Cauvery Coffee Traders, Mangalore vs. Hornor Resources (International) Company Limited,** reported in **(2011) 10 SCC 420** has held as under:

"34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide: Nagubai Ammal & Ors. v. B. Shama Rao & Ors., AIR 1956 SC 593; C.I.T. Vs. MR. P. Firm Maur, AIR 1965 SC 1216; Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati & Ors., AIR 1969 SC 329; P.R.

Deshpande v. Maruti Balaram Haibatti, AIR 1998 SC 2979; Babu Ram v. Indrapal Singh, AIR 1998 SC 3021; Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, *AIR 2004 SC 1330; Ramesh Chandra Sankla & Ors. v. Vikram Cement & Ors., AIR 2009 SC 713; and Pradeep Oil Corporation v. Municipal Corporation of Delhi & Anr., (2011) 5 SCC 270).*

35. Thus, it is evident that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."

64. The Hon'ble Apex Court in the case of **Sri Gangai Vinayagar Temple and another vs. Meenakshi Ammal and others**, reported in **(2015) 3 SCC 624** has observed as under:

"16.2. Secondly, on a proper perusal of the plaint, it ought to have been palpably evident that the Plaintiff/Tenant in O.S.5/78 feared dispossession from the demised premises because of what they considered to be an illegal transfer; but since all the Defendants had averred in their Written Statement that they had no intention of doing so, the suit ought not to have been dismissed but ought to have been decreed without more ado solely so far as the prayer of injunction was concerned. But, in the Trial Court the title to the leased land had become the fulcrum of the fight, owing to the pleadings of the Tenant in which it had repeatedly and steadfastly challenged the title of the Trust as well as the Transferees. The Tenant should not be permitted to approbate and reprobate, as per its whim or convenience, by disowning or abandoning a controversy it has sought to have adjudicated."

65. Proposition of law as culled out by the Hon'ble Supreme Court in the above noted decisions draws irresistible conclusion that a party cannot approbate and reprobate at the same time as once it becomes beneficiaries of certain documents/instruments then the said party cannot elect to honor the commitments of certain parts which are beneficial to it and wriggle out of those conditions which puts liability upon it.

66. Nevertheless, Transfer Memorandum was executed on 24.12.2020 and the petitioner signed the same and in absence of the any challenge to the same the petitioner is bound by it and it has to comply with the contractual obligation in-toto. The Hon'ble Apex Court in the case of **R. K. Mittal and Others vs. State of U.P. and Others** reported in **2012 (2) SCC 232** in paragraph no. 53 has observed as under:-

"53. Reverting to the case in hand, we may notice that the lease deed executed in favour of the predecessor-in-interest of R.K. Mittal and the other appellants had contained specific stipulations that the lessee will obey and submit to all directions issued, existing or thereafter to exist, as obeyed by the lessor. The erection of the structure was also to be in accordance with the approved plans. Clause (h) of the lease deed specifically provides that the constructed building shall be used only for the purpose of residential, residential-cum-or surgical clinic and for no other purpose, that too subject to such terms as are imposed by the lessor. The transfer deed which was executed in favour of the present appellants, with the approval of the Development Authority, also contained similar clauses and also provided that the terms and conditions imposed by Development Authority from time to time shall be binding on the transferee. Clause 15 of the transfer deed stipulated that the transferee shall put the property to use exclusively for residential purpose and shall not use it for any purpose other than residential. After raising the construction on the plot in question, admittedly, the appellants have put the property to a different use other than residential. The property was rented out to two different commercial undertakings, i.e., Andhra Bank and a company by the name `Akariti Infotech'. It is not even the case of the appellants before us that the Development Authority had granted any specific permission to them to use the property for any purpose other than residential."

67. Perusal of the above noted paragraph of the judgment itself shows that the transfer deed is an instrument which is normally executed in case of transfer of lease land in favour of any third party which sets out with the terms and conditions of the transfer. Applying the said judgment this Court finds that the petitioner being a beneficiary of a transfer is bound to honor the contractual obligation as contained in the Transfer Memorandum.

68. Admittedly, the petitioner is seeking refunds of certain amount which he claims to have deposited under protest for discharge the contractual obligation. Now the question arises as to whether this Court can in exercise of the jurisdiction under Article 226 of the Constitution of India by virtue of judicial fiat grant relief to the petitioner which tantamount to resiling and wriggling away from a contractual obligation.

69. The Hon'ble Apex Court in the case of **Har Shankar and Others vs. The Dy. Excise and Taxation Commercial and Others** reported in **1975 (1) SCC 737** in paragraph no. 22 observed as under:-

"The writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred."

70. In the Case of **M/s Radhakrishna Agarwal and Others vs. State of Bihar**

and Others reported in **1977 (3) SCC 457** in paragraph nos. 12, 13, 14 and 15 observed as under:-

"12. The Patna High Court had, very rightly divided the types of cases 'in which breaches of alleged obligation by the State units agents can be set up into three types. These were stated as follows :--

"(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where an assurance or promise made by the State he has acted to his prejudice and predicament, but the agree- ment is short of a contract within the meaning of article 299 of the Constitution;

(ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or Rules framed thereunder and the petitioner alleges a breach on the pan of State; and

(iii) Where the contract entered into between the State, and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State."

13. It rightly held that the cases such as Union of India v. M/s. AngloAfghan Agencies,(1) and Century Spinning & Manu- facturing Co. Ltd. v. Ulhasnagar Municipal Council(2); and Robertson v. Minister of Pensions,(3) belong to the first category where it could be held that public bodies or the State are as much bound as private individual are to carry out obligations incurred by them because parties seeking to bind the authorities have altered their position to their disadvantage or have acted to their detriment on the strength of the representations made by these authorities. The High Court thought that in such cases the obligation could sometimes be appropriately enforced on a Writ Petition even though the obligation was equitable only. We do not propose to express an opinion here on the question whether such an obligation could be enforced in proceedings under Article 226 of the Constitution now. It. is enough to observe that the cases before us do not belong to this category.

14. The Patna High Court also distinguished cases which belong to the second category, such as K.N. Guruswami v. The State of Mysore;(4) ' D.F. South Kheri v. Ram Sanehi Singh;(5) and M/s. Shree Krishna Gyanoday Sugar Ltd. v. The State of Bihar,(6) where the breach complained of was of a statutory obligation. It correctly pointed out that the cases before us do not belong to this class either.

15. It then, very rightly, held that the cases now before us should be placed in the third category where questions of pure alleged breaches of contract are involved. It held, upon the strength of Umakant Saran v. The State of Bihar;(7) and Lekhrai Sathram Das v.N.M. Shah;(8) and B.K. Sinha v. State of Bihar(9) that no writ order can issue under Article 226 of the Constitution in such cases "to compel the authorities to remedy are a breach of contract pure and simple"."

71. The Hon'ble Apex Court in **Premji Bhai Parmar and Others vs. Delhi Development Authority and Others** reported in **1980 (2) SCC 129** in paragraph no. 8 observed as under:-

"8. Though we are not inclined to reject the petitions on this preliminary objection as we have heard them on merits it is undeniable that camouflage of Art. 14 cannot conceal the real purpose motivating these petitions, namely, to get back a part

of the purchase price of flats paid by the petitioners with wide open eyes after flats have been securely obtained and petition to this Court under Art. 32 is not a proper remedy nor is this Court a proper forum for re-opening the concluded contracts with a view to getting back a part of the purchase price paid and the benefit taken. The undisputed facts are that petitioners offered themselves for registration for allotment of flats that may be constructed by the, Authority for MIG scheme. After the registration and when the flats were constructed and ready for occupation brochures were issued by the Authority. One such brochure for ', allotment of MIG flats in Lawrence Road residential scheme is Annexure R-1. This brochure specifies the terms and conditions including price on which flat will be offered. It also reserved the right to surrender or cancel the registration, the mode and method of paying the price and handing over the possession. There is an application form annexed to the brochure. Annexure 'A' to the brochure sets out the price of flat on the ground floor, first floor and second floor respectively. It sets out the premium amount payable for land as also the total cost in respect of the flats on the ground floor, first floor and second floor. The statement also shows the earnest money deposited at the time of the registration and the balance payable. It is on the basis of these brochures that the applicants applied for the flats in Lawrence Road and other MIG schemes. They knew and are presumed to know the contents of the brochure and particularly the price payable. They offered to purchase the flats at the price on which the Authority offered to sell the same. After the lots were drawn and they were lucky enough to be found eligible for allotment of flats, each one of them paid the price set out in the brochure and took possession of the flat, and thus sale became complete. There is no suggestion that there was a mis-statement or incorrect statement or any fraudulent concealment in the information supplied in the brochure published by the Authority on the strength of which they applied and obtained flats. How the seller works out his price is a matter of his own choice unless it is subject to statutory control. Price of property is in the realm of contract between a seller and buyer. There is no obligation on the purchaser to purchase the flat at the price offered. Even afar registration the registered applicants may opt for other schemes. His light to enter into-other scheme opting out of present offer is not thereby jeopardised or negatived and applicants so outnumbered the available flats that lots had to be drawn. With this background the petitioners now contend that the Authority has collected surcharge as component of price which the Authority was not authorised or entitled to collect. Even if there may be any merit in this contention, though there is none, such a relief of refund cannot be the subject-matter of a petition under Art. 32. And Art. 14 cannot camouflage the real bone of contention. Conceding for this submission that the Authority has the trappings of a State or would be comprehended in 'other authority' for the purpose of Art. 12, while determining price of flats constructed by it, it acts purely in its executive capacity and "is bound by the obligations which dealings of the State with the individual citizens import into every transacting entered into the exercise of its constitutional powers But after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the Constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of

violation of Art. 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the. terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract" (see Radhakrishna Agarwal & Ors. v. State of Bihar & Ors.) Petitioners were under no obligation to seek allotment of flats even after they had registered themselves. They looked at the price and flats and applied for the flats. This they did voluntarily. hey were advised by the brochures to look at the flats before going in for the same. They were lucky enough to get allotment when the lots were drawn. Each one of them was allotted a flat and he paid the price voluntarily. They are now trying to wriggle out by an invidious method so as to get back a part of the purchase price not offering to return the benefit under the contract, namely, surrender of flat. I The Authority in its affidavit in reply in terms stated that it is. willing to take back the fiats and to repay them the full price. The transaction is complete, viz., possession of the flat is taken and price is paid. At a later stage when they are secure in possession with title, petitioners are trying to get back a part of the purchase price and thus trying to re-open and wriggle out of a concluded contract only partially. In a similar and identical situation a Constitution Bench of this Court in Har Shankar & ors. etc. etc. v. The Dy. Excise & Taxation Commr. & ors. has observed that those who contract with open eyes must accept the burdens of the contract along with its benefits. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract would ever have a binding force. The jurisdiction of this Court under Art. 32 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred. It would thus appear that petitions ought not to have been entertained. However, as the petitions were heard on merits, the contentions canvassed on behalf of the petitioners may as well be examined."

72. In the case of **Divisional Forest Officer vs. Bishwanath Tea Co. Ltd**. reported in **1981 (3) SCC 238** the Hon'ble Apex Court in paragraph nos. 8 and 9 has observed as under:-

"8. It is undoubtedly true that High Court can entertain in its extraordinary jurisdiction a petition to issue any of the prerogative writs for any other purpose. But such writ can be issued where there is executive action unsupported by law or even in respect of a Corporation where there is a denial of equality before law or equal protection of law. The Corporation can also file a writ petition for enforcement of a right under a statute. As pointed out earlier, the respondent (Company) was merely trying to enforce a contractual obligation. To clear the ground let it be stated that obligation to pay royalty for timber cut and felled and removed is prescribed by the relevant regulations. The validity of regulations is not challenged. Therefore, the demand for royalty is unsupported by law. What the respondent claims is an exception that in view of a certain term in the indenture of lease, to wit, Clause 2, the appellant is not entitled to demand and collect royalty from the respondent. This is nothing but enforcement

of a term of a contract of lease. Hence, the question whether such contractual obligation can be enforced by the High Court in its writ jurisdiction.

9. Ordinarily, where a breach of contract is complained of, a party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would ordinarily be cognizable by the Civil Court. The High Court in its extraordinary jurisdiction would not entertain a petition either for specific performance of contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a civil court where a suit for specific performance of contract or for damages could be filed. This is so well settled that no authority is needed. However, we may refer to a recent decision bearing on the subject. In Har Shankar and Ors. etc. etc. v. The Deputy Excise and Taxation Commissioner and Ors., the petitioners offered their bids in the auctions held for granting licences for the sale of liquor. Subsequently, the petitioners moved to invalidate the auctions challenging the power of the Financial Commissioner to grant liquor licence. Rejecting this contention, Chandrachud J., as he than was speaking for the Constitution Bench at page 263 observed as under:

"Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."

Again at page 265 there is a pertinent observation which may be extracted.

`Analysing the situation here, a concluded contract must be held to have come into existence between the parties. The appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations."

`This apart, it also appears that in a later decision, the Assam High Court itself took an exactly opposite view in almost identical circumstances. In Woodcrafts Assam v. Chief Conservator of Forests, Assam, a writ petition was filed challenging the revision of rates of royalty for two different periods. Rejecting this petition as not maintainable, a Division Bench of the High Court held that the complaint of the petitioner is that there is violation of his rights under the contract and that such violation of contractual obligation cannot be remedied by a writ petition. That exactly is the position in the case before us. Therefore, the High Court was in error in entertaining the writ petition and it should have been dismissed at the threshold."

73. In the case of **Barielly Development Authority and Another vs. Ajay Pal Singh and Others** reported in **1989 (2) SCC 116** the Hon'ble Apex Court in paragraph nos. 20, 21 and 22 observed as under:-

"20. Thus the factual position in this case clearly and unambiguously reveals that the respondents after voluntarily accepting the conditions imposed by the BDA have entered into the realm of

concluded contract pure and simple with the BDA and hence the respondents can only claim the right conferred upon them by the said contract and are bound by the terms of the contract unless some statute steps in and confers some special statutory obligations on the part of the BDA in the contractual field. In the case before us, the contract between the respondents and the BDA does not con- tain any statutory terms and/or conditions. When the factual position is so, the High Court placing reliance on the decision in Ramana Dayaram Shetty case (AIR 1979 SC 1628) has erroneously held:

"It has not been disputed that the contesting opposite party is included within the term 'other authority' mentioned under Article 12 of the Constitution. Therefore, the contesting opposite parties cannot be permitted to act arbitrarily with the principle which meets the test of reason and relevance. Where an author- ity appears acting unreasonably this Court is not powerless and a writ of mandamus can be issued for performing its duty free from arbitrariness or unreasonableness."

21. This finding, in our view, is not correct in the light of the facts and circumstances of this case because in Ramana Dayaram Shetty case there was no concluded contract as in this case. Even conceding that the BDA has the trap- pings of a State or would be comprehended in 'other authori- ty' for the purpose of Article 12 of the Constitution, while determining price of the houses/flats constructed by it and the rate of monthly instalments to be paid, the 'authority' or its agent after entering into the field of ordinary contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter-se. In this sphere, they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. B.D.A. in this case) in the said contractual field.

22. There is a line of decisions where the contract entered into between the State and the persons aggrieved is non- statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple Radhakrishna Agarwal & Ors. v. State of Bihar & Ors., [1977] 3 SCR 249; Premji Bhai Parmar & Ors. etc. v. Delhi Development Authority & Ors, [1980] 2 SCR 704 and D.F.O. v. Biswanath Tea Company Ltd., [1981] 3 SCR 662."

74. In **Noida Entrepreneur Association vs. U.P. Financial Corporation and Another** reported in **1994 Supp (2) SCC 108** the Hon'ble Apex Court in paragraph nos. 2, 3 and 4 has observed as under:-

"2. The Association filed a writ petition before the Allahabad High Court seeking a direction to the Corporation to adhere to the guidelines laid down by the IDBI in respect of interest and the penal interest. The High Court dismissed the writ petition. This appeal by the Association is against the judgment of the High Court.

3. According to the Association the Corporation is charging from them the interest at higher rate than the ceiling provided under the guidelines issued by the IDBI. It is further alleged that the penal interest in the event of default in repayment, provided in the agreement was also over and above the norms laid down by the IDBI.

4. WE have heard learned counsel for the appellant. He has taken us through the

judgment of the High Court and the other material on record. The High Court declined to exercise its jurisdiction under Article 226 of the Constitution of lndia on the short ground that the appellant-petitioner was disputing the contractual obligations entered into by the parties under the ordinary law of contract. While dismissing the writ petition the High Court observed as under:

"We feel on the facts and circumstances of this case that since only the petitioner has come before us, the proper remedy for the petitioner even otherwise is to go to the civil court and get the matter adjudicated in the suit. This is, nowever, without prejudice to the right of the petitioner to approach the IDBI by means of representation if they really have power to take action they can take necessary action if it is so desirable under that power against respondent 1."

75. In the Case of **Improvement Trust Ropar Through Its Chairman vs. Tejinder Singh Gujral And Others** reported in 1995 Supp (4) SCC 577 the Hon'ble Apex Court in paragraph no. 3 has observed as under:-

"3. No writ petition can lie for recovery of an amount under a contract The High Court was clearly wrong in entertaining and allowing the petition There is no separate law for the advocates"

76. Yet in the case of **State of Orissa vs. Narain Prasad and Others** reported in AIR 1997 S.C. 1493 the Hon'ble Apex Court in paragraph no. 35 observed as under:-

"35. Lastly we may also invoke the holding in Har Shankar and Jageram that the writ petitioners, having entered into agreements voluntarily,containing the conditions aforesaid and having done the business under the licences obtained by them, cannot be allowed to either wriggle out of the agreements nor can they be allowed to challenge the validity of the Rules which constitute the terms of the contract. The High Court should not have exercised its extra-ordinary discretionary jurisdiction under Article 226 of the Constitution in aid of such licencees."

77. **Orissa State Financial Corporation vs. Narsingh Ch. Nayak And Others** reported in 2003 (10) SCC 261 the Hon'ble Apex Court in paragraph no. 6 has observed as under:-

"6. The said order is under challenge in this appeal. On a plain reading of the impugned order it is manifest that the High Court, while considering the writ petition filed by the owner of the vehicle for quashing of the notice of auction sale and for other consequential reliefs, has passed order drawing up a fresh contract between the parties and has issued certain further directions in the matter; the corporation has been directed to advance a fresh loan to the writ petitioner to enable him to purchase a new truck; to enter into agreement for realization of the balance loan amount in accordance with law; to write off the remaining amount of Rs. 16,500/-and to order waiving of the interest till date etc. The order to say the least, was beyond the scope of the writ petition which was being considered by the High Court and beyond the jurisdiction of the court in a contractual matter. No doubt, while exercising its extraordinary jurisdiction under Article 226 of the Constitution, the High Court has wide power to pass appropriate order and issue proper direction as necessary in the facts and

circumstances of the case and in the interest of justice. But that is not to say that the High Court can ignore the scope of the writ petition and nature of the dispute and enter the field pertaining to contractual obligations between the parties and issue such directions annulling the existing contract and introducing a fresh contract in its place."

78. Yet in the case of **Rajasthan State Industrial Development (supra)** the Hon'ble Apex Court in paragraph nos. 19, 20, 21, 22, 23, 24 has observed as under:-

"19. There can be no dispute to the settled legal proposition that matters/disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution. Thus, writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties. (Vide: Bareilly Development Authority & Anr. v. Ajay Pal Singh & Ors., AIR 1989 SC 1076; and State of U.P. & Ors. v. Bridge & Roof Co. (India) Ltd., AIR 1996 SC 3515).

20. In Kerala State Electricity Board & Anr. v. Kurien E. Kalathil & Ors., AIR 2000 SC 2573, this Court held that a writ cannot lie to resolve a disputed question of fact, particularly to interpret the disputed terms of a contract observing as under: (SCC pp. 298-99, paras 10-11)

"10.....The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. ....If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract.....

11.....The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract.... The contractor should have relegated to other remedies."

21. It is evident from the above, that generally the court should not exercise its writ jurisdiction to enforce the contractual obligation. The primary purpose of a writ of mandamus, is to protect and establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (ex debito justiceiae). The grant or refusal of the writ is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, inter-alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal.

22. Hence, discretion must be exercised by the court on grounds of public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would lead to injustice. The prime consideration for the issuance of the said writ is, whether or not substantial

justice will be promoted. Furthermore, while granting such a writ, the court must make every effort to ensure from the averments of the writ petition, whether there exist proper pleadings. In order to maintain the writ of mandamus, the first and foremost requirement is that the petition must not be frivolous, and must be filed in good faith. Additionally, the applicant must make a demand which is clear, plain and unambiguous. It must be made to an officer having the requisite authority to perform the act demanded. Furthermore, the authority against whom mandamus is issued, should have rejected the demand earlier. Therefore, a demand and its subsequent refusal, either by words, or by conduct, are necessary to satisfy the court that the opposite party is determined to ignore the demand of the applicant with respect to the enforcement of his legal right. However, a demand may not be necessary when the same is manifest from the facts of the case, that is, when it is an empty formality, or when it is obvious that the opposite party would not consider the demand.

IV. Interpretation of terms of contract

23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. (Vide: United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, AIR 2004 SC 4794; Polymat India P. Ltd. & Anr. v. National Insurance Co. Ltd. & Ors., AIR 2005 SC 286).

24. In DLF Universal Ltd. & Anr. v. Director, T. and C. Planning Department Haryana & Ors., AIR 2011 SC 1463, this court held:

"It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. ?It comprises joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation. As is stated in Anson's Law of Contract, "a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they will accept...Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power

between the contracting parties can be assumed and no injury is done to the interests of the community at large."

The Court assumes "that the parties to the contract are reasonable persons who seek to achieve reasonable results, fairness and efficiency...In a contract between the joint intent of the parties and the intent of the reasonable person, joint intent trumps, and the Judge should interpret the contract accordingly."

79. Applying the said judgments in the present case this Court finds that the petitioner is seeking a judicial intervention for resiling and wriggling from contractual obligations which are not within the realm of the present proceedings.

80. Another issue which needs to be taken note of is the fact as to whether a writ petition under Article 226 of the Constitution would lie seeking mandamus for only refund of money when the same is disputed. The said issue is no more res integra as in the case of **Suganmal Vs. State of Madhya Pradesh reported in AIR 1965 Supreme Court page 1740** wherein the Hon'ble Apex Court observed as under:-

"6. On the first point, we are of opinion that though the High Court have power to pass any appropriate order in the exercise of the powers conferred under article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax. We have been referred to cases in which orders had been issued directing the state to refund taxes illegally collected, but all such had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illgally collected. We have not been referred to any case in which the courts were moved by a petition under article 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or unconstitutionality and, therefore, could take action under Art. 226 for the protection of their fundamental right and the Courts, on setting aside the assessment orders exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and, therefore, hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right. "

81. The judgment in the case of Suganmal (supra) was followed in the case of **Salonah Tea Company Ltd. And Others vs. Superintendent of Taxes Nowgong And Others** reported in **1988 (1) SCC 401** wherein in paragraph no. 6 and 7 the Hon'ble Apex Court has observed as under:-

"6. In this case indisputably it appears that tax was collected without the authority of law. Indeed the appellant had to pay the tax in view of the notices which were without

jurisdiction. It appears that the assessment was made under section 9(3) of the Act. Therefore, it was with out jurisdiction. In the premises it is manifest that the respondents had no authority to retain the money collected without the authority of law and as such the money was liable to refund. The only question that falls for consideration here is whether in an application under Article 226 of the Constitution the Court should have directed refund. It is the case of the appellant that it was after the judgment in the case of Loong Soong Tea Estate the cause of action arose. That judgment was passed in July 1973. It appears thus that the High Court was in error in coming to the conclusion that it was possible for the appellant to know about the legality of the tax sought to be imposed as early as 1963, when the Act in question was declared ultra vires as mentioned hereinbefore. Thereafter the taxes were paid in 1968. Therefore the claim in November, 1973 was belated. We are unable to agree with this conclusion. As mentioned hereinbefore the question that arises in this case is whether the Court should direct refund of the amount in question. Courts have made a distinction between those cases where a claimant approaches a High Court seeking relief of obtaining refund only and those where refund is sought as a consequential relief after striking down of the order of assessment etc. Normally speaking in a society governed by rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally, as a corollary of the said statement of law it follows that taxes collected without the authority of law as in this case from a citizen should be refunded because no State has the right to receive or to retain taxes or monies realised from citizens without the authority of law.

7. In Suganmal v. State of Madhya Pradesh and others, AIR 1965 SC 1740, this Court held that the High Courts have power to pass any appropriate order in the exercise of the powers conferred on them under Article 226 of the Constitution. A petition solely praying for the issue of a writ of mandamus directing the State to refund the money alleged to have been illegally collected by the State as tax was not ordinarily maintainable for the simple reason that a claim for such refund can always be made in a suit against the authority which had illegally collected the money as a tax and in such a suit it was open to the State to raise all possible defences to the claim, defences which cannot in most cases,, be appropriately raised and considered in the exercise of writ jurisdiction. It appears that Section 23 of the Act deals with refund. In the facts of this case, the case did not come within section 23 of the Act. But in the instant appeal, it is clear as the High Court found in our opinion rightly that the claim for refund was a consequential relief."

82. In the case in hand the Court finds that only a solitary relief has been sought in the nature of mandamus directing the GNIDA to refund the amount so deposited by the petitioner along with 18% per annum. The judgment in the case of **Suganmal** and **Salonah Tea Company Ltd. (supra)** are squarely applicable in the facts of the present case particularly when refund is being sought on the basis of certain deposits so made by the petitioner for discharging the contractual obligation. This Court is of the firm opinion that the present writ petition so instituted, seeking the solitary relief of mandamus without assailing any order, is not maintainable.

83. Learned Senior Counsel for the petitioner has lastly argued that the amount in dispute was deposited under protest and thus, the GNIDA is under legal obligation

to refund the same. Sri Ramendra Pratap Singh, who appears for GNIDA has argued that for discharge of the contractual obligations the petitioner has deposited the said amount and the same cannot be refunded. The Court notices the fact that there is a marked difference between the deposit of amount under protest and protest against the very instruments which occasioned deposit of the said amount. In the present case in hand, the entire pleadings centers around the deposit of amount under protest but there has been no attempt made by the petitioner to raise protest or challenge the Transfer Memorandum dated 24.12.2020, which became instrumental in deposit of the lease rentals and interest thereon. Hence, in the firm opinion of the Court, the interpretation so sought to be suggested by the petitioner that since the amount was deposited under protest, the petitioner is entitled to refund of the same is out of context besides being misconceived and misplaced.

84. Meticulously, analyzing the facts of the case in hand from the four corners of law this Court cannot subscribe to the argument of the learned Senior Counsel who appears for the petitioner as the controversy sought to raked up by the petitioner devolves around factual issues relating to the contractual obligation so embodied in the underline instruments be that the lease deed so executed from time to time or the Transfer Memorandum so executed between the parties. More so, the sale certificate itself has been issued after noticing the fact that the petitioner transferee (auction purchaser) is bound by the covenants contained in the lease deed as well as the Transfer Memorandum. Writ jurisdiction cannot be expanded in an elastic manner so as to stretch it to such a position which tantamounts to giving its judicial seal while delving into the factual issue as to whether pressure/coercion so adopted was practiced upon the petitioner. Nonetheless, to put the nail in the coffin the above noted instruments being sale deed certificate, Transfer Memorandum had not been put to challenge before any Court of law. More so, the conduct of the petitioner itself explicitly makes it clear that the petitioner has approbated and reprobated at the same time just in order to get the benefits and to wriggle out from obligations.

85. An impleadment application for impleading M/s Moser Baer India Private Limited Company in Liquadation for making it as fourth respondent, is not required to be allowed in view of the judgment/order so passed today.

SUMMATION

86. In summation of the discussion made herein above, we hold: -

(a). Merely because the petitioner is a bonafide auction purchaser who had purchased assets Corporate Debtor through auction/bidding so conducted by orders of NCLT, will not absolve it from paying arrears of lease rental and interest thereon.

(b). The Insolvency Bankruptcy Code-2016 grants limited protection to the petitioner (auction purchaser) while allowing it to step into the shoes of the Corporate Debtor but in order to the lessee of the principle lessor (GNIDA) the petitioner has to honor the commitments and discharge its contractual obligation as embodied in the lease deeds, Transfer Memorandum and Sale Certificate.

(c). The conduct of the petitioner also dis-entitles it to be granted relief under the equitable jurisdiction as the petitioner has

approbated and reprobated at the same time as on one hand it seeks to become a lessee while being put in possession for enjoying the immovable assets of Corporate Debtor but on the other hand it wriggles and resiles from the contractual obligation.

(d). The words so employed in the Certificate of Sale Deed dated 11.09.2019 being "AS IS WHERE IS", "AS IS WHAT IS", "WHATEVER THERE IS" AND "NO RECOURSE" read with the Transfer Memorandum dated 24.12.2020 so executed between the petitioner (auction purchaser) and GNIDA as well as the Sale Certificate dated 30.07.2021 itself creates contractual obligation upon the petitioner to honor the commitments and to discharge the obligations so embodied in the lease deed dated 26.06.2021 and the subsequent lease deeds for the payment of past lease rentals and interest thereon.

(e). GNIDA being the principal lessor has paramount interest over the demised land put to auction and it has legal as well as contractual right to raise demand of out standing arrears of lease rentals and interest thereon.

(f). High Court under Article 226 of the Constitution of India cannot by a judicial fiat creates a podium to facilitate avoidance of agreements while wriggling out from contractual obligations so embodied therein.

(g). A writ petition containing solitary relief of refund of the amount deposited for fulfilling contractual obligation, is not maintainable.

(h). Even otherwise, in absence of any challenge being made to the covenants of the Transfer Memorandum dated 24.12.2020 and the Sale Certificate dated 30.07.2021, the petitioner is not entitled to refund of the amount so deposited by him claiming it to be under protest.

CONCLUSION

87. In view of the forgoing discussions, the writ petition is devoid of merit and thus, liable to be dismissed. It is, therefore, dismissed.

88. All pending applications stands disposed of.

89. Interim order, if any, stands vacated.

90. No order as to costs.

(2022)07ILR A417
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-B No. 368 of 2022

Mahendra Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Harsh Vikram, Sri Dharm Vir Jaiswal

Counsel for the Respondents:
C.S.C., Sri Arun Kumar Pandey

A. Revenue Law - U.P. Revenue Code, 2006-Sections 144, 146 & 210 - Petitioners instituted a suit for declaration and also moved an application seeking temporary injunction-the said temporary injunction application was rejected by trial court which was challenged before the Board of Revenue which was also dismissed at the stage of admission-an order passed upon an application seeking temporary injunction u/s 146 of the Revenue Code during the course of a suit u/s 144 or 145 would be amenable to a first appeal u/s 207, and would not be revisable under Section 210-Thus the

order passed by the Board of revenue rejecting the revision at the stage of admissibility is not illegal.(Para 1 to 46)

B. The temporary injunction which was sought under Section 146 during the pendency of the suit u/s 144 was as per terms of the provisions under Order XXXIX Rule 1 CPC and the said order being referable to sub-rule(r) under Rule 1 of Order XLIII, the same would be of the nature specified under clause(b) and clause (c) of sub-section (2) of Section 207 and in view thereof a first appeal under Section 207 would lie against the said order.(Para 39)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Talib Khan Vs Addl. Commr.(Admin.) Moradabad DiVs, Moradabad (2008) 104 RD 458

2. Mulraj Vs Murti Raghonathji Maharaj (1967) AIR SC 1386

3. Jean Marc Nken, Petitioner, Vs Eric H. Holder, Jr. Attorney General (2009) 556 U.S. 418

4. Weinberger Vs Romero-Barcelo (1982) 456 U.S. 305, 312

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

1. Heard Sri Harsh Vikram, learned counsel for the petitioners, Sri Neeraj Tripathi, learned Additional Advocate General assisted by Sri Shashank Shekhar Singh, learned Additional Chief Standing Counsel and Sri Surya Bhan Singh and Sri Devesh Vikram, learned Standing Counsel appearing for the State respondents.

2. The instant writ petition has been filed praying for quashing of the order dated 23.09.2021 passed by the court of Additional Sub-Divisional Magistrate Sadar, Moradabad in Case No. 04080 of 2018, Computerized Case No. T201813540104080 (Mahendra Singh and others Vs. State of U.P.) in proceedings under Section 144 of the U.P. Revenue Code, 20061 and the order dated 23.11.2021 passed by the Member Board of Revenue, U.P. Allahabad in Case No. Rev/2396/2021/Moradabad, Computerized Case No. AL20211354002396 (Mahendra Singh and others Vs. Smt.Sharda Devi and others) in proceedings under Section 210 of the Revenue Code. A further direction is sought to the private respondent nos. 3 to 8 not to interfere in the peaceful possession of the petitioners on land bearing Gata No. 251Aa situate at Bhaypur Tehsil and District Moradabad.

3. The case as set up in the writ petition is that the land bearing Gata No. 521 Ka area 3.2380 acre situate at village Bhaypur Tehsil and District Moradabad was allotted to the predecessors-in-interest of the petitioners; however due to mistake of revenue authorities, their names were wrongly recorded as class III tenure holder and treating them to be asami, proceedings under Rule 176-A (2) of the U.P. Zamindari Abolition and Land Reforms Rules, 19522 were initiated and an exparte order dated 07.03.2003 was passed directing their names to be expunged from the revenue records. The land in question was thereafter allotted to the respondent nos. 3 to 8. Upon an application filed by the petitioners, the aforestated order was recalled by an order dated 04.12.2003 and the proceedings were thereafter dropped with the passing of an order dated 23.03.2006 under Rule 176-A (2). The order dated 23.03.2006 was put to challenge by the subsequent allottees as also the State of U.P. by filing a revision before the Additional Commissioner (Administration), Moradabad and in terms of an order dated 31.03.2010, the revisions

were allowed and the order dated 23.03.2006 was set aside. The earlier order dated 07.03.2003, whereby the names of the predecessors-in-interest of the petitioners had been expunged, was affirmed. The petitioners thereafter preferred a revision before the Board of Revenue being Revision No. 13 of 2010-2011, which is stated to be pending.

4. It is further stated that the predecessors-in-interest of the petitioners died in the meantime and the petitioners thereafter instituted a suit for declaration under Section 144 of the Revenue Code and also moved an application seeking temporary injunction against the respondents under Section 146 of the Revenue Code. The aforestated application seeking temporary injunction was rejected by the trial court by means of an order dated 23.09.2021, which was subjected to challenge in a revision being Revision No. 2396 of 2021 before the Board of Revenue, which was also dismissed at the stage of admission. Aggrieved against the aforestated order, the present writ petition has been filed.

5. Learned counsel for the petitioners has made his submissions as under :-

5.1 The revisional court erred in dismissing the revision on the ground of maintainability. The provision for grant of injunction having been separately provided for under Section 146 of the Revenue Code any order passed thereon disposing the application, either by granting or refusing to grant the injunction, would have the effect of terminating the proceedings under Section 146 and therefore the order would be revisable.

5.2 Section 209 creates a bar in respect of certain appeals and in terms of clause (d) thereof, an appeal is barred against an order granting or rejecting an application for stay.

5.3 Section 210 provides for a revision before the Board or the Commissioner in respect of any suit or proceeding decided by any subordinate revenue court in which no appeal lies. In the instant case, the application for injunction filed under Section 146 having been finally decided and an appeal thereagainst being barred as per Section 209, the order rejecting the application for injunction would be revisable under Section 210. Reliance in this regard has been placed on the decision in the case of **Talib Khan Vs. Additional Commissioner (Administration) Moradabad Division, Moradabad**3

6. Learned Additional Advocate General has refuted the aforestated contentions raised on behalf of the petitioners by submitting as under :-

6.1 The provision for injunction available under Section 146 is during the course of a suit under Section 144 and accordingly an order rejecting the application seeking injunction cannot be said to be "case decided" so as to be amenable to a revision under Section 210.

6.2 The remedy of first appeal under Section 207 of the Revenue Code, apart from being available against a final order or decree passed in a suit, is also available against an order of the nature specified in Order XLIII Rule 1 of the First Schedule of the Code of Civil Procedure, 19084. Order XLIII Rule 1 (r) provides for an appeal against an order under Rule 1, Rule 2 of Order XXXIX which is with regard to grant of temporary injunctions in a suit. The provision with regard to grant of injunction under Section 146 being similarly worded as the Order XXXIX Rule 1, an order rejecting the application seeking injunction

in a pending suit under Section 144, would be appealable as per clause (c) of sub-section (2) of Section 207 of the Revenue Code.

6.3 The bar under Section 209 against filing an appeal against an order rejecting an application for stay would not be attracted inasmuch as in the present case, in terms of the order in question the injunction sought by the petitioners has been refused and the same cannot be said to be an order rejecting an application for stay. Placing reliance upon the judgment in the case of **Mulraj vs Murti Raghonathji Maharaj**5, it has been contended that there is a distinction between an order of an injunction and an order of stay.

7. Rival contentions now fall for consideration.

8. The provision with regard to declaratory suits finds place under Chapter IX of the Revenue Code. Section 144 is with regard to declaratory suits by the tenure holders and the same reads as follows :-

"**144. Declaratory suits by tenure holders**.— (1) Any person claiming to be a bhumidhar or asami of any holding or part thereof, whether exclusively or jointly, with any other person, may sue for a declaration of his rights in such holding or part.

(2) In every suit under sub-section (1) instituted by or on behalf of—

(a) a Bhumidhar, the State and the Gram Panchayat shall be necessary parties;

(b) an asami, the land-holder shall be a necessary party."

9. The corresponding provisions with regard to declaratory suits under the U.P. Zamindari Abolition and Land Reforms Act, 19506 (now repealed) was contained under Section 229-B of the said enactment, and the same was as follows :-

"229-B. Declaratory suit by person claiming to be an asami of a holding or part thereof.— (1) Any person claiming to be an asami of a holding or any part thereof, whether exclusively or jointly with any other person, may sue the landholder for a declaration of his rights as asami in such holding or part, as the case may be.

(2) In any suit under sub-section (1) any other person claiming to hold as asami under the land-holder shall be impleaded as defendant.

(3) The provisions of sub-sections (1) and (2) shall mutatis mutandis apply to a suit by a person claiming to be a bhumidhar with the amendment that for the word "landholder" the words "the State Government and the Gaon Sabha are substituted therein."

10. Section 144 contains the provision for declaratory suits by tenure holders and in terms thereof any person claiming to be a bhumidhar or asami of any holding or part thereof, whether exclusively or jointly with any other person, may sue for a declaration of his rights in such holding or part thereof. The State and the Gram Panchayat shall be necessary parties in every such suit instituted by or on behalf of the bhumidhar, and in the case of a suit instituted by an asami, the landholder shall be a necessary party.

11. Section 146 contains the provision for injunction, and the same reads as follows :-

"146. Provision for injunction.— If in the course of a suit under Section 144 or 145, it is proved by affidavit or otherwise —

(a) that any property, trees or crops standing on the land in dispute is in danger of being wasted, damaged or alienated by any party to the suit; or

(b) that any party to the suit threatens or intends to remove or dispose of the said property, trees or crops in order to defeat the ends of justice, the Court may grant a temporary injunction, and where necessary, also appoint a receiver."

12. The corresponding provision with regard to grant of injunction during the course of a suit instituted under the provisions of Section 229-B and 229-C of the UPZA and LR Act, as then it stood, was contained under Section 229-D of the said enactment which reads as follows :-

"229-D. Provision for injunction.— (1) If in the course of a suit under the provisions of Sections 229-B and 229-C, it is proved by an affidavit or otherwise-

(a) that any property, trees or crops standing on the land in dispute is in danger of being wasted, damaged or alienated by any party to the suit; or

(b) that any party to the suit threatens or intends to remove or dispose of the said property, trees or crops in order to defeat the ends of justice, the Court may grant a temporary injunction and where necessary, also appoint a receiver.

(2) Nothing in sub-section (1) shall apply to a suit filed under sub-section (4-D) of Section 122-B."

13. Section 146 contains the provision for injunction and in terms thereof, if in the course of a suit under Section 144 or 145 it is proved by affidavit or otherwise : i.e. (i) that any property, trees or crops standing on the land in dispute is in danger of being wasted, damaged or alienated by any party to the suit; or (ii) that any party to the suit threatens or intends to remove or dispose of the said property, trees or crops in order to defeat the ends of justice, the Court is empowered to grant a temporary injunction, and where necessary, also appoint a receiver.

14. It would be relevant to notice that Section 214 of the Revenue Code provides for applicability of Code of Civil Procedure, 1908 to every suit, application or proceedings under the Code. For ease of reference Section 214 of the Revenue Code is being extracted below:-

"214. Applicability of Code of Civil Procedure, 1908 and Limitation Act, 1963.— Unless otherwise expressly provided by or under this Code, the provisions of the Code of Civil Procedure, 1908 and the Limitation Act, 1963 shall apply to every suit, application or proceedings under this Code."

15. Section 341 of the repealed UPZA and LR Act, provided for applicability of the provisions of the Code of Civil Procedure, to proceedings under the said Act, in similar terms.

16. The power to grant temporary injunction during the pendency of a suit has been conferred by Order XXXIX Rule 1 of the CPC, which reads as follows:-

"Order XXXIX Rule 1. Cases in which temporary injunction may be granted.--Where in any suit it is proved by affidavit or otherwise--

(a) that any property in dispute in a suit is in danger of being wasted, damaged

or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders."

17. The language and phraseology of Section 146 of the Revenue Code as also Section 229-D of the repealed UPZA and LR Act, are in terms which are similar to the language of Order XXXIX Rule 1, and therefore the provisions under Section 146 would be seen as being supplemental to Order XXXIX Rule 1 CPC, the applicability whereof is provided as per terms of Section 214 of the Revenue Code.

18. Section 207 of the Revenue Code provides for the remedy of a first appeal to any party aggrieved by certain orders specified in the section. Section 207 reads as follows:-

"**207. First appeal.—** (1) Any party aggrieved by a final order or decree passed in any suit, application or proceeding specified in Column 2 of the Third Schedule, may refer a first appeal to the Court or officer specified against it in Column 4, where such order or decree was passed by a Court or officer specified against it in Column 3 thereof.

(2) A first appeal shall also lie against an order of the nature specified —

(a) in Section 47 of the Code of Civil Procedure, 1908; or

(b) in Section 104 of the said Code; or

(c) in Order XLIII Rule 1 of the First Schedule to the said Code.

(3) The period of limitation for filing a first appeal under this section shall be thirty days from the date of the order or decree appealed against."

19. It is relevant to notice that as per sub-section (2) of Section 207, a first appeal shall also lie against an order of the nature specified— (i) in Section 47 of the Code of Civil Procedure, 1908; or (ii) in Section 104 of the said Code; or (iii) in Order XLIII Rule 1 of the First Schedule to the said Code.

20. It would therefore be seen that apart from the remedy of a first appeal being available against final orders or decrees passed in a suit, application or proceeding specified in column 2 of the Third Schedule, the said remedy is also available against an order of the nature specified in Section 104 of the CPC or in Order XLIII Rule 1 of the First Schedule of the CPC.

21. Section 104 of the CPC and also the Order XLIII Rule 1 of the First Schedule of the CPC, which have been referred under sub-section (2) of Section 207 of the Revenue Code, and which would be relevant for appreciation of the controversy at hand are being extracted below :-

"**104. Orders from which appeal lies.**-- (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :--

(a) ***

(b) ***
(c) ***
(d) ***
(e) ***
(f) ***
(ff) an order under Section 35-A;
(ffa) an order under Section 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may be;
(g) an order under section 95;
(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;
(i) any order made under rules from which an appeal is expressly allowed by rules:
Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.
(2) No appeal shall lie from any order passed in appeal under this section."

"FIRST SCHEDULE
ORDER XLIII
APPEALS FROM ORDERS

"1. Appeals from Orders.— An appeal shall lie from the following orders under the provisions of Section 104, namely :-
(a) an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court except where the procedure specified in Rule 10-A of Order VII has been followed;
(b) ***
(c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an Order to set aside the dismissal of a suit;
(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte;
(e) ***
(f) an order under Rule 21 of Order XI;
(g) ***
(h) ***
(i) an order under Rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;
(j) an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a sale;
(ja) an order rejecting an application made under sub-rule (1) of Rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of Rule 105 of that Order is appealable.
(k) an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;
(l) an order under Rule 10 of Order XXII giving or refusing to give leave;
(m) ***
(n) an order under Rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
(na) an order under Rule 5 or Rule 7 of Order XXXIII rejecting an application for permission to sue as an indigent persons;
(o) ***
(p) orders in interpleader-suit under Rule 3, Rule 4 or Rule 6 of Order XXXV;
(q) an order under Rule 2, Rule 3 or Rule 6 of Order XXXVIII;
(r) an order under Rule 1, Rule 2, Rule 2-A, Rule 4 or Rule 10 of Order XXXIX;
(s) an order under Rule 1 or Rule 4 of Order XL;

(t) an order of refusal under Rule 19 of Order XLI to readmit, or under Rule 21 of Order XLI to rehear, an appeal;

(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

(v) ***

(w) an order under Rule 4 of Order XLVII granting an application for review."

22. It would be seen that sub-rule (r) under Rule 1 of Order XLIII contains reference to an order under Rule 1 of Order XXXIX which relates to the provisions for grant of temporary injunctions during the pendency of a suit.

23. A combined reading of the provisions contained under clause (b) and clause (c) under sub-section (2) of Section 207 together with the provisions under Section 104 of the CPC and Order XLIII Rule 1 of the First Schedule thereof in conjunction with Order XXXIX Rule 1 and also the provisions relating to injunction under Section 146 of the Revenue Code, would lead to the inference that an order with regard to injunction passed in exercise of powers under Section 146 during the course of a suit under Sections 144 or 145, would be amenable to the remedy of a first appeal under Section 207.

24. It would be relevant to notice that sub-section (3) of Section 331 of the UPZA and LR Act contained a similar provision with regard to the remedy of an appeal from an order of the nature mentioned in Section 104 of the CPC or in Order XLIII Rule 1 of the First Schedule thereof.

25. Having arrived at an inference that an order passed in exercise of powers under Section 146 would be subject to an appeal under Section 207, the contention raised on behalf of the petitioners with regard to an appeal against an order granting or rejecting an application for a stay being barred in terms of clause (d) of Section 209, would be required to be adverted to.

26. Section 209 of the Revenue Code which contains a bar against certain appeals, is being extracted below :-

"**209 Bar against certain appeals.**.—Notwithstanding anything contained in Sections 207 and 208, no appeal shall lie against any order or decree-

(a) made under Chapter XI of this Code;

(b) granting or rejecting an application for condonation of delay under Section 5 of the Limitation Act, 1963;

(c) rejecting an application for revision;

(d) granting or rejecting an application for stay;

(e) remanding the case to any subordinate Court;

(f) where such order or decree is of an interim nature;

(g) passed by Court or officer with the consent of parties; or

(h) where order has been passed ex-parte or by default:

Provided that any party aggrieved by order passed ex-parte or by default, may move application for setting aside such order within a period of thirty days from the date of the order:

Provided further that no such order shall be reversed or altered without previously summoning the party, in whose favour order has been passed to appear and be heard in support of it."

27. Section 209 provides that certain orders or decrees are not appealable, and clause (d) thereof refers to an order

granting or rejecting an application for a stay.

28. An appeal against order granting or rejecting an application for stay would therefore be barred notwithstanding anything contained under Sections 207 and 208.

29. The question which thus falls for consideration is as to whether an order passed under Section 146 of the Revenue Code granting or refusing to grant a temporary injunction can be held to be an order granting or rejecting an application for stay so as to attract the bar under Section 209 and to hold such order to be non-appealable.

30. The question with regard to the effect of a stay order and its distinction from an order of injunction fell for consideration in the case of **Mulraj vs Murti Raghonathji Mahara**j4 wherein it was held that an order of injunction is generally issued to a party by which it is forbidden from doing certain acts whereas a stay order is addressed to a court which prohibits it from proceeding further. The distinction between a stay order and an order of injunction was drawn by observing as follows :-

"8...In effect therefore a stay order is more or less in the same position as an order of injunction with one difference. An order of injunction is generally issued to a party and it is forbidden from doing certain acts. It is well settled that in such a case the party must have knowledge of the injunction order before it could be penalised for disobeying it. Further it is equally well settled that the injunction order not being addressed to the court, if the court proceeds in contravention of the injunction order, the proceedings are not a nullity. In the case of a stay order, as it is addressed to the court and prohibits it from proceeding further, as soon as the court has knowledge of the order it is bound to obey it and if it does not, it acts illegally, and all proceedings taken after the knowledge of the order would be a nullity. That in our opinion is the only difference between an order of injunction to a party and an order of stay to a court. In both cases knowledge of the party concerned or of the court is necessary before the prohibition takes effect. Take the case where a stay order has been passed but it is never brought to the notice of the court, and the court carries on proceedings ignorance thereof. It can hardly be said that the court has lost jurisdiction because of some order of which has no knowledge...

...

10. As we have already indicated, an order of stay is as much a prohibitory order as an injunction order and unless the court to which it is addressed has knowledge of it, it cannot deprive that court of the jurisdiction to proceed with the execution before it. But there is one difference between an order of injunction and an order of stay arising out of the fact that an injunction order is usually passed against a party while a stay order is addressed to the court. As the stay order is addressed to the court as soon as the court has knowledge of it, it must stay its hand; if it does not do so, it acts illegally. Therefore, in the case of a stay order as opposed to an order of injunction, as soon as the court has knowledge of it, it must stay its hand and further proceedings are illegal; but so long as the court has no knowledge of the stay order it does not lose the jurisdiction to deal with the execution which it has under the Code of Civil Procedure."

(emphasis supplied)

31. The difference between an injunction and an order of stay were noticed in the decision of United States Supreme Court in **Jean Marc Nken, petitioner Vs. Eric H. Holder, Jr., Attorney General**7, wherein it was held that a stay and an injunction were not synonymous since an injunction refers to an order requiring a person to act or refrain from acting and a stay is a temporary suspension of legal proceedings. It was observed as follows :-

*"An injunction and a stay have typically been understood to serve different purposes. The former is a means by which a court tells someone what to do or not to do. When a court employs "the extraordinary remedy of injunction," **Weinberger v. Romero-Barcelo**8, it directs the conduct of a party, and does so with the backing of its full coercive powers."*

32. It would therefore be seen that an order of injunction and an order of stay have been held to be distinct and to serve different purposes. An injunction order is generally issued to party and operates in personam whereas a stay operates upon the judicial proceedings itself by halting or postponing the same wholly or in part, or by temporarily divesting an order of its enforceability.

33. An order of stay in a pending review before a higher forum or Court may have some overlap with injunction, in the sense that both have the effect of preventing further action before the legality of the same has been conclusively determined. A stay order achieves this result by temporarily suspending the source of authority to act ─ the order or the judgment in question, while an order of injunction has the effect of commanding or forbidding the action and is a mandate operating in personam.

34. In the case at hand the application seeking interim relief filed by the petitioners under Section 146 of the Revenue Code contains a prayer for issuance of a direction for maintaining status quo till the disposal of the declaratory suit filed under Section 144. The affidavit filed along with the application contains an assertion that the defendants in the suit were trying to forcibly take possession of the property in question and to destroy the same, and in view thereof an order directing status quo was required.

35. The order dated 23.09.2021 in terms of which the application under Section 146 was disposed contains specific reference to the prayer made on behalf of the petitioners for a direction to maintain status quo during the pendency of the suit and thereafter the court upon consideration of the material on record and the submissions made by counsel for parties drew a conclusion that there was no material to indicate any urgency in the matter which may require passing of an order directing for maintaining status quo and accordingly the application seeking temporary injunction was rejected.

36. The application filed under Section 146 was for a direction to the parties to maintain status quo during the pendency of the suit i.e. an injunctive relief, which was declined in terms of the order rejecting the application under Section 146. The application in question did not seek any relief for grant of a stay order to any court or authority and was not directed against any order passed by the court or authority.

37. It may be noticed that Section 146 contains a provision with regard to grant of a temporary injunction in the course of a suit under Section 144 or Section 145, and the terminology of the section does not cover orders granting stay. The marginal heading of the section is titled as "Provision for injunction" which clearly goes to show the scope of the section and its legislative intent.

38. The order dated 23.09.2021 passed by the respondent no. 2 before whom the suit is pending therefore cannot be held to be an order rejecting an application for stay so as to attract the bar under Section 209 and to make the order non-appealable. The order in question, from its plain reading and also taking into consideration the contents of the application along with the affidavit filed by the petitioners seeking the prayer for interim relief, makes it clear that it is an order declining to grant a temporary injunction as was being sought under Section 146.

39. The temporary injunction which was sought under Section 146 during the pendency of the suit under Section 144 was as per terms of the provisions under Order XXXIX Rule 1 CPC and the said order being referable to sub-rule (r) under Rule 1 of Order XLIII, the same would be of the nature specified under clause (b) and clause (c) of sub-section (2) of Section 207 and in view thereof a first appeal under Section 207 would lie against the said order.

40. The order in question passed under Section 146 having been held to be appealable under Section 207 the said order would not be revisable under Section 210 in view of the condition contained under sub-section (1) of Section 210 which is to the effect that the revision would lie only in a case "in which no appeal lies".

41. The legal position can therefore be summarized by stating that an order passed upon an application seeking temporary injunction under Section 146 of the Revenue Code during the course of a suit under Section 144 or 145 would be amenable to a first appeal under Section 207, and would not be revisable under Section 210.

42. As regards the decision in the case of **Talib Khan (supra)** relied upon on behalf of the petitioners, it may be observed that the specific provision contained under sub-section (3) of Section 331 of the UPZA and LR Act, as then it stood, which provided for a remedy of an appeal against an order of the nature mentioned in Section 104 of the CPC or in Order XLIII Rule 1 of the First Schedule, having not been taken note of the said decision cannot be held to be an authority for the proposition that an order rejecting an application for temporary injunction during the pendency of a declaratory suit under the Revenue Code or under the analogous provision of the repealed UPZA and LR Act, would be revisable.

43. The Board of Revenue in terms of an order dated 23.11.2021 has rejected the revision preferred by the petitioners against the order rejecting their application for temporary injunction under Section 146 after observing that the order of the trial court was based on merits and the application for temporary injunction had been rejected for the reason that there was no material to support the claim sought to be raised. Further, taking note of the fact that the case was pending before the trial court where the parties would have ample

opportunity to adduce evidence in support of their case, the revision was rejected at the stage of admission.

44. The order rejecting an application seeking temporary injunction under Section 146 of the Revenue Code having been held to be not amenable to the remedy of a revision under Section 210, the order passed by the Board of Revenue rejecting the revision at the stage of admissibility therefore cannot be faulted.

45. The writ petition thus fails and is accordingly dismissed.

46. Counsel for the petitioners at this stage seeks liberty to invoke statutory remedy of an appeal against the order rejecting their application for temporary injunction. In this regard, it is only required to be observed that dismissal of the writ petition would not preclude the petitioners from taking recourse to any appropriate legal remedy as they may be advised.

(2022)07ILR A428
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.07.2022

BEFORE

THE HON'BLE RAJEEV SINGH, J.

Application U/S 482 No. 2288 of 2022

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

Counsel for the Applicants:
Rishad Murtaza, Aishwarya Mishra, Syed Ali Zafar Rizvi

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Sections 482 - Protection of Women from Domestic Violence Act, 2005-Section 12-applicant ousted from her matrimonial house, when she was carrying the pregnancy of almost 7 months-applicant made complaint to the police but no assistance was provided to her-applicant filed complaint case- the court below dismissed the application with the order for calling the report of Protection officer i.e. Domestic Incident Report-Apex Court held that for proceeding in the case u/s 12 of the Act, 2005, the DIR of the Protection Officer is not mandatory before passing any order-if DIR has been received by the Magistrate either from the Protection Officer or the service provider then it becomes obligatory on the part of the Magistrate to take note of the said report before passing an order on the application filed by the aggrieved party, but if no complaint or application of domestic violence is received by the Magistrate from the Protection Officer or the service provider, the question of considering such a report does not rise at all. (Para 1 to 10)

B. The Magistrate has jurisdiction to take cognizance of the complaint u/s 12 of the D.V. Act in the absence of a Domestic Incident Report under Rule 5 when the complaint is not filed on behalf of the aggrieved person through a Protection Officer or service provider. Such a purposeful interpretation has to be given bearing in mind the fact that the immediate relief would have to be given to an aggrieved person and hence the proviso cannot be interpreted in a manner which would be contrary to the object of the D.V. Act which renders Section 12 bereft of its object and purpose.(Para 8)

The application is allowed. (E-6)

List of Cases cited:

1. Prabhad Tyagi Vs Kamlesh Devi (2022) SCC Online SC 607

2. Nayankumar Vs St. of Karn. (2009) ILR Kar 4295

3. Abhiram Gogoi Vs Rashmi Rekha Gogoi (2011) 4 Gau LR 276

4. Md. Basit Vs St. of Assam (2012) 1 Gau LR 747

5. Rahul Soorm Vs St. of H.P.(2012) SCC Online HP 2574

6. A.Vidya Sagar Vs St. of A.P. (2014) SCC Online Hyd 715

7. Ravi Kumar Bajpai Vs Renu Awasthi Bajpai (2016) ILR MP 302

8. Shambhu Prasad Singh Vs Manjari (2012) 190 DLT 647

9. Rakesh Choudhary Vs Vandana Choudhary (2019) SCC Online J& K 512

10. Vijay Maruti Gaikwad Vs Sawita Vijay Gaikwad (2018) 1 HLR 295

11. Suraj Sharma Vs Bharti Sharma (2016) SCC Online Chh 1825

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

1. Heard Shri Rishad Murtaza, learned counsel for the applicants, Shri Aniruddha Kumar Singh, learned A.G.A. for the State and Ms. Madhulika Yadav, learned counsel for the private respondent nos. 2 to 5.

2. This application has been filed seeking quashing of the order dated 03.03.2022 passed by Additional Chief Judicial Magistrate V, Lucknow, whereby Domestic Incident Report has been called for. A further prayer has been sought to direct the court concerned to proceed in Complaint Case No. 557 of 2022 under the Protection of Women from Domestic Violence Act.

3. Learned counsel for the applicants submitted that the marriage of applicant no. 1 was solemnized with respondent no. 2 as per the Hindu Rites on 17th June, 2017 and out of their wedlock, applicant no. 2 was born, who is at present in the care and custody of applicant no. 1 (mother). Respondent nos. 3 to 5 are the mother-in-law, brother-in-law and sister-in-law respectively. It has further been submitted that applicant no. 1 was ousted from her matrimonial house by respondent nos. 2 to 5 on 1st October, 2020, when she was carrying the pregnancy of almost 7 months of applicant no. 2. Later on, applicant no. 2 born in Fatima Hospital, Lucknow. It has also been submitted that since the private respondents were not taking care of the applicants, applicant no. 1 made complaint in local police station, but no assistance was provided to her from the local police. Thereafter, she preferred application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the "Act, 2005') in the court of ACJM V, Lucknow, which was registered as Complaint Case No. 557 of 2022. Submission of the learned counsel for the applicants is that in place of issuing notice on the aforesaid application, the Presiding Officer called for the report of Protection Officer, i.e., Domestic Incident Report (for short "DIR') and fixed the matter for 3rd March, 2022. As the report of the Protection Officer was not received, the applicants, while relying on the decision of this Court in the case of Manoj Kumar yadav Vs. State of U.P. & Ors. (Appilcation u/s 482 Cr.P.C. No. 2384 of 2020), moved application to the court below to proceed without calling for the DIR. However, the court below vide impugned order dated 3rd March, 2022, in spite of issuing notice to the respondents, dismissed the said application with the

order for calling the report of Protection Officer.

4. It has been submitted by the learned counsel for the applicants that the DIR is not mandatory for adjudicating the matter under Section 12 of the Act, 2005. It has further been submitted that this controversy has already been decided by the Hon'ble Apex Court in the case of **Prabha Tyagi Vs. Kamlesh Devi, (2022) SCC Online SC 607**. It has, thus, been submitted that indulgence of this Court is necessary. The impugned order dated 03.03.2022 is liable to be set aside and the court below may be directed to proceed in the matter and conclude the same expeditiously.

5. Learned A.G.A. as well as learned counsel for the complainant vehemently opposed the prayer of the applicants and submitted that without DIR of Protection Officer, the correct picture of the incident will not be clear to the court below and, therefore, there is no illegality in the impugned order passed by the court below by calling for the DIR. However, they have no objection if the court below is directed to proceed in the matter expeditiously.

6. Considering the arguments advanced by the learned counsel for the applicants, learned A.G.A. as well learned counsel for the private respondents and going through the impugned order and other relevant documents, it is undisputed fact that the complaint under Section 12 of the Act, 2005 was filed on 25th January, 2022 and the court concerned called for the DIR from the Protection Officer and fixed the matter for 3rd March, 2022. It is also undisputed that since the report was not made available, another application was moved by the applicants with the prayer to proceed in the matter and issue notice to the private respondents, but the court below rejected the said applicant and called for the DIR.

7. Hon'ble Apex Court in the case of **Prabha Tyag**i (supra) has already answered the issue, whether before proceeding in the matter, the DIR is mandatory or not under the provisions of the Act, 2005 in order to invoke the substantive provision of Sub-sections 18 to 21 and 22 of the Act, 2005. The Hon'ble Supreme Court held that Section 12 of the Act, 2005 does not make it mandatory for a Magistrate to consider the DIR filed by the Protection Officer or the Service Provider before passing any order under the Act, 2005. It has also been clarified that even in absence of DIR, the Magistrate is empowered to proceed ex parte and pass interim as well as final order under the provisions of Act, 2005.

8. Relevant portions of the judgment of **Prabha Tyagi** (supra) are quoted hereinbelow:

"25. The submissions of the learned amicus curiae counsel for the respective sides were on the following points for consideration which were raised vide order dated 11th February, 2022:

"(i) Whether the consideration of Domestic Incident Report is mandatory before initiating the proceedings under D.V. Act, in order to invoke substantive provisions of Sections 18 to 20 and 22 of the said Act?

(ii) Whether it is mandatory for the aggrieved person to reside with those persons against whom the allegations have been levelled at the point of commission of violence?

(iii) Whether there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed?"

Legal Framework:

26. For an easy and immediate reference, the following provisions of the Protection of Women from D.V. Act are extracted as under:

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

(a) "aggrieved person' means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

x x x

(e) "domestic incident report' means a report made in the prescribed form on receipt of a complaint of domestic violence from an aggrieved person;

(f) "domestic relationship' means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

x x x

(s) "shared household' means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a house hold whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."

"3. Definition of domestic violence.--For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it--

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person. Explanation I.--For the purposes of this section,--

(i) "physical abuse' means any act or conduct which is of such a nature as to

cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse' includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse' includes-

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested;

(iv) "economic abuse' includes--

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, house hold necessities for the aggrieved person and her children, if any, Stridhana, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared house hold and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her Stridhana or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.--For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence' under this section, the overall facts and circumstances of the case shall be taken into consideration."

x x x

"12. Application to Magistrate.--(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Provided that before passing any order on such application, the Magistrate shall take into consideration any Domestic Incident Report received by him from the Protection Officer or the service provider.

(2) The relief sought for under Sub-Section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under Sub-Section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall Endeavour to dispose of every application made under Sub-Section (1) within a period of sixty days from the date of its first hearing."

x x x

"**17. Right to reside in a shared household.**-- (1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law."

x x x

"23. Power to grant interim and ex parte orders.--(1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent."

59. We are, therefore, of the view that the High Court was not right in holding that the application filed by the appellant herein was not accompanied by a Domestic Incident Report and therefore under the proviso to Sub-Section (1) of Section 12 of the D.V. Act, the Magistrate had no authority to issue orders and directions in favour of the appellant.

(i) Following are the judgments where the High Courts have held that the Domestic Incident Report is not a sine qua non for entertaining or deciding the application under Section 12 of the D.V. Act by the learned Magistrate.

a) In *Nayanakumar v. State of Karnataka,* [ILR 2009 Kar 4295], the High Court of Karnataka (Kalaburagi Bench) while dealing with Section 12 of the D.V.

Act, held that in case a Domestic Incident Report is received by the Magistrate either from the Protection Officer or from the Service Provider, then it becomes obligatory on the part of the Magistrate to take note of the said Domestic Incident Report before passing an order on the application filed by the aggrieved party. It was further clarified that the scheme of the D.V. Act makes it clear that it is left to the choice of the aggrieved person to go before the service provider or the Protection Officer or to approach the Magistrate under Section 12 of the D.V. Act.

b) In *Abhiram Gogoi v. Rashmi Rekha Gogoi*, [(2011) 4 Gau LR 276], the Gauhati High Court held that Section 9(1)(b) of the D.V. Act makes it clear that it is the duty of the Protection Officer to make a Domestic Incident Report to the Magistrate upon receipt of a complaint of domestic violence and forward copies thereof to the police officer-in-charge of the police station within the local limits of whose jurisdiction domestic violence is alleged to have been committed and to the service providers in that area.

c) In the case of *Md. Basit v. State of Assam*, [(2012) 1 Gau LR 747], the Gauhati High Court differed with the view taken by the Madhya Pradesh and Jharkhand High Courts and held that Section 12 only contemplates as to who can file a complaint under Section 12 of the D.V. Act, what relief may be sought for, what the contents of the complaint must be and how the complaint ought to be examined. That if the complaint conforms to the said pre-conditions, the same may be taken cognizance of. The High Court noted that an application under Section 12(1) of the D.V. Act may be filed either by an aggrieved person herself, or by a Protection Officer. The Court went on to hold that the provision does not require a Magistrate to specifically call for a Domestic Incident Report. That it would only be mandatory to consider such report, if the same had been filed by the Protection Officer before the Magistrate. The Gauhati High Court differed with the view taken by the Madhya Pradesh and Jharkhand High Courts, to the extent that the latter Courts observed that the Magistrate would not be obligated to consider the Domestic Incident Report even if the same was filed by the Protection Officer.

d) Delving on the same issue, the High Court of Himachal Pradesh in *Rahul Soorma v. State of Himachal Pradesh*, [2012 SCC OnLine HP 2574], held that the purpose of the D.V. Act is to give immediate relief to the aggrieved person; therefore, it was wrong to suggest that the Magistrate has no jurisdiction to take cognizance of the application under Section 12 of the D.V. Act before the receipt of a Domestic Incident Report by the Protection Officer or the service provider.

e) Further, the High Court of *Andhra Pradesh in A. Vidya Sagar v.State of Andhra Pradesh*, [2014 SCC OnLine Hyd 715], rejected the contention of the petitioner therein that a domestic violence case can be instituted and taken cognizance of on the basis of the Domestic Incident Report only and not otherwise.

f) In its judgment in the case of *Ravi Kumar Bajpai v. Renu Awasthi Bajpai*, [ILR 2016 MP 302], the High Court of Madhya Pradesh speaking through J.K. Maheshwari, J., while discussing on the legislative intent of the D.V. Act, held that if the legislative intent was to call for a report from the Protection Officer as a

precondition by the Magistrate to act upon a complaint of aggrieved person, then it would have expressed that intention emphasizing the words in the main section. The High Court relied on various judgments pertaining to the interpretation of a provision and proviso thereof.

g) The Division Bench of the High Court of Delhi in *Shambhu Prasad Singh v. Manjari*, [(2012) 190 DLT 647] speaking through Ravindra Bhat, J. dealt with the conflicting views of the two Single Judges on the question whether a Magistrate can act straightaway on the complaint made by an aggrieved person under the D.V. Act. It was held that Section 12(1) of the D.V. Act does not mandate that an application seeking relief under the said D.V. Act must be accompanied with a Domestic Incident Report or even that it should be moved by a Protection Officer. So also, Rule 6 which stipulates the form and manner of making an application to a Magistrate does not require that the Domestic Incident Report must accompany an application for relief under Section 12.

It was further held that an obligation to submit a Domestic Incident Report is imposed only on the Protection Officers under Section 9 of the D.V. Act and upon the service providers under Section 10 of the D.V. Act and the learned Magistrate "shall' take into consideration, the Domestic Incident Report if it is filed and not otherwise.

h) In *Rakesh Choudhary v. Vandana Choudhary*, [2019 SCC OnLine J&K 512], the High Court of Jammu and Kashmir rejected the argument of the petitioner therein that the report of the Protection Officer is sine qua non for issuing process in a petition under Section 12 of the D.V. Act. The Court held that the proviso to Section 12(1) of the D.V. Act only stipulates that the learned Magistrate shall take into consideration the Domestic Incident Report filed by the Protection Officer or the Service Provider, but it does not stipulate that a report "shall be called for' before any relief could be granted.

i) Further, the High Court of Bombay at Aurangabad Bench, while dealing with a criminal writ petition in the case of *Vijay Maruti Gaikwad v. Savita Vijay Gaikward*, [(2018) 1 HLR 295], observed that if the matter is before the Court and the wife preferred not to approach the Protection Officer, the Court is not bound to call the report of Protection Officer.

j) Lastly, in the case of *Suraj Sharma v. Bharti Sharma*, [2016 SCC OnLine Chh 1825], the High Court of Chhattisgarh while expressing its view on Section 12 of the D.V. Act also held that the Domestic Incident Report shall not be conclusive material for making any order.

61. On an analysis of the aforesaid judgments from various High Courts, we find that the High Courts of Andhra Pradesh, Bombay, Delhi, Gauhati, Himachal Pradesh, Jammu & Kashmir, Karnataka, and Madhya Pradesh, are right in holding that if Domestic Incident Report has been received by the Magistrate either from the Protection Officer or the service provider then it becomes obligatory on the part of the Magistrate to take note of the said report before passing an order on the application filed by the aggrieved party, but if no complaint or application of domestic violence is received by the Magistrate from the Protection Officer or the service provider, the question of considering such a

report does not arise at all. As already discussed, the D.V. Act does not make it mandatory for an aggrieved person to make an application before a Magistrate only through the Protection Officer or a service provider. An aggrieved person can directly make an application to the jurisdictional Magistrate by herself or by engaging the services of an Advocate. In such a case, the filing of a Domestic Incident Report by a Protection Officer or service provider does not arise. In such circumstances, it cannot be held that the Magistrate is not empowered to make any order interim or final, under the provisions of the D.V. Act, granting reliefs to the aggrieved persons. The Magistrate can take cognizance of the complaint or application filed by the aggrieved person and issue notice to the respondent under Section 12 of the D.V. Act even in the absence of Domestic Incident Report under Rule 5. Thus, the Magistrate has jurisdiction to take cognizance of the complaint under Section 12 of the D.V. Act in the absence of a Domestic Incident Report under Rule 5 when the complaint is not filed on behalf of the aggrieved person through a Protection Officer or service provider. Such a purposeful interpretation has to be given bearing in mind the fact that the immediate relief would have to be given to an aggrieved person and hence the proviso cannot be interpreted in a manner which would be contrary to the object of the D.V. Act which renders Section 12 bereft of its object and purpose.

64. In view of the above discussion, the three questions raised in this appeal are answered as under:

"(i) Whether the consideration of Domestic Incidence Report is mandatory before initiating the proceedings under Domestic Violence Act, 2005 in order to invoke substantive provisions of Sections 18 to 20 and 22 of the said Act?"

65. It is held that Section 12 does not make it mandatory for a Magistrate to consider a Domestic Incident Report filed by a Protection Officer or service provider before passing any order under the D.V. Act. It is clarified that even in the absence of a Domestic Incident Report, a Magistrate is empowered to pass both ex parte or interim as well as a final order under the provisions of the D.V. Act.

"(ii) Whether it is mandatory for the aggrieved person to reside with those persons against whom the allegations have been levied at the point of commission of violence?"

9. As the controversy in question has already been decided by the Hon'ble Apex Court by holding that for proceeding in the case under Section 12 of the Act, 2005, the DIR of the Protection Office is not mandatory before passing any order.

In view of the above facts and circumstances as well as the law laid down by the Hon'ble Apex Court in the case of **Prabha Tyagi (**supra), it is evident that the court below has committed error in rejecting the application for expedite disposal of the case by the impugned order and calling for the DIR, in place of proceeding in the matter.

10. The impugned order dated 03.03.2022 is hereby set aside. The application stands allowed.

11. The court below is directed to proceed in the matter and conclude the same expeditiously, strictly in accordance

with law and the principle laid down by the Hon'ble Apex Court in the case of **Prabha Tyagi (**supra), without giving any unnecessary adjournments to either of the parties.

(2022)07ILR A437
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.06.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Application U/S 482 No. 3899 of 2022

Vivekanand Dobriyal ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Arun Sinha, Sri Ram Chandra Singh, Sri Siddhartha Sinha, Sri Umang Agarwal

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Sections 482 & 82 - Indian Penal Code, 1860- Sections 120-B, 384, 389, 405, 420,467, 468, 465, 471 & 504 - Prevention of Corruption Act, 1988-Section 7/13(1)(b)-challenge to-Non-bailable warrant-In the present case, the process issued or even the publication does not indicate any specified time and place-Furthermore, none of the sections as mentioned in Section 82(4) are the part of the FIR of which the applicant is allegedly accused of, as such, the applicant , prima facie cannot be declared as proclaimed offender in exercise of powers u/s 82(4) of the Cr.P.C.-Thus, on that count also, the apprehension of the applicant is not justified.(Para 1 to 22)

B. On a plain reading, the intent and purpose of section 82 is to secure the presence of the accused who does not participate in the proceedings despite issuance of warrants. To exercise the said powers, the court is to form 'reasons to believe' based upon material before him that any person against whom a warrant has been issued has absconded or is concealing himself so that such warrant cannot be executed. The second requirement is that the court shall issue a written proclamation requiring the accused to appear at a specified place and at a specified time which could not be less than 30 days from the date of publication of such proclamation. In the absence of the court forming the 'reasons to believe' the power clearly cannot be exercised and in terms of the powers so conferred, it is also essential that the written proclamation should specify the place and the time for appearance which could not be less than 30 days from the date of application.(Para 13, 14)

The application is allowed. (E-6)

List of Cases cited:

1. Lavesh Vs St. (NCT of Delhi) (2012) LawSuit SC 562: (2012) 8 SCC 730

2. St. thru CBI Vs Dawood Ibrahim Kaksar & ors. (2000) 10 SCC 438

3. Kunwar Mahendra Pratap Singh @ Chandan Singh, Appl. u/s 482 No. 2261 of 2021)

4. Pankaj Singh @ Ajay Singh Vs St. of U.P. & ors., Appl. u/s 482 No. 175 of 2022

5. Kalbe Raza Abidi Vs St. of U.P.,Appl. u/s 482 No. 102 of 2022

6. Vinod Kumar Singh @ Vinod Singh Vs St. of U.P., Appl. u/s 482 No. 5195 of 2021

7. N. Nagendra Rao & Co. Vs St. of A.P.(1994) 6 SCC 205

8. Dr. Pratap Singh & anr. Vs ED (1985) 3 SCC 72

9. Dr. Jai Shanker Vs St. of H.P. (1973) 3 SCC 83

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

1. Heard Sri Siddhartha Sinha, learned Counsel for the applicant as well as Sri S.N. Tilhari, learned Counsel appearing on behalf of the State and perused the record.

2. The present application under Section 482 of Cr.P.C. has been filed challenging the order dated 14.06.2022 issued in exercise of powers under Section 82 of the Code of Criminal Procedure (in short "the Cr.P.C."). Although other prayers have been made in the application, however, the Counsel for the applicant confines his submission to the challenge to the order dated 14.06.2022 alone.

3. The facts in brief are that an FIR No.82 of 2022, under Sections 120-B, 384, 389, 405, 420, 465, 471, 504 IPC read with Section 7/13(1)(b) of the Prevention of Corruption Act, 1988 at Police Station Kaiserbagh, District Lucknow was registered against the applicant. It is also on record that subsequently, Sections 467 and 468 IPC were added.

4. It is argued by the Counsel for the applicant that on 09.05.2022, a non-bailable warrant was issued by the court concerned at the instance of the investigating authorities who had alleged that the applicant is not co-operating with the investigation. Subsequently, an application was moved on 24.05.2022 stating therein that despite efforts for arresting the accused in terms of the non-bailable warrant issued on 09.05.2022, the applicant has concealed himself, as a result whereof, non-bailable warrant could not be executed, as such, it was prayed that a proclamation under Section 82 of Cr.P.C. be issued and published against the applicant. An affidavit was also filed on 24.05.2022 in support of the application, wherein the averments similar to the one made in the said application were made. Subsequently, on 25.05.2022, an application was moved by the Investigating Officer stating that in pursuance to the non-bailable warrant issued on 09.05.2022, efforts were made for arresting the accused which has resulted in vain and as an application had already been filed on 24.05.2022 for passing orders against the accused under Section 82 of Cr.P.C., and prayed that the orders be passed. It was also recorded in the said application that during the investigation, it was revealed that the applicant is in the process of selling of valuable assets and may leave the country and as such, it was essential that process be issued against the applicant under Section 82 of the Cr.P.C. On the said applications, an order came to be passed on 14.06.2022 wherein after recording the contents of the application and the submissions made by the Public Prosecutor, the court recorded that prima facie, there was no reason to disbelieve the contents of the application or the affidavit in its support and thus, proceeded to pass an order for issuance of process under Section 82 of the Cr.P.C. The said order is under challenge in the present proceedings.

5. The Counsel for the applicant argues that the application filed for issuance of process under Section 82 of the Cr.P.C. clearly fell short of the requirements prescribed for issuance of process under Section 82 of the Cr.P.C., inasmuch as, in the application, it was only stated that the non-bailable warrant issued by the court could not be executed. He thus argues that based upon the application and the affidavit, the court could not have formed an opinion which is sine qua non for exercise of powers under Section 82 of the Cr.P.C.

6. T he Counsel for the applicant further argues that in pursuance to the order passed by this Court, the process issued under Section 82 of the Cr.P.C. is also

defective, inasmuch as, neither any specified time nor any specified place has been recorded in the proclamation and thus, the proclamation falls short of the requirements as specified under Section 82(1) of the Cr.P.C. He lastly submits that in the present case, in which the investigating authority has approached the court for issuance of the process under Section 82 of the Cr.P.C. was malafide and only with a view to deny the benefit of anticipatory bail to the applicant in the light of observations made in the judgment of the Hon'ble Supreme Court in the case of ***Lavesh vs State (NCT of Delhi); 2012 LawSuit (SC) 562) [Equivalent Citation (2012) 8 SCC 730]*** wherein the Hon'ble Supreme Court observed in para 10 as under:

"(10) From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code is not entitled the relief of anticipatory bail."

7. In the light of the said submission, he argues that the proceedings under Section 82 of the Cr.P.C. has been initiated by the impugned order are liable to be set aside.

8. Sri Tilhari, learned A.G.A. appearing on behalf of the State opposes the application and argues that only process have been issued against the applicant as he was not co-operating with the investigation and despite efforts being made, the non-bailable warrant could not be executed against him which is exactly the intent and purpose of Section 82 of Cr.P.C. He further argues that para 10 of the judgment in the case of Lavesh vs State (NCT of Delhi) (supra) is confined to the cases where a person is declared a proclaimed offender or absconder under Section 82(4) of the Cr.P.C. and thus, the apprehension of the applicant is misfounded.

9. Sri Tilhari further argues that in terms of the mandate of Section 82 (2) of the Cr.P.C., a publication was also made in the newspaper. He has drawn my attention to the publication by passing a copy of the same newspaper which is taken on record. Curiously enough, the said publication in the newspaper also does not specify time and place for appearance of the applicant. He lastly submits that the directions be issued to the applicant to co-operate with the investigation.

10. In rejoinder, the Counsel for the applicant argues that his anticipatory bail was rejected by the court below and the applicant has approached this Court by filing an application which is likely to come up tomorrow i.e. 24.05.2022 before the appropriate Court. He also places reliance on the judgment of the Hon'ble Supreme Court in the case of ***State through CBI vs Dawood Ibrahim Kaskar and others; (2000) 10 SCC 438*** and places emphasis on paragraph 24 which is quoted below:

"24. Now that we have found that Section 73 of the Code is of general application and that in course of the investigation a Court can issue a warrant

in exercise of power thereunder to apprehend, inter alia, a person who is accused of a non-bailable offence and is evading arrest, we need answer the related question as to whether such issuance of warrant can be for his production before the police in aid of investigation. It cannot be gainsaid that a Magistrate plays, not infrequently, a role during investigation, in that, on the prayer of the Investigating Agency he holds a test identification parade, records the confession of an accused or the statement of a witness, or takes or witnesses the taking of specimen handwritings etc. However, in performing such or similar functions the Magistrate does not exercise judicial discretion like while dealing with an accused of a non-bailable offence who is produced before him pursuant to a warrant of arrest issued under Section 73. On such production, the Court may either release him on bail under Section 439 or authorise his detention in custody (either police or judicial) under Section 167 of the Code. Whether the Magistrate, on being moved by the Investigating Agency, will entertain its prayer for police custody will be at his sole discretion which has to be judicially exercised in accordance with Section 167(3) of the Code. Since warrant is and can be issued for appearance before the Court only and not before the police and since authorisation for detention in police custody is neither to be given as a matter of course nor on the mere asking of the police, but only after exercise of judicial discretion based on materials placed before him, Mr. Desai was not absolutely right in his submission that warrant of arrest under Section 73 of the Code could be issued by the Court solely for the production of the accused before the police in aid of investigation."

11. The Counsel for the applicant has also drawn attention to the orders passed by this Court in the cases of *Kunwar Mahendra Pratap Singh @ Chandan Singh (Application u/s 482 No.2261 of 2021) decided on 18.08.2021, Pankaj Singh @ Ajay Singh vs State of Uttar Pradesh and others (Application u/s 482 NO.175 of 2022) decided on 25.01.2022, Kalbe Raza Abidi vs State of U.P. (Application U/S 482 No.102 of 2022) decided on 11.01.2022 and Vinod Kumar Singh @ Vinod Singh vs State of U.P. (Application U/S 482 No.5195 of 2021) decided on 10.12.2021.*

12. Considering the submissions made at the bar, this court is to consider whether the steps for issuance of the process under Section 82 of the Cr.P.C. could be resorted to in the facts of the case and whether the process issued under Section 82 of the Cr.P.C. is in accordance with the scope of Section 82 (1) of the Cr.P.C.?

13 . To appreciate the controversy as raised at the bar, it is essential to look at Section 82 of the Cr.P.C., which is quoted below:

*"**82. Proclamation for person absconding** - (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear **at a specified place and at a specified time** not less than thirty days from the date of publishing such proclamation.*

(2) The proclamation shall be published as follows:--

(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

[(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under section ***302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860),*** *and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.*

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1).]"

14. On a plain reading, the intent and purpose of Section 82 is to secure the presence of the accused who does not participate in the proceedings despite issuance of warrants. To exercise the said powers, the court is to form 'reasons to believe' based upon material before him that any person against whom a warrant has been issued has absconded or is concealing himself so that such warrant cannot be executed. The second requirement is that the court shall issue a written proclamation requiring the accused to appear at a specified place and at a specified time which could not be less than 30 days from the date of publication of such proclamation. In the absence of the court forming the 'reasons to believe' the power clearly cannot be exercised and in terms of the powers so conferred, it is also essential that the written proclamation should specify the place and the time for appearance which could not be less than 30 days from the date of application.

15. The reason recorded in the impugned order by the court below while issuing the process under Section 82 of the Cr.P.C. are to the effect that there is no reason to disbelieve the version as contained in the application and the affidavit filed in support thereof. There is no averment or mention of the Magistrate having perused any martial, nor is there any consideration to any other material relating to the execution of the non-bailable

warrant. The reasoning recorded clearly falls short of the requirements to pass an order which cannot be done only after having 'reasons to believe'. It is well established that 'reasons to believe' as contained in various statutes, both fiscal and penal, have been interpreted by the Hon'ble Supreme Court to hold that the 'reasons to believe' should be based upon the material as exists and should demonstrate application of mind, as the steps proposed to be taken are harsh and stringent in nature and have the effect of infringing the rights of the citizen guaranteed under Articles 21 and 300-A of the Constitution of India.

16. The expression 'reasons to believe' has come for interpretation on various occasions before the Hon'ble Supreme Court wherein it was categorically held in the case of ***N. Nagendra Rao & Co vs State Of A.P.; (1994) 6 SCC 205*** that expression 'reasons to believe' means formation of an opinion which may be subjective but it must be based on material on record. It cannot be arbitrary, capricious or whimsical. In the case of ***Dr. Partap Singh and another vs Director Of Enforcement; (1985) 3 SCC 72***, it has been held that 'reasons to believe' is not synonymous with subjective satisfaction of the Officer. The belief must be held in good faith; it cannot be merely be a pretence. In the case of ***Dr. Jai Shanker vs State of Himachal Pradesh; (1973) 3 SCC 83,*** the Hon'ble Supreme Court has held that expression 'reasons to believe' mean a belief which a reasonable person would entertain on the facts before him.

17. The reasons recorded in the impugned order clearly do not show any application of mind, or reference to any material before the Magistrate to demonstrate as to how the Magistrate formed 'reasons to believe' and thus on that ground alone, the order is liable to be set aside.

18. Coming to the second part of the requirement as specified under Section 82(1), the process so issued should indicate specific date, time and place for appearance, as the sole purpose of Section 82 of the Cr.P.C is to secure the presence of the accused and without there being any specific time and place mentioned in the order, the same would not satisfy the requirements which is contemplated under Section 82 (1) of the Cr.P.C. In the present case, the process issued or even the publication does not indicate any specified time and place and thus on this ground also, the process issued under Section 82 cannot be sustained.

19. As regards the third submission of the Counsel for the applicant that the whole action was done to deny the benefit of anticipatory bail by the State, I do not find any material on record to substantiate the said submission. Furthermore, the State would not benefit by getting the issuance of proclamation under Section 82(1) as in terms of the mandate of the Hon'ble Supreme Court in the case of Lavesh vs State (supra), the benefit of anticipatory bail are not available only when the person is declared proclaimed offender under Section 82(4) of the Cr.P.C. or abscond and not prior thereto.

20. It is interesting to note that in terms of the prescription of Section 82(4) of the Cr.P.C., in the cases where the proclamation prescribed and published under sub-section (1) is in respect of a person accused of an offence punishable under Sections 302, 304, 364, 367, 382,

392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 IPC, the court can declare the person, who fails to appear at the specified place and time required under proclamation, as a proclaimed offender and make declaration to that effect.

21. In the present case, none of the sections as mentioned in Section 82(4) are the part of the FIR of which the applicant is allegedly accused of, as such, the applicant, prima facie cannot be declared as proclaimed offender in exercise of powers under Section 82(4) of the Cr.P.C., thus on that count also, the apprehension of the applicant is not justified.

22. In view of the reasonings recorded above, the application is ***allowed*** and the order dated 14.06.2022 is set aside.

23 . It is informed at the bar by the Counsel for the applicant that the passport of the applicant has already been seized by the police authority, however, in case the passport has not been seized by the police authority, the applicant shall surrender the passport before the court concerned.

24. It is further clarified that investigating authority shall be at liberty to carry out the investigation in accordance with law in respect of the offence in question and the applicant shall also be at liberty to avail such remedy as may be available to him under law.

(2022)07ILR A443
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.06.2022

BEFORE

THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Application U/S 482 No. 9060 of 2022

Santosh Sahgal ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Utkarsh Malviya

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Sections 482, 420, 467,468 & 471 - Copy Right Act, 1957-Section 63-preparing fake pan masala and using fake wrappers to be genuine branded wrappers, there is no allegation of cheating by personation in the First Information Report-no case is made out against the applicant u/s 419,272 IPC while in other section no prayer is made regarding quashing of entire proceedings though the arguments were made. (Para 1 to 20)

B. A person is said to cheat by personation if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is. (Para 14, 15)

The application is partly allowed. (E-6)

List of Cases cited:

1. M/s Pepsico India Holdings (Pvt.) Ltd & anr. Vs St. of U.P. & ors. (2010) SCC OnLine All 1708

2. Mahesh Kumar Agarwal Vs St. of U.P. & anr. (2013) SCC OnLine All 13094

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Learned counsel for the applicant is present. He has filed the amendment application with affidavit. The same be kept on the record.

2. As per facts of the case, an F.I.R. was registered against the unknown persons that they were manufacturing fake pan masala and selling the same in half of the rate of the original, which is resulting into the loss of the State exchequer, hence an action be taken against them. During investigation, the police apprehended three persons one from outside the unit and the rest two from inside the unit manufacturing the said fake pan masala with various branded empty pouches and raw material manufacturing pan masala etc. The present accused is said to have apprehended from out side the manufacturing place, sitting in a car and from car also some incriminatory material is said to have been found. Vide order dated 27.10.2021 the coordinate bench of this Court enlarged the accused on bail in the same case under Sections 420,467, 468, 471 I.P.C. and Section 63 of Copy Right Act, 1957. Later on, Sections 272 and 419 I.P.C. are also said to have been added. The trial court took cognizance against all the accused persons including the present one in the added sections 419 and 272 I.P.C. also. It appears from the record that since the charge sheet was filed in the court the present accused remained absent and after summons, then bailable warrants and at last, non bailable warrants against the present accused vide order dated 19.04.2022 were issued. The co-accused Amit Dixit is said to have been bailed out in the added Sections 419 and 272 I.P.C. also vide order dated 04.03.2022 of this court.

3. By means of this application under Section 482 Cr.P.C. learned counsel for the applicant seeks to invoke the inherent jurisdiction of this Court by staying the further proceedings in Case No. 117543 of 2021 pending before the Chief Metropolitan Magistrate, Kanpur Nagar in relation to Case Crime No. 799 of 2021 registered at Police Station Chakeri, District Kanpur Nagar under Sections 420, 419, 467, 468, 471, 272 I.P.C. and Section 63 of Copy Right Act, 1957 and the prayer is also made not to arrest the applicant during trial. In support of this application an affidavit has been filed wherein the prayer of quashing the entire proceedings in relation to additional sections 272 and 419 I.P.C. in the same case is also made.

4. Thus, it is clear that in his entire application and affidavit the applicant has not made any prayer to quash the proceedings under Sections 420, 467, 468, 471 I.P.C. and Section 63 of Copy Right Act, 1957.

5. So far as Section 272 I.P.C. is concerned, it is argued by the learned counsel for the applicant that after coming into force of the Food Safety and Standard Act, Sections 272 and 273 I.P.C. with regard to adulteration cases have become redundant. So the charge sheet, cognizance order of all the proceedings under these sections against the applicant are not maintainable.

6. Learned counsel for the applicant has drawn the attention of the court towards Sections 5 of Cr.P.C., which is apposite to mention here:-

"5. Saving. Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

7. Learned counsel for the applicant has also drawn the attention of the court towards the judgement of the Apex Court in **M/s Pepsico India Holdings (Pvt.)**

Limited and another Vs. State of U.P. and others, 2010 SCC OnLine All 1708 wherein it is observed that nothing in the penal code shall affect the provisions of any Special Act and when for any act or omission in a particular subject, a special set of rules have been framed, in that situation the provisions of the I.P.C. have to be ignored or over looked.

8. On the basis of this observation it is argued that in the present case the charge sheet has been filed under Section 272 I.P.C. pursuant to the impugned government order, although adulteration of food stuff is covered by Special Act i.e. The Food Safety and Standards Act, 2006.

9. The attention of the court is also drawn towards **Mahesh Kumar Agarwal Vs. State of U.P. and another reported in 2013 SCC OnLine All 13094** wherein it was found that as per judgement in **M/s Pepsico India Holdings (supra) the impugned G.O. dated 11.05.2010** issued by the State Government has been quashed so the first information report registered under Section 272/273 I.P.C. was also quashed.

10. I have through the Apex Court observation in M/s Pepsico India Holdings (supra) wherein it has been clearly observed that the PFA was enacted for the prevention of adulteration of food being a special Act it eclipsed sections 272 and 273 of I.P.C. In other words, the said Act made sections 272 and 273 I.P.C. redundant as punishment provided under the PFA Act was much more stringent than what was provided under Sections 272 and 273 I.P.C. The Apex Court, however, observed in the judgement that -

"In view of the aforesaid crystal clear legal proposition and particular provisions under the FSSA we are in agreement with the arguments advanced by the petitioner's Counsel that for adulteration of good or misbranding, after coming into force of the provisions of FSSA vide notification dated 29th July, 2010, the authorities can take action only under the FSSA as it postulates an over riding effects over all other food related laws including the PFA Act. In view of the specific provisions under the FSSA the offences relating to adulteration of food that are governed under the FSSA after July 29, 2010 are to be treated as per the procedures to be followed for drawing and analysis of samples as have been provided for. The provisions of penalties and prosecution have also been provided therein. Therefore, before launching any prosecution against an alleged offence of food adulteration, it is necessary for the concerned authorities to follow the mandatory requirements as provided under Sections 41 adn 42 of the FSSA and, therefore, the police have no authority or jurisdiction to investigate the matter under FSSA. Section 42 empowers the Food Safety Officer for inspection of food business, drawing samples and sending them to Food Analyst for analysis. The Designated Officer, after scrutiny of the report of Food Analyst shall decide as to whether the contravention is punishable with imprisonment or fine only and in the case of contravention punishable with imprisonment, he shall send his recommendations to the Commissioner of Food Safety for sanctioning prosecution. Therefore, invoking Sections 272 and 273 of the Penal Code, 1860 in the matter relating to adulteration of food pursuant to the impugned government order is wholly unjustified and non est. furthermore, it appears that the impugned Government Order has been issued without application

of proper mind and examining the matter minutely and thus the State Government travelled beyond the jurisdiction.

In view of the aforesaid discussions, the writ petitions are allowed. The impugned G.O. dated 11.5.2010 issued by the State Government contained in Annexure-1 to the writ petition is hereby quashed."

11. In the case in hand there is dispute regarding adulteration of pan masala, which is an edible item. It is clear that the charge sheet under Section 272 I.P.C. has been filed against the above legal proposition. In the case of adulteration regarding edible items it is the designated officer who is entitled to investigate such matters under Food Safety and Standards Act, 2006. Sections 41 and 42 of this Act provide power of search, investigation, prosecution and procedure thereof and the procedure of launching any prosecution also.

12. Thus, in the light of above judgements the charge sheet filed under Section 272 I.P.C. against the applicant and consequently the cognizance order and the whole proceedings under Section 272 I.P.C. are liable to be quashed.

13. So far as Section 419 I.P.C. is concerned which is regarding punishment for cheating by personation is reproduced as under:-

"419. Punishment for cheating by personation.?Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

14. Cheating by personation is defined under Section 416 of I.P.C.. It is apposite to reproduce this section also:-

"416. Cheating by personation.?A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.?The offence is committed whether the individual personated is a real or imaginary person. Illustration"

15. As per this section a person can be said to cheat some one by pretending himself to be some other person or by knowingly substituting one person for another or representing that he or any other person is a person other than he or such other person really is.

16. As this a simple case of preparing fake pan masala and using fake wrappers to be genuine branded wrappers, there is no allegation of cheating by personation in the first information report. Thus, in my opinion the case under Section 419 I.P.C. can also be said to be not made out against the applicant.

17. Thus, the charge sheet, cognizance order and the whole proceedings with regard to Sections 272 and 419 I.P.C. in the present case are liable to be quashed. Consequently, the charge sheet dated 29.08.2021 in Case Crime No. 799 of 2021 above and the cognizance order dated 26.11.2021 and the entire proceedings with respect to Sections 272 and 419 I.P.C. against the applicant - Santosh Sahgal are quashed.

18. So far as the other sections are concerned, though, the arguments were made regarding quashing of the

proceedings under sections 420, 467, 468, 471 I.P.C. and Section 63 of Copy Right Act, 1957 also but as no prayer regarding quashing of charge sheet, cognizance order or entire proceedings regarding these sections is made by the applicant so there is no need to discuss the allegations regarding these sections.

19. So far as the prayer regarding quashing of Non Bailable Warrants dated 19.04.2022 and 10.04.2022 against the applicant are concerned, the jurisdiction of recalling or cancelling the warrant rests with the trial court. In this regard, the prayer of the applicant is rejected, otherwise also in the rest Sections i.e. 420, 467, 468, 471 I.P.C. and Section 63 Copy Right Act, 1957 the applicant has been bailed out by this Court vide order dated 27.10.2021.

20. As the present application under Section 482 Cr.P.C. is being disposed of, so the question of staying further proceedings of the trial court in Case No. 117543 of 2021 above during pendency of the present criminal application does not arise.

21. The application under Section 482 Cr.P.C. is, thus, partly **allowed.**

(2022)07ILR A447
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.06.2022

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Application U/S 482 No. 11118 of 2022

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

Counsel for the Applicants:
Sri Vipul Shukla

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 323 & 504-quashing of entire proceedings-When the complaint is made in writing by a public servant acting or purporting to act in the discharge of his official duties, the Magistrate need not examine the complainant and the witnesses before proceeding with the matter and issuing process-In a case where a report made by a police officer is deemed to be a complaint by virtue of the explanation to Section 2(d) and the Magistrate proceeds to take cognizance thereon u/s 190(1)(a), treating it to be a complaint, and proceeds to issue process without following the procedure of examining the complainant u/s 200 and the witnesses u/s 202 , the issuance of process or summons cannot be held to be vitiated-Moreso, there would be no material change in the procedure of trial and such the applicant cannot be said to have been prejudiced by the order of cognizance by the Magistrate, for this reason also.(Para 1 to 57)

B. It is a cardinal principal of construction of a statute that effort should be made in construing the different provisions so that each provision will have its play and in the event of any conflict a harmonious construction should be given. The well-known principle of harmonious construction is that effect shall be given to all the provisions and for that any provision of the statute should be construed with reference to the other provisions so as to make it workable.(Para 50)

The application is rejected. (E-6)

List of Cases cited:

1. Mahendra Kumar Chaudhary & ors. Vs St. of U.P. & anr.(2022) 118 ACC 212

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

1. Heard Sri Vipul Shukla, learned counsel for the applicants and Sri Pankaj Saxena, learned Additional Government Advocate-I for the State-opposite party.

2. The present application under Section 482 CrPC has been filed with a prayer for quashing of the charge-sheet no. 262 of 2020 dated 19.07.2020, the cognizance order dated 25.02.2021 and entire proceedings of Case No. 14457 of 2021 pending in the court of Additional Chief Metropolitan Magistrate III, Kanpur Nagar (State Vs. Atmaram Yadav and others) in Case Crime No. 249 of 2020 under Sections 323, 504 IPC, P.S. Vidhnu, District Kanpur Nagar insofar as it relates to the applicants.

3. The facts as pleaded in the application are to the effect that an FIR No. 0249 was registered on 01.06.2020 under Sections 379, 323, 504 Indian Penal Code1 at P.S. Vidhnu, District Kanpur Nagar in which the applicants herein were named as accused. The case was investigated by the police and charge-sheet no. 262 of 2020 was submitted on 19.07.2020 under Sections 323, 504 IPC whereupon the Chief Metropolitan Magistrate III, Kanpur Nagar passed an order of cognizance on 25.02.2021.

4. Apart from raising contentions which are factual in nature and would relate to examining the defence of the applicants, the principal grounds urged by counsel for the applicants to seek quashing of the proceedings are as follows :

4.1 The FIR having been lodged in respect of cognizable offences under Sections 379, 323, 504 IPC and upon investigation the charge-sheet having been filed only under Sections 323, 504 IPC, which are offences of non-cognizable nature, the case would be covered by the explanation to Section 2 (d) of the Code of Criminal Procedure2 and it would be deemed to be a compliant. As a

consequence cognizance ought to be taken by the Magistrate under Section 190 (1) (a) CrPC and not under Section 190 (1) (b). In support of his submissions, learned counsel places reliance upon the judgment in the case of **Mahendra Kumar Chaudhary and others Vs. State of U.P. and another3.**

4.2 The order passed by the Magistrate taking cognizance is not a reasoned order as is the requirement as per the law laid down in the case of Pepsi Foods Ltd. Vs. Special Judicial Magistrate4.

5. Controverting the aforestated submissions, learned Additional Government Advocate-I appearing for the State-opposite party submits as under :

5.1 The FIR having been registered in respect of offences of a cognizable nature the same was investigated by the police and a report having been submitted disclosing offences under Section 323, 504 IPC which are of a non-cognizable nature the report would be deemed to be a complaint as per the explanation to Section 2 (d). Referring to the proviso to Section 200 CrPC, it is submitted that the complaint having been made by a police officer, who is a public servant acting in the discharge of his official duties, the Magistrate while taking cognizance under Section 190 (1) (a) was not required to examine the complainant and witnesses. It is submitted that since cognizance has been taken on a police report treating the same to be a deemed complaint, no reasons are required to be assigned for the purpose.

5.2 The case having been duly investigated and a report having been submitted, the order of cognizance even if held to be referable to Section 190 (1) (b), the same cannot be said to have led to a failure of justice since in a summons case as per the procedure prescribed under the Code there is no distinction with regard to the manner in which the trial is to proceed between cases instituted on a police report and those instituted otherwise than on a police report; this is more so for the reason that Section 465 is also applicable to challenges to interlocutory orders such as a cognizance order or summons order.

5.3. No prejudice having been caused to the applicants with regard to the procedure the order taking cognizance even if it is held to be vitiated would be a mere irregularity and as per Sections 461 and 462 the proceedings would not be vitiated. It is pointed out that an order taking cognizance based on a police report has been given a greater standing as compared to an order taking cognizance based on an information of any person other than a police officer for the purpose of deciding on the irregularity of the order. Reliance has been placed upon the decision in **Pradeep S. Wodeyar vs. The State of Karnataka5.**

6. The provisions relating to information to the police and their powers to investigate are contained under Chapter XII of the Code of Criminal Procedure, 1973. Section 154 of the Code provides for the manner of giving information to an officer in-charge of the police station relating to commission of a cognizable offence, and the manner in which the same is to be reduced in writing and entered in a book maintained for the purpose. Section 155 of the Code relates to giving of information as to non-cognizable cases and investigation of such cases. Sub-section (1) thereof, provides that when information is

given to an officer in-charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter it in the prescribed book and refer the informant to the Magistrate. Sub-section (2) states that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such cases or commit the case for trial. As per sub-section (3), any police officer receiving such order may exercise the same powers in respect of the investigation as an officer in charge of a police station may exercise in a cognizable case, except the power to arrest without warrant.

7. In terms of Section 156(1) of the Code, any officer in-charge of a police station may investigate any cognizable offence, without the order of a Magistrate. Sub-section (3) of Section 156 provides that any Magistrate empowered under Section 190 may order an investigation.

8. Section 173 of the Code, as per terms of sub-section (1) and sub-section (2) thereof, lays down that every investigation under Chapter XII shall be completed without unnecessary delay and on completion the officer in charge of the police station shall forward to the Magistrate empowered to take cognizance of the offence on a police report, a report in the prescribed form setting forth the required particulars.

9. Section 190 of the Code relates to cognizance of offences by Magistrates and falls under Chapter XIV, which is in respect of conditions requisite for initiation of proceedings. Section 190 of the Code lays down that the concerned Magistrate may take cognizance of any offence in three contingencies, namely; (a) upon receiving a complaint of facts which constitute such offence, (b) upon a police report of such facts, and (c) upon information received from any person other than a police officer or upon his own knowledge, that such offence has been committed.

10. Section 2(d) alongwith explanation, as it finds place under the Code, is as follows:-

"(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.--A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;"

11. The legislative changes brought in the definition of "complaint" and the insertion of the explanation made it clear that the report made by a police officer will be deemed to be a complaint only if the offence is discovered, after investigation by the police, to be a non-cognizable one. The explanation clearly states that a report by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be a complainant.

12. The scope of the explanation to Section 2 (d) was considered in the case of **Keshab Lal Thakur Vs. State of Bihar6**

and it was observed that the explanation would be available only in a case where the police initiates investigation into a cognizable offence but ultimately finds that only a non-cognizable offence has been made out.

13. The interpretation of the provisions contained under Section 2 (d) and the explanation appended to the section have been considered in extenso in a recent decision of this Court in **Mahendra Kumar Chaudhary and others vs. State of U.P. and another3** and after examining the provision as it existed under the old Code7 and as it presently stands with the enforcement of the new Code8 and also referring to the legislative history and the Law Commission Report9 the following three cases were held to be illustrative.

*"**Case I.** where the police report has been submitted following investigation in a non-cognizable case without conforming to the provisions of sub-section (2) of Section 155;*

***Case II.** where the police investigates a case relating to a cognizable offence, which discloses, after investigation, the commission of a non-cognizable offence;*

***Case III.** where a non-cognizable offence is reported and upon an order by the Magistrate under sub-section (2) of Section 155, the same is investigated, and the police report which is submitted also discloses non-cognizable offence."*

14. The alternative situations which would emerge in respect of the aforementioned three cases were described as follows :-

"39.1. In Case I where the police report has been submitted following investigation in a non-cognizable case without conforming to the provisions of sub-section (2) of Section 155, the same would be deemed to be a complaint.

39.2. In Case II where the police investigates a case relating to a cognizable offence, which discloses, after investigation, the commission of a non-cognizable offence, the same would also be deemed to be a complaint by virtue of the explanation to Section 2 (d).

39.3. In Case III where a non-cognizable offence is reported and upon an order by the Magistrate under sub-section (2) of Section 155, the same is investigated and the police report, which is submitted, also discloses non-cognizable offence, the same would not be covered within the purview of the explanation to Section 2 (d) to bring it within the ambit of the term 'complaint'. "

15. It was thereafter held that the explanation takes within its sweep only a case, where at the stage of commencement of the investigation commission of a cognizable offence is alleged or where it is doubtful as to whether it relates to a cognizable or a non-cognizable offence, and the investigation discloses only the commission of a non-cognizable offence; other categories, stand excluded by necessary implication.

16. The present being a case where the FIR having been initially registered in respect of offences of cognizable nature and after investigation the report which was submitted having disclosed offences of a non-cognizable nature, the explanation to Section 2 (d) would stand attracted and the report made by the police officer shall be deemed to be a complaint and the police

officer by whom the report has been made shall be deemed to be a complainant.

17. A question would therefore arise as to whether the order of cognizance by the Magistrate on the basis of the report, which in the instant case would have to be held to be a deemed complaint by virtue of the explanation to Section 2 (d), can be held to be irregular or vitiated.

18. In order to answer the aforestated question it would be necessary to examine the meaning and purport of the expression "taking cognizance of an offence".

19. The question as to when cognizance of an offence can be held to have been taken under Section 190 of the Code came up for consideration in **Darshan Singh Ram Kishan Vs. The State of Maharashtra10**, where it was held that cognizance takes place at a point when a Magistrate first takes judicial notice of an offence, whether on a complaint, or on a police report, or upon information of a person other than a police officer. The observations made in the judgment in this regard are as follows :-

"8. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."

20. The meaning of the word "cognizance' and the point in time and determination of occurrence of cognizance together with its distinction with "issuance of process' was explained in **S.K.Sinha, Chief Enforcement Officer Vs. Videocon International Limited11,** and it was held that "cognizance' connotes to take notice judicially and it occurs simultaneously with the application of mind by the court or Magistrate to the suspected commission of an offence. The question whether cognizance of an offence was taken or not depends upon the facts and circumstances of each case and no rule of universal application can be laid down to determine it. Referring to the earlier decisions in **Supdt. & Remembrancer of Legal Affairs v. Abani Kumar Banerjee12, R.R. Chari v. State of U.P.13, Narayandas Bhagwandas Madhavdas v. State of W.B.14, Gopal Das Sindhi v. State of Assam15, Nirmaljit Singh Hoon v. State of W.B.16, Darshan Singh Ram Kishan v. State of Maharashtra10, and Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy17**, it was observed as follows :-

"19. The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become

aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.

20. "Taking cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance.

21. Chapter XIV (Sections 190-199) of the Code deals with "Conditions requisite for initiation of proceedings". Section 190 empowers a Magistrate to take cognizance of an offence in certain circumstances...

22. Chapter XV (Sections 200-203) relates to "Complaints to Magistrates" and covers cases before actual commencement of proceedings in a court or before a Magistrate. Section 200 of the Code requires a Magistrate taking cognizance of an offence to examine the complainant and his witnesses on oath. Section 202, however, enacts that a Magistrate is not bound to issue process against the accused as a matter of course. It enables him before the issue of process either to inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether there is sufficient ground for proceeding further. The underlying object of the inquiry under Section 202 is to ascertain whether there is prima facie case against the accused. It thus allows a Magistrate to form an opinion whether the process should or should not be issued. The scope of inquiry under Section 202 is, no doubt, extremely limited. At that stage, what a Magistrate is called upon to see is whether there is sufficient ground for proceeding with the matter and not whether there is sufficient ground for conviction of the accused.

23. Then comes Chapter XVI (Commencement of proceedings before Magistrates). This Chapter will apply only after cognizance of an offence has been taken by a Magistrate under Chapter XIV. Section 204, whereunder process can be issued, is another material provision...

24. From the above scheme of the Code, in our judgment, it is clear that "Initiation of proceedings", dealt with in Chapter XIV, is different from "Commencement of proceedings" covered by Chapter XVI. For commencement of proceedings, there must be initiation of proceedings. In other words, initiation of proceedings must precede commencement of proceedings. Without initiation of proceedings under Chapter XIV, there cannot be commencement of proceedings before a Magistrate under Chapter XVI. The High Court, in our considered view, was not right in equating initiation of proceedings under Chapter XIV with commencement of proceedings under Chapter XVI.

25. Let us now consider the question in the light of judicial pronouncements on the point.

26. In **Supdt. & Remembrancer of Legal Affairs v. Abani Kumar Banerjee12 t**he High Court of Calcutta had an occasion to consider the ambit and scope of the phrase "taking cognizance" under Section 190 of the Code of Criminal Procedure, 1898 which was in pari materia with Section 190 of the present Code of 1973. Referring to various decisions, Das Gupta, J. (as His Lordship then was) stated: (AIR p. 438, para 7)

"7. ... What is "taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

2**7. R.R. Chari v. State of U.P.13**, was probably the first leading decision of this Court on the point. There, the police, having suspected the appellant-accused to be guilty of offences punishable under Sections 161 and 165 of the Penal Code (IPC) as also under the Prevention of Corruption Act, 1947, applied to the District Magistrate, Kanpur to issue warrant of arrest on 22-10-1947. Warrant was issued on the next day and the accused was arrested on 27-10-1947.

28. On 25-3-1949, the accused was produced before the Magistrate to answer the charge-sheet submitted by the prosecution. According to the accused, on 22-10-1947, when warrant for his arrest was issued by the Magistrate, the Magistrate was said to have taken cognizance of offence and since no sanction of the Government had been obtained before that date, initiation of proceedings against him was unlawful. The question before the Court was as to when cognizance of the offence could be said to have been taken by the Magistrate under Section 190 of the Code. Considering the circumstances under which "cognizance of offence" under sub-section (1) of Section 190 of the Code can be taken by a Magistrate and referring to **Abani Kumar Banerjee12**, the Court, speaking through **Kania, C.J.** stated: (Chari13 case, p. 208, para 3)

"3. It is clear from the wording of the section that the initiation of the proceedings against a person commences on the cognizance of the offence by the Magistrate under one of the three contingencies mentioned in the section. The first contingency evidently is in respect of non-cognizable offences as defined in CrPC on the complaint of an aggrieved person. The second is on a police report, which evidently is the case of a cognizable offence when the police have completed their investigation and come to the Magistrate for the issue of a process. The

third is when the Magistrate himself takes notice of an offence and issues the process..."

29. Approving the observations of Das Gupta, J. in **Abani Kumar Banerjee12,** this Court held that it was on 25-3-1949 when the Magistrate issued a notice under Section 190 of the Code against the accused that he took "cognizance" of the offence. Since before that day, sanction had been granted by the Government, the proceedings could not be said to have been initiated without authority of law.

30. Again in **Narayandas Bhagwandas Madhavdas v. State of W.B.14** this Court observed that when cognizance is taken of an offence depends upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuance of a search warrant for the purpose of an investigation or a warrant of arrest of the accused cannot by itself be regarded as an act of taking cognizance of an offence. It is only when a Magistrate applies his mind for proceeding under Section 200 and subsequent sections of Chapter XV or under Section 204 of Chapter XVI of the Code that it can be positively stated that he had applied his mind and thereby had taken cognizance of an offence (see also **Ajit Kumar Palit v. State of W.B.18, and Hareram Satpathy v. Tikaram Agarwala19.**

31. In **Gopal Das Sindhi v. State of Assam15,** referring to earlier judgments, this Court said:(AIR p. 989, para 7)

"7...We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word "may' in Section 190 to mean "must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter XVI of the Code."

32. In **Nirmaljit Singh Hoon v. State of W.B.16,** the Court stated that it is well settled that before a Magistrate can be said to have taken cognizance of an offence under Section 190(1)(a) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that section. Where, however, he applies his mind only for ordering an investigation under Section 156(3) or issues a warrant for arrest of the accused, he cannot be said to have taken cognizance of the offence.

33. In **Darshan Singh Ram Kishan v. State of Maharashtra10,** speaking for the Court, Shelat, J. stated that under Section 190 of the Code, a Magistrate may take cognizance of an offence either (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even

upon his own information or suspicion that such an offence has been committed. As has often been said, taking cognizance does not involve any formal action or indeed action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, thus, takes place at a point when a Magistrate first takes judicial notice of an offence.

34. In **Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy17,** this Court said: (SCC p. 257, paras 13-14)

"13. It is well settled that when a Magistrate receives a complaint, he is not bound to take cognizance if the facts alleged in the complaint, disclose the commission of an offence. This is clear from the use of the words "may take cognizance' which in the context in which they occur cannot be equated with "must take cognizance'. The word "may' gives a discretion to the Magistrate in the matter. If on a reading of the complaint he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence, himself.

14. This raises the incidental question: What is meant by "taking cognizance of an offence' by a Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in Clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If, instead of proceeding under Chapter XV, he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence." (emphasis supplied)

21. The meaning and connotation of the expression 'taking cognizance' again came up for consideration in **Fakhruddin Ahmad Vs. State of Uttaranchal and another20,** and it was held that the expression being of indefinite import it was neither practical nor desirable to precisely define as to what is meant by "taking cognizance' and the question as to whether the Magistrate has taken cognizance of an offence would depend upon the circumstances of the particular case, including the mode in which the case is

sought to be instituted and the nature of preliminary action. Taking note of the earlier decisions in **Ajit Kumar Palit v. State of W.B.18, Emperor Vs. Sourindra Mohan Chuckerbutty21 Chief Enforcement Officer v. Videocon International Ltd.11 Supdt. & Remembrancer of Legal Affairs v. Abani Kumar Banerjee12, and R.R. Chari v. State of U.P.13,** it was stated thus :-

"9. Before examining the rival contentions, we may briefly refer to some of the relevant provisions in the Code. Chapter XIV of the Code, containing Sections 190 to 199 deals with the statutory conditions requisite for initiation of criminal proceedings and as to the powers of cognizance of a Magistrate. Sub-section (1) of Section 190 of the Code empowers a Magistrate to take cognizance of an offence in the manner laid therein. It provides that a Magistrate may take cognizance of an offence either (a) upon receiving a complaint of facts which constitute such offence; or (b) upon a police report of such facts; or (c) upon information received from any person other than a police officer, or upon his own knowledge that such offence has been committed.

10. Chapter XV containing Sections 200 to 203 deals with "Complaints to Magistrates" and lays down the procedure which is required to be followed by the Magistrate taking cognizance of an offence on complaint. Similarly, Chapter XVI deals with "Commencement of Proceedings before Magistrates". Since admittedly, in the present case, the Magistrate has taken cognizance of the complaint in terms of Section 190 of the Code, we shall confine our discussion only to the said provision. We may, however, note that on receipt of a complaint, the Magistrate has more than one course open to him to determine the procedure and the manner to be adopted for taking cognizance of the offence.

11. One of the courses open to the Magistrate is that instead of exercising his discretion and taking cognizance of a cognizable offence and following the procedure laid down under Section 200 or Section 202 of the Code, he may order an investigation to be made by the police under Section 156(3) of the Code, which the learned Magistrate did in the instant case. When such an order is made, the police is obliged to investigate the case and submit a report under Section 173(2) of the Code. On receiving the police report, if the Magistrate is satisfied that on the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence, he may take cognizance of the offence under Section 190(1)(b) of the Code and issue process straightaway to the accused. However, Section 190(1)(b) of the Code does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation makes out a case against the accused. Undoubtedly, the Magistrate can ignore the conclusion(s) arrived at by the investigating officer.

12. Thus, it is trite that the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion in this behalf, irrespective of the view expressed by the police in their report and decide whether an offence has been made out or not. This is because the purpose of the police report under Section 173(2) of the Code, which will contain the facts discovered or unearthed by the police as

well as the conclusion drawn by the police therefrom is primarily to enable the Magistrate to satisfy himself whether on the basis of the report and the material referred therein, a case for cognizance is made out or not.

13. The next incidental question is as to what is meant by the expression "taking cognizance of an offence" by a Magistrate within the contemplation of Section 190 of the Code?

14. The expression "cognizance" is not defined in the Code but is a word of indefinite import. As observed by this Court in **Ajit Kumar Palit v. State of W.B.18**

"19... The word "cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means--become aware of and when used with reference to a court or Judge, to take notice of judicially."

Approving the observations of the Calcutta High Court in **Emperor v. Sourindra Mohan Chuckerbutty21** (at ILR p. 416), the Court said that

"taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence."

15. Recently, this Court in **Chief Enforcement Officer v. Videocon International Ltd.11 speaking through C.K. Thakker, J.**, while considering the ambit and scope of the phrase "taking cognizance" under Section 190 of the Code, has highlighted some of the observations of the Calcutta High Court in **Supdt. & Remembrancer of Legal Affairs v. Abani Kumar Banerjee12, AIR 1950 Cal 437** which were approved by this Court in R.R. Chari v. State of U.P.13 The observations are : (Abani Kumar Banerjee case, AIR 1950 Cal 437 [AIR p. 438, para 7].

"7. ...What is "taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

16. From the aforenoted judicial pronouncements, it is clear that being an expression of indefinite import, it is neither practicable nor desirable to precisely define as to what is meant by "taking cognizance". Whether the Magistrate has or has not taken cognizance of the offence will depend upon the circumstances of the particular case, including the mode in which the case is sought to be instituted and the nature of the preliminary action.

17. Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is

imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender."

22. The meaning of the term "cognizance' was again subject matter of consideration in **Subramanian Swamy Vs. Manmohan Singh and another22,** wherein it was held that the term though not statutorily defined, yet judicial pronouncements give it a definite meaning and connotation and broadly it means taking judicial notice by competent court of a cause or matter presented before it so as to decide whether there is basis for initiating proceedings for judicial determination. It was observed that the scope of consideration by the court at this stage would be as to whether material produced before court prima facie discloses commission of offence and a detailed enquiry and sifting of evidence is not to be undertaken at this stage. Referring to the earlier decisions in **R.R. Chari v. State of U.P.13, State of W.B. Vs. Mohd. Khalid23, and State of Karnataka and another Vs. Pastor P. Raju24, i**t was observed as follows:-

"34. The argument of the learned Attorney General that the question of granting sanction for prosecution of a public servant charged with an offence under the 1988 Act arises only at the stage of taking cognizance and not before that is neither supported by the plain language of the section nor the judicial precedents relied upon by him. Though, the term "cognizance" has not been defined either in the 1988 Act or CrPC, the same has acquired a definite meaning and connotation from various judicial precedents. In legal parlance cognizance is "taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially".

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38. The Court then referred to some of the precedents including the judgment in **Mohd. Khalid** case,(1995) 1 SCC 684 and observed: (**Pastor P. Raju** case, (2006) 6 SCC 728,[SCC p. 734, para 13].

"13. It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

23. In **State of WB Vs. Mohd. Khalid23**, observing that the expression 'taking cognizance' has not been defined in the Code, it was held to mean taking notice

of an offence, and to include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. It was also observed that the word 'cognizance' indicates the point when a Magistrate or a Judge first takes cognizance or judicial notice of an offence and it is entirely a different thing from initiation of proceedings; rather it is a condition precedent to the initiation of proceedings. It was further stated that while taking cognizance of an offence the Court is not required to pass a reasoned order and it can take into consideration not only police report but also on other materials on record.

"43...Then, the question is as to the meaning of taking cognizance. Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word "cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.

44. Cognizance is defined in **Wharton's Law Lexicon 14th Edn., at page 20925**. It reads:

"Cognizance (Judicial), knowledge upon which a judge is bound to act without having it proved in evidence: as the public statutes of the realm, the ancient history of the realm, the order and course of proceedings in Parliament, the privileges of the House of Commons, the existence of war with a foreign State, the several seals of the King, the Supreme Court and its jurisdiction, and many other things. A judge is not bound to take cognizance of current events, however notorious, nor of the law of other countries."

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78. Coming to taking cognizance, it has been held by the High Court that it is not a reasoned order. We are of the view that the approach of the High Court in this regard is clearly against the decision of this Court in ***Stree Atyachar Virodhi Parishad26*** case, which is as under:

"It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor is it necessary to delve deep into various aspects. All that the court has to consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into."

(emphasis supplied)

24. A similar observation with regard to there being no necessity to write detailed orders at the stage of issuing process was made in **Kanti Bhadra Shah and another Vs. The State of West Bengal.27**

25. In **U.P. Pollution Control Board Vs. Mohan Meakins Ltd. and others28**, the correctness of the order of the Sessions Court quashing the order of issuing process for the reason that the Magistrate had not passed a speaking order, which had been affirmed by the High Court, was under consideration and referring to the decision in the case of **Kanti Bhadra (supra)** it was observed that the Sessions Judge could have himself looked into the complaint to form his own opinion where process could have been issued by the Magistrate on the basis of the averments contained in the complaint instead of relegating the work to the trial Magistrate for doing the exercise over again. It was stated thus :-

"6. In a recent decision of the Supreme Court it has been pointed out that the legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons vide **Kanti Bhadra Shah v. State of W.B27.** The following passage will be apposite in this context: (SCC p. 726, para 12)

"12. If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work. The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial."

7. It was unfortunate that the Sessions Judge himself did not look into the complaint at that stage to form his own opinion whether process could have been issued by the Chief Judicial Magistrate on the basis of the averments contained in the complaint. Instead the Sessions Judge relegated the work to the trial Magistrate for doing the exercise over again…"

(emphasis supplied)

26. In **Rajesh Talwar Vs. CBI Delhi and another29,** it was observed that the correctness of the order whereby cognizance of the offence has been taken by the Magistrate, unless it is perverse or based on no material, should be sparingly interfered with.

27. The meaning of the expressions "cognizance' under Section 190 and "summons' in Section 204 were considered in **Bhushan Kumar and another Vs. State (NCT of Delhi) and another30** and it was stated that while issuing summons under Section 204 a reasoned order is not required. It was held that the Magistrate is not bound to give reasons for issuing an order of summons under Section 204 and the order issuing process cannot be quashed only on the ground that the Magistrate had not passed a speaking order. The questions which were specifically considered are as follows :-

"(a) Whether taking cognizance of an offence by the Magistrate is same as summoning an accused to appear?

(b) Whether the Magistrate, while considering the question of summoning an accused, is required to assign reasons for the same?"

(emphasis supplied)

28. Taking notice of the earlier decisions in **Chief Enforcement Officer v. Videocon International Ltd.11, Kanti Bhadra Shah v. State of W.B.27, Nagawwa v. Veeranna Shivalingappa Konjalgi31, Chief Controller of Imports & Exports v. Roshanlal Agarwal32 and U.P. Pollution Control Board v. Bhupendra Kumar Modi33** it was observed as follows :-

"11. In **Chief Enforcement Officer v. Videocon International Ltd.11** (SCC p. 499, para 19) the expression "cognizance" was explained by this Court as "it merely means "become aware of' and when used with reference to a court or a Judge, it connotes "to take notice of judicially'. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone." It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code.

12. A "summons" is a process issued by a court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in court. A person who is summoned is legally bound to appear before the court on the given date and time. Wilful disobedience is liable to be punished under Section 174 IPC. It is a ground for contempt of court.

13. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a prerequisite for deciding the validity of the summons issued.

14. Time and again it has been stated by this Court that the summoning

order under Section 204 of the Code requires no explicit reasons to be stated because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith.

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16. In **Nagawwa v. Veeranna Shivalingappa Konjalgi31,** this Court held that it is not the province of the Magistrate to enter into a detailed discussion on the merits or demerits of the case. It was further held that in deciding whether a process should be issued, the Magistrate can take into consideration improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. It was further held that: (SCC p. 741, para 5)

"5. ...Once the Magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused."

17. In **Chief Controller of Imports & Exports v. Roshanlal Agarwal32**, this Court, in para 9, held as under: (SCC pp. 145-46)

"9. In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons...

18. In **U.P. Pollution Control Board v. Bhupendra Kumar Modi33**, this Court, in para 23, held as under: (SCC p. 154)

"23. It is a settled legal position that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused."

19. This being the settled legal position, the order passed by the Magistrate could not be faulted with only on the ground that the summoning order was not a reasoned order."

(emphasis supplied)

29. The aforementioned position with regard to the order issuing summons/process not required to be a detailed and reasoned order was reiterated in **Nupur Talwar vs. Central Bureau of Investigation and another34** after noticing that the provisions under the Code do not require detailed consideration or passing of reasoned orders at the stage of summons/issuance of process. Referring to the views taken in **Kanti Bhadra Shah v. State of W.B.27, U.P. Pollution Control Board v. Bhupendra Kumar Modi33, Chief Controller of Imports & Exports v.**

Roshanlal Agarwal32 and Bhushan Kumar and another Vs. State (NCT of Delhi) and another30, it was stated as follows:-

"11. Undoubtedly, merely for taking cognizance and/or for issuing process, reasons may not be recorded. In **Kanti Bhadra Shah v. State of W.B**., this Court having examined Sections 227, 239 and 245 of the Code of Criminal Procedure, concluded, that the provisions of the Code mandate, that at the time of passing an order of discharge in favour of an accused, the provisions referred to above necessitate reasons to be recorded. It was, however, noticed, that there was no such prescribed mandate to record reasons, at the time of framing charges against an accused.

12. In **U.P. Pollution Control Board v. Mohan Meakins Ltd.28** the issue whether it was necessary for the trial court to record reasons while issuing process came to be examined again, and this Court held as under: (SCC pp. 748-49 & 752, paras 2-3, 5-6 & 12)

"2. Though the trial court issued process against the accused at the first instance, they desired the trial court to discharge them without even making their first appearance in the court. When the attempt made for that purpose failed they moved for exemption from appearance in the court. In the meanwhile the Sessions Judge,...entertained a revision moved by the accused against the order issuing process to them and, quashed it on the erroneous ground that the Magistrate did not pass "a speaking order' for issuing such summons.

3. The Chief Judicial Magistrate (before whom the complaint was filed) thereafter passed a detailed order on 25-4-1984 and again issued process to the accused. That order was again challenged by the accused in revision before the Sessions Court and the same Sessions Judge...again quashed it by order dated 25-8-1984.

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5. We may point out at the very outset that the Sessions Judge was in error for quashing the process at the first round merely on the ground that the Chief Judicial Magistrate had not passed a speaking order. In fact it was contended before the Sessions Judge, on behalf of the Board, that there is no legal requirement in Section 204 of the Code of Criminal Procedure (for short "the Code') to record reasons for issuing process.

13. Whether an order passed by a Magistrate issuing process required reasons to be recorded, came to be examined by this Court again in **Chief Controller of Imports & Exports v. Roshanlal Agarwal32** wherein this Court concluded as below: (SCC pp. 145-46, para 9)

"9. In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. This question was considered recently in **U.P. Pollution Control Board v. Mohan Meakins Ltd.28** and after noticing the law laid down in Kanti Bhadra Shah v. State of W.B. (2000) 1 SCC 722 it

was held as follows: **(Mohan Meakins Ltd. case**,[(2000) 3 SCC 745, SCC p. 749, para 6)]

"The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to the accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order."

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15. It is therefore apparent, that an order issuing process, cannot be vitiated merely because of absence of reasons.

(emphasis supplied)

30. The material that may be considered while taking cognizance and issuing process was also discussed in the aforesaid decision of **Nupur Talwa**r and it was held that the purpose of examining such material at the stage of taking cognizance and issuing process would be tentative as distinguished from consideration of actual evidence during trial. It was held that at this stage the test to be applied is as to whether there is sufficient ground for proceeding against the accused and the Magistrate is not required to weigh the evidence meticulously and to scrutinize the same as is to be done at the stage of trial. It was also observed that in the absence of any legal requirement under Section 204, it was not necessary for the Magistrate to give detailed reasons while passing an order issuing process. The observations made in the judgment in this regard are as follows :-

"36. The basis and parameters of issuing process, have been provided for in Section 204 of the Code of Criminal Procedure.

37. The criteria which needs to be kept in mind by a Magistrate issuing process, have been repeatedly delineated by this Court..."

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39. The same issue was examined by this Court in Jagdish Ram v. State of Rajasthan (2004) 4 SCC 432 wherein this Court held as under: (SCC p. 436, para 10)

"10. The contention urged is that though the trial court was directed to consider the entire material on record including the final report before deciding whether the process should be issued against the appellant or not, yet the entire material was not considered. From perusal of order passed by the Magistrate it cannot be said that the entire material was not taken into consideration. The order passed by the Magistrate taking cognizance is a well-written order. The order not only refers to the statements recorded by the police during investigation which led to the filing of final report by the police and the statements of witnesses recorded by the Magistrate under Sections 200 and 202 of the Code but also sets out with clarity the principles required to be kept in mind at the stage of taking cognizance and reaching a prima facie view. At this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter. It is well settled that notwithstanding the opinion of the police, a Magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The

investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons.[Chief Controller of Imports & Exports v. Roshanlal Agarwal,(2003) 4 SCC 139].

All along having made a reference to the words "there is sufficient ground to proceed" it has been held by this Court that for the purpose of issuing process, all that the court concerned has to determine is: whether the material placed before it "is sufficient for proceeding against the accused"? The observations recorded by this Court extracted above, further enunciate that the term "sufficient to proceed" is different and distinct from the term "sufficient to prove and establish guilt".

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65..Sub-section (1) of Section 204 CrPC quoted above itself does not impose a legal requirement on the Magistrate to record reasons in support of the order to issue a process and in U.P. Pollution Control Board v. Mohan Meakins Ltd.28 and Chief Controller of Imports & Exports v. Roshanlal Agarwal32, this Court has held that the Magistrate is not required to record reasons at the stage of issuing the process against the accused. In the absence of any legal requirement in Section 204 CrPC to issue process, it was not legally necessary for the Magistrate to have given detailed reasons in her order dated 9-2-2011 for issuing process to the petitioner and her husband Dr Rajesh Talwar.

66. The fact however remains that the Magistrate has given detailed reasons in the order dated 9-2-2011 issuing process and the order dated 9-2-2011 itself does not disclose that the Magistrate has considered all the relevant materials collected in the course of investigation. Yet from the mere fact that some of the relevant materials on which the petitioner relies on have not been referred to in the order dated 9-2-2011, the High Court could not have come to the conclusion in the revision filed by the petitioner that these relevant materials were not considered. Moreover, this Court has held in Nagawwa v. Veeranna Shivalingappa Konjalgi (1976) 3 SCC 736 that whether the reasons given by the Magistrate issuing process under Section 202 or 204 CrPC were good or bad, sufficient or insufficient, cannot be examined by the High Court in the revision. All that the High Court, however, could do while exercising its powers of revision under Sections 397/401 CrPC when the order issuing process under Section 204 CrPC was under challenge was to examine whether there were materials before the Magistrate to take a view that there was sufficient ground for proceeding against the persons to whom the processes have been issued under Section 204 CrPC."

(emphasis supplied)

31. The meaning and scope of expression "taking cognizance' again fell for consideration in **Sunil Bharti Vs. Central Bureau of Investigation35** and it was reiterated that though the expression has not been defined in the Code; however,

when the Magistrate applies his mind for proceeding against the person concerned, he is said to have taken cognizance of an offence. It was stated that formation of such opinion is to be stated on the basis of a material available on record.

"48. Sine qua non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a prima facie case or not.

49. Cognizance of an offence and prosecution of an offender are two different things. Section 190 of the Code empowered taking cognizance of an offence and not to deal with offenders. Therefore, cognizance can be taken even if offender is not known or named when the complaint is filed or FIR registered. Their names may transpire during investigation or afterwards.

51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction."

32. The question as to whether at the stage of issuance of process to the accused in case of taking cognizance of an offence based upon a police report under Section 190 (1) (b) CrPC, it is mandatory for the court to record reasons for its satisfaction that there are sufficient grounds for proceeding against the accused was subject matter of consideration in **State of Gujarat Vs. Afroz Mohammed Hasanfatta36** and it was held that the Magistrate is only required to be satisfied about sufficient grounds to proceed and issue summons on basis of prima facie evidence in the charge-sheet and other documents filed by the police but the Magistrate is not explicitly required to record reasons therefor at the stage of issuing summons.

33. Distinguishing the cognizance taken on the basis of a police report from a case instituted on a private complaint, it was held, in **Afroz Mohammed Hasanfatta**, that the order for issuance of process without explicitly recording

reasons for the issue of process does not suffer from any illegality. The observations and discussions made in the decision on the aforesaid point are as follows:-

"13.2...While taking cognizance of an offence under Section 190(1)(b) CrPC, whether the court has to record reasons for its satisfaction of sufficient grounds for issuance of summons

14...The order of taking cognizance of the second supplementary charge-sheet and issuance of summons to the respondent Afroz Hasanfatta reads as under:

"I take in consideration charge-sheet/complaint for the offence of Sections 420, 465, 467, 468 IPC, etc. Summons to be issued against the accused."

15. The first and foremost contention of the respondent-accused is that summoning an accused is a serious matter and the summoning order must reflect that the Magistrate has applied his mind to the facts of the case and the law applicable thereto and in the present case, the order for issuance of process without recording reasons was rightly set aside by the High Court. In support of their contention that the summoning order must record reasons showing application of mind, reliance was placed upon **Pepsi Foods Ltd. v. Special Judicial Magistrate4,** The second limb of submission of the learned Senior Counsel appearing for the respondent-accused is that there has to be an order indicating the application of mind by the Magistrate as to the satisfaction that there are sufficient grounds to proceed against the accused irrespective of the fact that whether it is a charge-sheet by the police or a private complaint.

16. It is well settled that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and the Magistrate is only to be satisfied that there are sufficient grounds for proceeding against the accused. It is fairly well settled that when issuing summons, the Magistrate need not explicitly state the reasons for his satisfaction that there are sufficient grounds for proceeding against the accused. Reliance was placed upon **Bhushan Kumar v. State (NCT of Delhi)30...**

17. After referring to **Bhushan Kumar v. State (NCT of Delhi)**,(2012) 5 SCC 424 **Chief Enforcement Officer v. Videocon International Ltd.11**, and other decisions, in **Mehmood Ul Rehman v. Khazir Mohammad Tunda37**, it was held as under:

"20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in **Pepsi Foods Ltd. v. Special Judicial Magistrate4,** to set in motion the process of criminal law against a person is a serious matter."

The above observations made in para 20 is in the context of taking

cognizance of a complaint. As per definition under Section 2(d) CrPC, complaint does not include a police report.

18. The learned Senior Counsel appearing for the respondent-accused relied upon various judgments to contend that while taking cognizance, the court has to record the reasons that prima facie case is made out and that there are sufficient grounds for proceeding against the accused for that offence. The learned Senior Counsel appearing on behalf of the respondent-accused relied upon the judgments in **Pepsi Foods Ltd. v. Special Judicial Magistrate,** (1998) 5 SCC 749 and **Mehmood Ul Rehman v. Khazir Mohammad Tunda, (2015) 12 SCC 420** to contend that while taking cognizance, the court has to record reasons that prima facie case is made out and that there are sufficient grounds for proceeding against the accused for that offence. On the facts and circumstances of those cases, this Court held that the order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. However, what needs to be understood is that those cases relate to issuance of process taking cognizance of offences based on the complaint. Be it noted that as per the definition under Section 2(d) CrPC, "complaint" does not include a police report. Those cases do not relate to taking of cognizance upon a police report under Section 190(1)(b) CrPC. Those cases relate to taking cognizance of offences based on the complaint. In fact, it was also observed in **Mehmood Ul Rehman v. Khazir Mohammad Tunda37,** (at SCC p. 430, para 21) that "under Section 190(1)(b) CrPC, the Magistrate has the advantage of a police report; but under Section 190(1)(a) CrPC, he has only a complaint before him. Hence, the Code specifies that "a complaint of facts which constitutes an offence".

19...The procedure for taking cognizance upon complaint has been provided under Chapter XV -- Complaints to Magistrates under Sections 200 to 203 CrPC. A complaint filed before the Magistrate may be dismissed under Section 203 CrPC if the Magistrate is of the opinion that there is no sufficient ground for proceeding and in every such case, he shall briefly record his reasons for so doing. If a complaint is not dismissed under Section 203 CrPC, the Magistrate issues process under Section 204 CrPC. Section 204 CrPC is in a separate chapter i.e. Chapter XVI -- Commencement of Proceedings before Magistrates. A combined reading of Sections 203 and 204 CrPC shows that for dismissal of a complaint, reasons should be recorded. The procedure for trial of warrant cases is provided in Chapter XIX -- Trial of Warrant Cases by the Magistrates. Chapter XIX deals with two types of cases -- A-Cases instituted on a police report and B-Cases instituted otherwise than on police report. In the present case, cognizance has been taken on the basis of police report.

20. In a case instituted on a police report, in warrant cases, under Section 239 CrPC, upon considering the police report and the documents filed along with it under Section 173 CrPC, the Magistrate after affording opportunity of hearing to both the accused and the prosecution, shall discharge the accused, if the Magistrate considers the charge against the accused to be groundless and record his reasons for so doing. Then comes Chapter XIX-C -- Conclusion of trial -- the Magistrate to render final judgment under Section 248 CrPC considering the various provisions

and pointing out the three stages of the case. Observing that there is no requirement of recording reasons for issuance of process under Section 204 CrPC, in **Raj Kumar Agarwal v. State of U.P.38**, B.K. Rathi, J. the learned Single Judge of the Allahabad High Court held as under: (SCC OnLine All paras 8-9)

"8. ...As such there are three stages of a case. The first is under Section 204 CrPC at the time of issue of process, the second is under Section 239 CrPC before framing of the charge and the third is after recording the entire evidence of the prosecution and the defence. The question is whether the Magistrate is required to scrutinise the evidence at all the three stages and record reasons of his satisfaction. If this view is taken, it will make speedy disposal a dream. In my opinion the consideration of merits and evidence at all the three stages is different. At the stage of issue of process under Section 204 CrPC detailed enquiry regarding the merit and demerit of the cases is not required. The fact that after investigation of the case, the police has submitted the charge-sheet, may be considered as sufficient ground for proceeding at the stage of issue of process under Section 204 CrPC however subject to the condition that at this stage the Magistrate should examine whether the complaint is barred under any law,... At the stage of Section 204 CrPC if the complaint is not found barred under any law, the evidence is not required to be considered nor are the reasons required to be recorded. At the stage of charge under Section 239 or 240 CrPC the evidence may be considered very briefly, though at that stage also, the Magistrate is not required to meticulously examine and to evaluate the evidence and to record detailed reasons.

9. A bare reading of Sections 203 and 204 CrPC shows that Section 203 CrPC requires that reasons should be recorded for the dismissal of the complaint. Contrary to it, there is no such requirement under Section 204 CrPC. Therefore, the order for issue of process in this case without recording reasons, does not suffer from any illegality."

(emphasis supplied)

We fully endorse the above view taken by the learned Judge.

21. In para 21 of **Mehmood Ul Rehman v. Khazir Mohammad Tunda37,** this Court has made a fine distinction between taking cognizance based upon charge-sheet filed by the police under Section 190(1)(b) CrPC and a private complaint under Section 190(1)(a) CrPC and held as under: (SCC p. 430)

"21. Under Section 190(1)(b) CrPC, the Magistrate has the advantage of a police report and under Section 190(1)(c) CrPC, he has the information or knowledge of commission of an offence. But under Section 190(1)(a) CrPC, he has only a complaint before him. The Code hence specifies that "a complaint of facts which constitute such offence". Therefore, if the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance under Section 190(1)(a) CrPC. The complaint is simply to be rejected."

22. In summoning the accused, it is not necessary for the Magistrate to examine the merits and demerits of the case and whether the materials collected is adequate for supporting the conviction. The court is not required to evaluate the

evidence and its merits. The standard to be adopted for summoning the accused under Section 204 CrPC is not the same at the time of framing the charge. For issuance of summons under Section 204 CrPC, the expression used is "there is sufficient ground for proceeding..."; whereas for framing the charges, the expression used in Sections 240 and 246 IPC is "there is ground for presuming that the accused has committed an offence...". At the stage of taking cognizance of the offence based upon a police report and for issuance of summons under Section 204 CrPC, detailed enquiry regarding the merits and demerits of the case is not required. The fact that after investigation of the case, the police has filed charge-sheet along with the materials thereon may be considered as sufficient ground for proceeding for issuance of summons under Section 204 CrPC.

23. Insofar as taking cognizance based on the police report is concerned, the Magistrate has the advantage of the charge-sheet, statement of witnesses and other evidence collected by the police during the investigation. Investigating officer/SHO collects the necessary evidence during the investigation conducted in compliance with the provisions of the Criminal Procedure Code and in accordance with the rules of investigation. Evidence and materials so collected are sifted at the level of the investigating officer and thereafter, charge-sheet was filed. In appropriate cases, opinion of the Public Prosecutor is also obtained before filing the charge-sheet. The court thus has the advantage of the police report along with the materials placed before it by the police. Under Section 190(1)(b) CrPC, where the Magistrate has taken cognizance of an offence upon a police report and the Magistrate is satisfied that there is sufficient ground for proceeding, the Magistrate directs issuance of process. In case of taking cognizance of an offence based upon the police report, the Magistrate is not required to record reasons for issuing the process. In cases instituted on a police report, the Magistrate is only required to pass an order issuing summons to the accused. Such an order of issuing summons to the accused is based upon subject to satisfaction of the Magistrate considering the police report and other documents and satisfying himself that there is sufficient ground for proceeding against the accused. In a case based upon the police report, at the stage of issuing the summons to the accused, the Magistrate is not required to record any reason..."

(emphasis supplied)

34. In the case at hand the Magistrate having taken cognizance on the basis of a report ─ deemed to be a complaint, by virtue of explanation to Section 2 (d), and not on the basis of a private complaint, the case would be squarely covered by the decision in **State of Gujarat Vs. Afroz Mohammad Hasanfatta36** wherein it was held that the Magistrate is only required to be satisfied about sufficient grounds to proceed and issue summons on basis of prima facie evidence in the charge-sheet and other documents filed by the police but the Magistrate is not explicitly required to record reasons therefor at the stage of issuing summons.

35. The decision in the case of **Pepsi Foods Ltd. Vs. Special Judicial Magistrate4** sought to be relied on behalf of the applicants to contend that while taking cognizance the court has to record reasons would not be applicable since that case relates to issuance of process taking cognizance of offences based on a complaint.

36. In this regard it may be noted that as per the definition under Section 2 (d), "complaint" does not include a police report and the present being a case where pursuant to an FIR in respect of cognizable offences the case was investigated and a report was placed disclosing non-cognizable offences, by virtue of the explanation to Section 2 (d) the report made by the police officer would be held to be a "deemed complaint" and in view of the proviso to Section 200 the police officer concerned who would be "deemed to be the complainant", would not be required to be examined by the Magistrate before issuance of process under Section 204. The reason for this being that the Magistrate in the instant case has the advantage of the police report along with the materials placed before it by the police. This may include statement of witnesses and other evidence collected by the police during the investigation. This would be a case distinct from one under Section 190 (1) (a) CrPC where the Magistrate has only a complaint before him.

37. The explanation to Section 2 (d) contains a deeming provision and in terms thereof a report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be "deemed to be a complaint"; and the police officer by whom such report is made shall be "deemed to be the complainant."

38. The nature and effect of a deeming provision and the legal fiction created in terms thereof came up for consideration in **Ali M.K. And others Vs. State of Kerala and others,39** and after extensively referring to the case law on the point, it was observed as follows :-

"13...Therefore, the vital question is whether the appointment is made in the exigencies of public service. For that purpose, Note 1 assumes significance. It is, as noted above, a deeming provision. Such a provision creates a legal fiction. As was stated by **James, L.J. in Levy, Re, ex p Walton40.**

"when a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. After ascertaining the purpose full effect must be given to the statutory fiction and it should be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate."

[See **Hill v. East and West India Dock Co.41, State of Travancore Cochin v. Shanmugha Vilas Cashewnut Factory42, American Home Products Corpn. v. Mac Laboratories (P) Ltd.43 and Parayankandiyal Eravath Kanapravan Kalliani Amma v. K. Devi44. In an oft-quoted passage, Lord Asquith stated: (All ER p. 599 B-D)**.

"If you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had, in fact, existed must inevitably have flowed from or accompanied it. ... The statute states that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

(See **East End Dwellings Co. Ltd. v. Finsbury Borough Council45**.)

"The word "deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

[Per **Lord Radcliffe in St. Aubyn (L.M.) v. Attorney-General (No. 2)46 All ER p. 498 F-G.]**

14. "Deemed", as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient devise for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem' and "deemed' when used in a statute thus simply state the effect or meaning which some matter or thing has -- the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion." (Per **Windener, J. in Hunter Douglas Australia Pty. v. Perma Blinds47.)**

15. When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else (per Cave, J., R. v. Norfolk County Court48.)

"When a statute gives a definition and then adds that certain things shall be "deemed' to be covered by the definition, it matters not whether without that addition the definition would have covered them or not."(Per **Lord President Cooper in Ferguson v. McMillan49.)**

16. Whether the word "deemed" when used in a statute established a conclusive or a rebuttable presumption depended upon the context (see St. Leon Village Consolidated School Distt. v. Ronceray50.)

"I ... regard its primary function as to bring in something which would otherwise be excluded."

(Per **Viscount Simonds in Barclays Bank v. IRC51).**

"Deems" means "is of opinion" or "considers" or "decides" and there is no implication of steps to be taken before the opinion is formed or the decision is taken.[See **R. v. Brixton Prison (Governor), ex p Soblen52, All ER p. 669 C.**]

39. It would therefore be seen that while interpreting a provision creating a legal fiction, the Court would be required to ascertain for what purpose the fiction is created and thereafter the Court is to assume all those facts and consequences which are incidental or which follow as necessary corollaries in order to give effect to the fiction.

40. The fiction created by a deeming provision is essentially an assumption or supposition in law with regard to existence of a state of facts. The fiction in the realm of law has a defined role to play and while

construing the same it is not to be extended beyond the purpose for which it is created or beyond the language of the section by which it is created. It would be required to be borne in mind that the statute introduces a legal fiction for a certain purpose and it would not be legitimate to travel beyond the scope of that purpose or to stretch it to point where it loses the purpose for which it has been created or employed.

41. In the facts of the present case, the report made by the police officer having been "deemed to be a complaint" by virtue of the explanation to Section 2 (d), the legal fiction thus set up cannot be stretched to a point so as to equate the same to a "private complaint" and thereby derive a conclusion that while taking cognizance thereon the Magistrate would be required to record detailed reasons.

42. The matter may be examined from another perspective, as to whether the order taking cognizance, if held to be irregular, can be said to have occasioned failure of justice or to have vitiated the proceedings. Chapter XXXV of the Code is in respect of irregular proceedings. The provisions contained under Section 460, 461 and 465, under Chapter XXXV, which

are relevant for ensuing discussion, are being extracted below.

"460. Irregularities which do not vitiate proceedings.-If any Magistrate not empowered by law to do any of the following things, namely:-

(a) to issue a search-warrant under section 94;

(b) to order, under section 155, the police to investigate an offence;

(c) to hold an inquest under section 176;

(d) to issue process under section 187, for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;

(e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of section 190;

(f) to make over a case under sub-section (2) of section 192;

(g) to tender a pardon under section 306;

(h) to recall a case and try it himself under section 410; or

(i) to sell property under section 458 or section 459,

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

461.Irregularities which vitiate proceedings.- If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:-

(a) attaches and sells property under section 83;

(b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;

(c) demands security to keep the peace;

(d) demands security for good behavior;

(e) discharges a person lawfully bound to be of good behavior;

(f) cancels a bond to keep the peace;

(g) makes an order for maintenance;

(h) makes an order under section 133 as to a local nuisance;

(i) prohibits, under section 143, the repetition or continuance of a public nuisance;

(j) makes an order under Part C or Part D of Chapter X;

(k) takes cognizance of an offence under clause (c) of sub-section (1) of section 190;

(l) tries an offender;

(m) tries an offender summarily;

(n) passes a sentence, under section 325, on proceedings recorded by another Magistrate;

(o) decides an appeal;

(p) calls, under section 397, for proceedings; or

(q) revises an order passed under section 446,

his proceedings shall be void.

465.Finding or sentence when reversible by reason of error, omission or irregularity.-(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact

been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

43. Section 460 pertains to irregularities which do not vitiate proceedings, whereas Section 461 is in respect of irregularities which vitiate proceedings. Clause (e) of Section 460 refers to taking cognizance of an offence under clause (a) or clause (b) of sub-section (1) of Section 190. Clause (a) of sub-section (1) of Section 190 refers to receipt of a complaint of facts which constitute an offence and clause (b) refers to a police report of the facts. Therefore, in a case where a Magistrate, who is not empowered by law, takes cognizance of an offence either under clause (a) or clause (b) of sub-section (1) of Section 190, even erroneously, the proceedings will not be held to be vitiated. It is only in a case,

where a Magistrate, who is not empowered, takes cognizance of an offence under Section 190 (1) (c), upon information received from a person other than a police officer, or upon his own knowledge, the act of taking cognizance can be held to vitiate proceedings in view of clause (k) of Section 461 of the Code.

44. The question as to whether an order issuing summons could be held to be vitiated on the ground that it did not contain reasons was also examined in the decision of **Nupur Talwar vs. Central Bureau of Investigation and another34** and taking into consideration the provisions under Section 461 of the Code, which expressly delineates irregularities in procedure which would vitiate proceedings, it was held that since orders passed under Section 204 do not find mention under Section 461, the said orders could not be faulted on the ground that they did not contain reasons.

45. Section 465 of the Code embodies the principle that the finding, sentence or order passed by the court of competent jurisdiction would not be reversible on account of any error, omission or irregularity unless the same has occasioned a "failure of justice". In determining as to whether there has been any failure of justice, sub-section (2) of Section 465 provides that regard would be had to the fact whether the objection regarding the irregularity could and should have been raised at an earlier stage in the proceedings. Section 465 relates to proceedings before trial or any inquiry, and since cognizance is pre-trial or inquiry stage, any irregularity of a cognizance order would be covered under the provision.

46. The object of provisions contained under Chapter XXXV of the Code has been subject matter of consideration in a recent decision of the Supreme Court in **Pradeep S.Wodeyar Vs. The State of Karnataka5**, wherein it has been held that the purpose of these provisions is to prevent irregularities, that do not go to the root of the case, from delaying the proceedings. Taking notice of a growing tendency on part of the accused using delaying tactics by seeking to challenge every interlocutory order with a view to prolong the proceedings and prevent the commencement or conclusion of the trial, and referring to the earlier decisions in **A.R.Antulay vs Ramdas Sriniwas Nayak And Another53** and **Santhosh De Vs. Archana Guha54,** it has been observed as follows :-

"44. The overarching purpose of Chapter XXXV CrPC, as is evident from a reading of Sections 460 to 466, is to prevent irregularities that do not go to the root of the case from delaying the proceedings. Sections 462-464 lay down specific irregularities which would not vitiate the proceedings. Section 465 on the other hand is a broad residuary provision that covers all irregularities that are not covered by the above provisions. This is evident from the initial words of Section 465, namely, "Subject to the provisions hereinabove contained". Therefore, irregular proceedings that are not covered under Sections 461-464 could be covered under Section 465. It is also evident that the theme of "failure of justice', uniformly guides all the provisions in the Chapter. There is no indication in Section 465 and in Sections 462-464 that the provisions only apply to orders of conviction or acquittal. All the provisions use the words "finding, sentence or order". Though one of the major causes of judicial delay is the delay caused from the commencement of the trial to its conclusion, there is no denying that

delay is also predominantly caused in the pre-trial stage. Every interlocutory order is challenged and is on appeal till the Supreme Court, on grounds of minor irregularities that do not go to the root of the case. The object of Chapter XXXV of the CrPC is not only to prevent the delay in the conclusion of proceedings after the trial has commenced or concluded, but also to curb the delay at the pre-trial stage. It has been recognized by a multitude of judgments of this Court that the accused often uses delaying tactics to prolong the proceedings and prevent the commencement or conclusion of the trial. The object of Chapter XXXV is to further the constitutionally recognized principle of speedy trial. This was highlighted by **Justice Jeevan Reddy** while writing for a two judge Bench in **Santhosh De v. Archana Guha** where the learned judge observed:

"15. The facts of this case impel us to say how easy it has become today to delay the trial of criminal cases. An accused so minded can stall the proceedings for decades together, if he has the means to do so. Any and every single interlocutory order is challenged in the superior Courts and the superior Courts, we are pained to say, are falling prey to their stratagems. We expect the superior Courts to resist all such attempts. Unless a grave illegality is committed, the superior Courts should not interfere. They should allow the Court which is seized of the matter to go on with it. There is always an appellate Court to correct the errors. One should keep in mind the principle behind Section 465 Cr. P.C. That any and every irregularity or infraction of a procedural provision cannot constitute a ground for interference by a superior Court unless such irregularity or infraction has caused irreparable prejudice to the party and requires to be corrected at that stage itself, because such frequent interference by superior Court at the interlocutory stages tends to defeat the ends of Justice instead of serving those ends. It should not be that a man with enough means is able to keep the law at bay. That would mean the failure of the very system."

45. Section 465 would also be applicable to challenges to interlocutory orders such as a cognizance order or summons order on the ground of irregularity of procedure. This interpretation is supported by sub-section (2) to Section 465 which states that while determining if the irregularity has occasioned a failure of justice, the Court shall have regard to whether the objection could or should have been raised at an earlier stage in the proceeding. Therefore, the very fact that the statute provides that the Court is to consider if the objection could have been raised earlier, without any specific mention of the stage of the trial, indicates that the provision covers challenges raised at any stage. The Court according to sub-Section (2) is to determine if the objection was raised at the earliest."

47. The question as to whether condoning the irregularity of the cognizance order under Section 465 would lead to a "failure of justice" was considered in the aforestated decision in the case of **Pradeep S.Wodeyar Vs. The State of Karnataka5** and while referring to the gradation in irregularity of cognizance order under Sections 460 and 461, it was observed as follows :-

"48.(ii) Gradation in irregularity of cognizance order under Sections 460 and 461- Under Sections 460 and 461, the order taking cognizance based on a police report

has been given a greater standing as compared to an order taking cognizance based on information received from any person other than a police officer or upon the own knowledge of the Magistrate, for the specific purpose of deciding on the irregularity of the order. The reason behind the gradation is because in the former case, the Magistrate has material based on an investigation by the police to ground his decision which may be absent when cognizance is taken based on information by any other person. In this case, cognizance was taken based on the SIT report. Therefore, the case squarely falls under Section 190(b) of CrPC which under Section 460, even if irregular would not vitiate the proceedings."

(emphasis supplied)

48. In the facts of the present case also the cognizance was taken based on a report made by the police which under Section 460 even if irregular would not have the effect of vitiating the proceedings.

49. The legal position with regard to the manner of taking cognizance and issuing process as per the procedure prescribed under the Code and as to whether the detailed reasons are required to be recorded at the stage of taking cognizance or issuing of process has been elaborated in a recent decision of this Court in **Badri Prasad and others Vs. State of U.P. and another.55**

50. The aforementioned reasoning also finds support from the principle of statutory construction that the provisions of a statute are to be read in a way that renders them compatible and not contradictory. It is a cardinal principle of construction of a statute that effort should be made in construing the different provisions so that each provision will have its play and in the event of any conflict a harmonious construction should be given. The well-known principle of harmonious construction is that effect shall be given to all the provisions and for that any provision of the statute should be construed with reference to the other provisions so as to make it workable. In this regard, reference may be had to the decisions in **Sultana Begum Vs. Prem Chand Jain56 and Commissioner of Income Tax Vs. Hindustan Bulk Carriers57.**

51. It would be apt to apply the aforestated principles to consider the question as to whether in a situation where the report made by the police officer having been held to be covered by the explanation to Section 2 (d) and accordingly having been deemed to be a complaint, the cognizance taken thereon by the Magistrate can be assailed on the ground that the procedure as required in the case of a "private complaint" as per Sections 200 and 202 has not been followed.

52. For ease of reference Section 200 of the Code is being extracted below:-

"200. Examination of complainant.- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or-purporting to act in the discharge of his

official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

53. Clause (a) of the first proviso to Section 200 of the Code provides that when the complaint is made in writing by a public servant acting or purporting to act in the discharge of his official duties, the Magistrate need not examine the complainant and the witnesses before proceeding with the matter and issuing process. Therefore, in a case where a report made by a police officer is deemed to be a complaint by virtue of the explanation to Section 2(d) and the Magistrate proceeds to take cognizance thereon under Section 190(1)(a), treating it to be a complaint, and proceeds to issue process without following the procedure of examining the complainant under Section 200 and the witnesses under Section 202, the issuance of process or the summons cannot be held to be vitiated.

54. Moreover, in the facts of the present case looking at the nature of the offence disclosed in the police report, the case which is to be tried would be a summons case and the procedure prescribed for the same would be as per Chapter XX of the Code, wherein there is no distinction with regard to the manner in which the trial is to proceed between cases instituted on a police report and those instituted otherwise than on a police report i.e. a complaint. Accordingly, there would be no material change in the procedure of trial and as such the applicant cannot be said to have been prejudiced by the order of cognizance by the Magistrate, for this reason also.

55. The line of reasoning referred to above also follows from the principles enunciated in the case of **Mahendra Kumar Chaudhary and others Vs. State of U.P. and another3.**

56. Having regard to the foregoing discussion the challenge raised to the cognizance order on both the grounds i.e. cognizance ought to have been taken under Section 190 (1) (a) as is required in the case of a "private complaint" and that the same should have been based on a reasoned order, cannot be held to be in conformity with the legal principles in regard to the manner of taking cognizance and issuing process as per the procedure prescribed under the Code and therefore cannot be accepted.

57. The prayer for quashing of the charge-sheet no. 262 of 2020 dated 19.07.2020, the cognizance order dated 25.02.2021 and entire proceedings of Case No. 14457 of 2021 pending in the court of Additional Chief Metropolitan Magistrate III, Kanpur Nagar (State Vs. Atmaram Yadav and others) in Case Crime No. 249 of 2020 under Sections 323, 504 IPC, P.S. Vidhnu, District Kanpur Nagar insofar as it relates to the applicants is therefore refused.

58. Counsel for the applicants, at this stage, submits that the offences which are of cognizable nature would be covered under the 'Category A' as specified in the

order of the Hon'ble Supreme Court in the case of **Satendra Kumar Antil Vs. Central Bureau of Investigation and another58** and the requisite conditions specified therein also stand fulfilled and in view of the same, a direction may be issued to the court below to consider the grant of bail.

59. Learned A.G.A.-I appearing for the State opposite party has no objection to the prayer so made.

60. Counsel for the applicants states that the applicants would submit to the jurisdiction of the court below and apply for bail.

61. In case any such application is moved the court below would be expected to pass appropriate orders thereon in accordance with the settled principles of law.

62. The application stands disposed of accordingly.

(2022)07ILR A481
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.06.2022

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Application U/S 482 No.12409 of 2022

Madhusudan Shukla ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Bipin Kumar Tripathi, Sri V.P. Srivastava (Senior Adv.)

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

A. Criminal Law -Code of Criminal Procedure, 1973-Section 482, 311 - Indian Penal Code, 1860-Section 364-application u/s 311 for summoning certain witnesses was rejected - the same could not be rejected on the sole ground that the case had been pending for an inordinate amount of time-delay in conclusion of the proceedings should not be the reason for rejection of an application u/s 311 Cr.P.C.- In the instant case, the additional witness who claims himself to be an eye witness of the incident in his statement u/s 161 Cr.P.C., sought to be summoned for arriving at the just decision of the case – Trial court adopted a hyper technical view in rejecting the application-it has failed to adhere to the well known adage that every trial is a voyage in which quest for truth is the goal.(Para 1 to 16)

B. The power conferred u/s 311 Cr.P.C. is to be invoked by the court to meet the ends of justice, for strong and valid reasons and it is to be exercised with great caution and circumspection. The determinative factor in this regard should be whether the summoning or recalling of the witness is in fact, essential to the just decision of the case keeping in view that fair trial-which entails the interests of the accused, the victim and of the society-is the main object of the criminal procedure and the court is to ensure that such fairness is not hampered or threatened in any manner.(Para 9 to 11)

The application is allowed. (E-6)

List of Cases cited:

1. Rajaram Prasad Yadav Vs St. of Bih. & ors. (2013) 14 SCC 461

2. The St. reptd. by DSP Vs N. Seenivsagan (2021) AIR SC 2441

3. Manju Devi Vs St. of Raj. (2019) 6 SCC 203

4. Natasha Singh Vs C.B.I. (2013) 5 SCC 741

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. This is a petition under Section 482 Cr.P.C. against the order dated 29.04.2022 by virtue of which the application of the applicant under section 311 Cr.P.C. for summoning certain witnesses was rejected.

2. Heard Sri V. P. Srivastava, learned Senior Advocate assisted by Sri Bipin Kumar Tripathi, learned counsel for the applicant, Mr Vijendra Kumar Mishra, learned counsel for the opposite party no. 2 and Mr L. M. Singh, learned AGA for the State.

3. In short, facts giving rise to present case are that an FIR vide Case Crime No. 1052 of 1996, under Section 364 IPC was lodged on 19.10.1996 by the informant against the applicant and three others alleging therein that on 18.10.1996 at about 7 p.m. elder brother of the informant along with one Sanjay Rai were going Girdharganj to buy vegetables; at that time applicant and other named accused persons came in a jeep and took away brother of the informant with them and when the informant reached to his house from his village, Sanjay Rai is said to have narrated all these facts to the informant. The informant further apprehends that his brother has been abducted with intention to kill him because of old enmity with one co-accused Prajapati Shukla @ Jhanney Shukla, named in the FIR.

4. Investigation is said to have been carried out but about one month none of the prosecution witnesses were examined and even the statement of informant was not recorded and as such the investigation was transferred to CBCID, Gorakhpur on 31.12.1996 by parcha no. 3 and during course of process of investigation, the matter was again transferred to CBCID, Allahabad. During pendency of investigation, Investigating Officer, CBCID, Gorakhpur submitted charge sheet against Madhusudan Shukla (applicant) and Devi Sharan Yadav in the matter on 9.9.1997 under Sections 302, 364, 201/34 IPC and against accused Prajapati Shukla @ Jhannu Shukla and Girija Shanker Pandey on 4.11.1997 under Sections 364, 302, 201/34 IPC, whereupon cognizance was taken by the learned Magistrate. However, later on, the second Investigating Officer H. N. Kanojiya, Inspector CBCID, Allahabad is said to have submitted final report against the applicant and other co accused persons. But the Trial Court has proceeded merely on the basis of the previous charge sheets, without taking any notice of the final report submitted by second Investigating Officer.

5. During course of trial, after recording of the statement under Section 313 Cr.P.C., an application (163 kha) under Section 311 Cr.P.C. dated 25.4.2022 was filed on behalf of the accused applicant to produce one Sanjay Rai as well as Second Investigating Officer H. N. Kanjiya, Inspector CBCID, Allahabad either as defence witness or court witness for the just and proper decision of the trial, which has been rejected by the trial court vide order dated 29.04.2022 noticing the fact that this Court, considering it to be one of the oldest matter, on earlier occasion had already directed the trial court to conclude the trial of the matter within six months. It is this order which is subject matter of challenge before this Court.

6. Learned counsel for the applicant has contended that examination of the witnesses named in the application filed by

the applicant under Section 311 Cr.P.C. is very essential for the just decision of the case. It is further submitted that applicant has been falsely implicated in the present case, which is based on last seen testimony and the applicant has no criminal history to his credit. In support of his arguments, he relied upon the judgements of **Rajaram Prasa Yadav Vs State of Bihar and others, reported in 2013 14 SCC 461; The State represented by the Deputy Superintendent of Police Vs N. Seenivsagan, reported in AIR 2021 SC 2441.**

7. On the other hand learned counsel for the respondent no. 2 and learned AGA for the State pleading the legality and validity of the impugned order contended that application under Section 311 Cr.P.C. moved by the applicant at the fag end of the trial was nothing, but a deliberate attempt to delay the conclusion of the trial. By way of aforesaid application, applicant wanted to re-open the entire case, which in law is not permissible. Even otherwise, application of the applicant under Section 311 Cr.P.C. was an attempt to fill up a lacuna.

8. I have carefully considered the submissions as well as gone through the record.

9. The nature and scope of the powers to be exercised by the court under Section 311 Cr.P.C. was elaborately considered in the case of R**ajaram Prasad Yadav v State of Bihar and another (supra) a**nd after considering the earlier precedents, the principles to be followed by the courts with regard to exercise of powers under the said section have been explained and enumerated. It has been stated thus:-

"14. A conspicuous reading of Section 311 Cr P C would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case.

Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any

person already examined. Insofar as recalling and re-examination of any person already examined, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

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23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr P C read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

a) Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Cr P C should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr P C simultaneously imposes a duty on the court to determine the truth and to render a just decision.

i) The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not

brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

k) The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

10. In the case of **The State represented by the Deputy Superintendent of Police (supra),** the Apex Court has held that if it appeared to the Court that the evidence of a person who is sought to be recalled is essential to the just decision of a case, the Court could do so under Section 311 Cr.P.C. The relevant extract is as under:-

"13. In our view, having due regard to the nature and ambit of Section 311 of the Cr.P.C., it was appropriate and proper that the applications filed by the prosecution ought to have been allowed.Section 311 provides that any Court may, at any stage of any inquiry, trial or other proceedings under the CrPC, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined and the Court shall summon and examine or recall and re-examine test, therefore, is whether it appears to the Court that the evidence of such person who is sought to be recalled is essential to the just decision of the case."

11. Thus, the power to summon material witnesses under Section 311 Cr.P.C. which falls under Chapter XXIV containing the general provisions as to inquiries and trials has been held to confer a very wide power on the courts for summoning witnesses and accordingly the discretion conferred is to be exercised judiciously as wider the power the greater is the necessity for application of judicial mind. The power conferred has been held to be discretionary and is to enable the court to determine the truth after discovering all relevant facts and obtaining proper proof thereof to arrive at a just decision in the case. The power conferred under Section 311 Cr.P.C. is to be invoked by the court to meet the ends of justice, for

strong and valid reasons and it is to be exercised with great caution and circumspection. The determinative factor in this regard should be whether the summoning or recalling of the witness is in fact, essential to the just decision of the case keeping in view that fair trial - which entails the interests of the accused, the victim and of the society - is the main object of the criminal procedure and the court is to ensure that such fairness is not hampered or threatened in any manner.

12. In the case o**f Manju Devi Vs State of Rajasthan, (2019) 6 SCC 203**, Hon'ble Apex Court had noted that an application Under Section 311 Cr.P.C could not be rejected on the sole ground that the case had been pending for an inordinate amount of time (ten years there). Rather, it noted that "the length/duration of a case cannot displace the basic requirement of ensuring the just decision after taking all the necessary and material evidence on record. In other words, the age of a case, by itself, cannot be decisive of the matter when a prayer is made for examination of a material witness". Speaking for the Court, Hon. Mr. Justice Dinesh Maheshwari expounded on the principles underlying Section 311 in the following terms:

"10. It needs hardly any emphasis that the discretionary powers like those Under Section 311 Code of Criminal Procedure are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity insofar as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 Code of Criminal Procedure and amplitude of the powers of the court thereunder have been explained by this Court in several decisions. In **Natasha Singh Vs CBI, (2013) 5 SCC 741**, though the application for examination of witnesses was filed by the Accused but, on the principles relating to the exercise of powers Under Section 311, this Court observed, inter alia, as under:

"8. Section 311 Code of Criminal Procedure empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under Code of Criminal Procedure, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, Code of Criminal Procedure has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

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15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power

must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application Under Section 311 Code of Criminal Procedure must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the Accused, or to cause serious prejudice to the defence of the Accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred Under Section 311 Code of Criminal Procedure must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this Section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

(emphasis in original)

13. In the instant case, record (application 163 Kha) reveals that the additional witness, namely, Sanjay Rai, who claims himself to be an eye witness of the incident in his statement under Section 161 Cr.P.C., sought to be summoned by the applicant by way of additional evidence, was cited in the list of witness by both the Investigating Officers at the time of filing of the charge sheet and while submitting final report but he was not produced by the prosecution side in the trial proceedings. Whereas the Second witness sought to be examined is the second Investigating Officer, who submitted the final report after thorough investigation and, therefore, their examination in the trial proceedings are necessary for arriving at the just decision of the case, when allegedly the case is based upon circumstantial evidence.

14. The observation of the trial court in the impugned order that the applicant, by moving the application under Section 311 Cr.P.C. belatedly wants to derail the trial, also to fill up a lacuna and to delay the trial proceedings and more particularly it has also noted in the impugned order that Sessions Trial is pending since 2013, and evidence under Section 313 Cr.P.C. was recorded on 12.4.2022 and the case was fixed on 13.4.2022 for defence evidence but on that date it has been endorsed by counsel for the applicant that applicant does not want to give any defence evidence and in view thereof the application under Section 311 Cr.P.C. has been rejected but the court below has not returned any finding as to why the evidence of witnesses sought to be summoned is not necessary.

15. Keeping in view the various pronouncements, the observations noted by the Trial Court in the impugned order are not tenable when the paramount consideration is **"just decision of a case"** and also keeping in view the decision of Apex Court in **Manju**

Devi (supra) wherein it has specifically been held that delay in conclusion of the proceedings should not be the reason for rejection of an application under Section 311 Cr.P.C., the order impugned is liable to be quashed. Moreover, trial Court appears to have adopted a hyper technical view in rejecting the application, however, what it appears to have ignored is the purpose for which the salutary provisions of Section 311 Cr.P.C. has been incorporated. It has failed to adhere to the well known adage that every trial is a voyage in which quest for truth is the goal. The trial court can summon any witness even if evidence of both sides is closed. What is required to be demonstrated is, evidence of such witness is essential to the just decision of the case.

16. Accordingly, this application under Section 482 Cr.P.C. is hereby allowed. The order of the learned trial Court dated 29.04.2022 is hereby quashed.

17. Court below is directed to fix a short date for the examination of the witnesses sought to be summoned by the applicant and on that date if the applicant fails to examine the witnesses, court below shall proceed in the matter without giving any further opportunity to the applicant to lead his evidence. Since the records indicate that the matter is oldest one, the trial Court is directed to take up the matter on day today basis and dispose of the trial as early as possible but not later than six months from the date of receipt of a copy of this order.

(2022)07ILR A488
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.07.2022

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482 No. 13840 of 2022

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

Counsel for the Applicants:
Sri Pawan Kumar

Counsel for the Opposite Parties:
G.A., Sri Arun Kumar Tripathi

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 323, 504, 506, 325 & 308-Challenge to-charge-sheet-In the instant case filed application u/s 482 Cr.P.C. without disclosing the fact of filing other two applications-applicants have not come with clean hands and tried to obtain order in their favour by playing fraud upon the Court-One, who comes to the court, must come with clean hands and no material facts should be concealed-the process of the court is being abused by unscrupulous litigants to achieve their nefarious design-the judicial process cannot become an instrument of oppression or abuse or a means in the process of the Court to subvert justice-the applicants have misused the process of law by filing successive applications before this Court suppressing the material facts and documents and misled the Court.(Para 1 to 7)

The application is rejected. (E-6)

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

1- Heard Mr. Pawan Kumar, learned counsel for the applicants, Mr. Arun Kumar Tripathi, learned counsel for the complainant/opposite party no.2 and learned A.G.A. fo

2- By means of this application under Section 482 Cr.P.C., the applicants have made a prayer for quashing the impugned

charge-sheet dated 4.6.2020 and summoning order dated 16.9.2020 in Criminal Case No. 3297 of 2020 arising out of Case Crime No. 106 of 2020 (State Vs. Vinod & Others) under Sections 323, 504, 506, 325, 308 I.P.C. pending in the Court of Chief Judicial Magistrate, Maharajganj.

3- At the out-set on the matter being taken up, learned counsel for the complainant / opposite party no. 2 raises preliminary objection that the applicants have not come with clean hands before this Court as the averment made in paragraph no.2 of the affidavit filed in support of this application "that this is the first application on behalf of the applicants before this Court" is totally incorrect and false. In support of his submission, he pointed out that earlier the applicants had preferred an application under Section 482 Cr.P.C. No. 1982 of 2021 through Mr. Sumit Kumar Srivastava, advocate challenging the charge-sheet dated 04.06.2020, cognizance order dated 16.09.2020 as well as the entire proceedings of the aforesaid case no. 3297/2020. In the said application the applicant no-1(Vinod) was the deponent. The said application was disposed of vide order dated 29.1.2021 declining to quash the proceedings of the aforesaid case before the concerned court below with further direction that applicants shall appear before the court below within 30 days and for a period of 30 days interim protection was granted to the applicants. It is further pointed out that the said order dated 29.1.2021 has not been complied with by the applicants and thereafter they filed another application under Section 482 Cr.P.C. No. 12919 of 2022 through Mr. S.K.Tiwari advocate challenging the non bailable warrant dated 03.01.2022, 09.03.2022 and 19.04.2022 issued against them, in which the applicant no-2 (Dinesh) is the deponent and the said application is still pending before this Court. During pendency of the aforesaid second application, the applicants have again preferred the instant third application under Section 482 Cr.P.C.through Mr. Pawan Kumar advocate, with the prayer to quash the charge-sheet dated 4.6.2020 and summoning order dated 16.9.2020 as well as entire proceedings of aforesaid case without disclosing the fact of filing aforesaid two applications.

4- When learned counsel for the applicants was confronted with the aforesaid facts, he became speechless and did not dispute the aforesaid factual aspect of the matter. However, he submits at the Bar that the deponent of this case is maternal uncle of applicant no.1 Vinod and he did not inform him about the filing of aforesaid applications under Section 482 Cr.P.C. Nos. 1982 of 2021 and 12919 of 2022, therefore, he has not given reference of the same in the affidavit. He has fairly submits that since the deponent has concealed the material facts before him as well as before this Court, therefore he has no objection in imposing some cost upon the deponent.

5- Having heard the submissions of the learned counsel for the parties and examining the matter in its entirety, I find substance in the submissions of learned counsel appearing on behalf of opposite party no.2 that the applicants have not come with clean hands and tried to obtain order in their favour by playing fraud upon the Court.

6- Under the facts of the case, I am of the considered view that the applicants have no respect to the order of this Court. Furthermore, they have not approached this

Court with clean hands and filed this application suppressing the material facts, therefore, they do not deserve any indulgence by this Court. The courts of law are meant for imparting justice between the parties. One, who comes to the court, must come with clean hands and no material facts should be concealed. I am constrained to hold that more often the process of the court is being abused by unscrupulous litigants to achieve their nefarious design. I have no hesitation in saying that a person, whose case is based on falsehood can be summarily thrown out at any stage of the litigation. The judicial process cannot become an instrument of oppression or abuse or a means in the process of the Court to subvert justice, for the reason that the Court exercises its jurisdiction, only in furtherance of justice. The applicants have misused the process of law by filing successive applications before this Court suppressing the material facts and documents and misled the Court. Honesty, fairness, purity of mind should be of the highest order to approach the court, failing which the litigant should be shown the exit door at the earliest point of time.

7- In view of the above, the application is rejected with costs, which is quantified at Rs.5,000/- (rupees five thousand only) to be deposited by the deponent (Rajesh s/o Late Baccha Lal, R/o village Pakri Siswa, police station-Ghughuli District Maharajganj) within one month with the Registrar General of this Court, failing which the same shall be recovered from the deponent as arrears of land revenue. After deposition of aforesaid amount, the Registrar General shall forward the same to the account of Rajkiya Bal Greh Shishu, Allahabad being Account No. 3785336735, State Bank of India, Khuldabad Branch, Prayagraj, IFSC Code SBI N0002560, 9 Micro Code 211002015, which shall be used for the welfare of the children

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(2022)07ILR A490
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.07.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Application U/S 482 No. 14443 of 2022

Naresh Kumar Valmiki ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Arvind Kumar Singh

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 & 156(3)-Application u/s 156(3) was filed against the accused but the court concerned directed the same to be registered as a complaint-It cannot be that by treating an application moved u/s 156(3) Cr.P.C. as a complaint, making an inquiry into it and then proceeding as per section 204 Cr.P.C., the complainant will not get an effective and efficacious remedy to ventilate his grievances-The power of a Magistrate or such court cannot be curtailed so as to place it in a tight compartment to exercise it in a particular direction and way only mechanically without being left to pass any other order as per his wisdom- Moreso,the Court differed with a view taken in the Case of Soni Devi in which the FIR to be ordered to be registered whereas special judge takes cognizance, the mode of taking cognizance will be as prescribed u/s 190 Cr.P.C., hence, the Special Judge, SC/ST (PA) Act is well within his powers to treat an application moved u/s 156(3) Cr.P.C.

as a complaint-Hence, the matter directed to be placed before a Division Bench.(Para 1 to 21)

The application is disposed of. (E-6)

List of Cases cited:

1. Soni Devi Vs St. of U.P. & ors. (2022) 5 ADJ 64

2. Ram Swarup Vs Mohd. Javed Razack & anr.(2005) 10 SCC 393

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Arvind Kumar Singh, learned counsel for the applicant, Sri Ankit Srivastava, learned counsel for the State and perused the records.

2. The present Criminal Misc. Application under Section 482 of Code of Criminal Procedure, 1973 (Cr.P.C.) has been filed by the applicant Naresh Kumar Valmiki, with the following prayers :

"It, therefore, most respectfully prayed that this Hon'ble Court may kindly be pleased to stay the effect and operation of the order dated 12.8.2021 (Annexure No. 2) passed by Special Judge (SC/ST), Etah and also be pleased to direct to the police of police station : Aliganj, District : Etah to lodge the FIR and investigate the case against the accused persons in accordance with law and/or may pass such other and further order as this Hon'ble Court may deem fit and proper, so the justice be done between the parties.

It is further, most respectfully prayed that this Hon'ble Court may graciously be pleased to quash the order dated 12.8.2021 (Annexure No. 2) passed by Special Judge (SC/ST), Etah in criminal misc. case no. 220 of 2021 (Naresh Kumar vs. Indrajit & ors.) and further be pleased to direct to the learned Special Judge (SC/ST (PA) Act, Etah to proceed application u/s 156(3) Cr.P.C. in accordance with law and direct to the police of police station : Aliganj, District : Etah to lodge the FIR and investigate the case against the accused persons in accordance with law and/or may pass such other and further order as this Hon'ble Court may deem fit and proper, so the justice be done between the parties."

3. Learned counsel for the applicant has confined his argument only to the aspect that the impugned order dated 12.8.2021 passed by Special Judge, SC/ST (PA) Act, Etah is ex-facie bad, illegal and not sustainable in the eyes of law as an application dated 5.4.2021 was filed under Section 156(3) Cr.P.C. against Indrajit Singh, Abhijit @Chhote Yadav, Akhilesh and Umesh, with the prayer that appropriate order be passed for registration of F.I.R. and investigation upon the same, but the court concerned vide its order dated 12.8.2021 directed the said application filed under Section 156(3) Cr.P.C. to be registered as a complaint and further directed that the matter be posted for further date for recording of statement of the complainant under Section 200 Cr.P.C.

4. Learned counsel for the applicant argued that the opposite party no. 2 to 5 who are the accused in the application under Section 156(3) Cr.P.C., are not the members of Scheduled Castes and/or Scheduled Tribes. He has relied upon the judgment of a co-ordinate Bench of this Court in the case of ***Soni Devi vs. State of U.P. and others : 2022 (5) ADJ 64*** and has argued that the issue as to whether an application under Section 156(3) Cr.P.C. specifically with regards to an offence under The Scheduled Castes and the

Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred as "the Act 1989'), can be treated as a complaint or not, is no more res integra but it has been held in the said judgement that the same cannot be treated as a complaint and the only option before the concerned court is to direct lodging of a First Information Report and investigation thereupon. It is argued that in view of the said judgement, the order impugned be set aside and the application under Section 156(3) Cr.P.C. be directed to be ordered to be registered as a First Information Report and investigation be carried out against the accused persons.

5. Per contra, learned State counsel has opposed the said argument and has argued that Special Judge, SC/ST(PA) Act is not bound to direct lodging of a F.I.R. only on an application moved under Section 156(3) Cr.P.C. before him. It is argued that the court concerned has to apply its judicial mind and then reach to a conclusion as to what order has to be passed and the order as such passed, has to reflect the independent opinion of the court concerned.

6. This Court has gone through the judgement passed in the case of ***Soni Devi (Supra).***

7. Two questions were framed in the same. The first question is not being referred to, as the same does not relate to the issue in dispute. The second question as framed therein in paragraph 15 is as follows:

"15. The second question for consideration before this Court is as to whether Special Judge can treat the application under Section 156(3) Cr.P.C. as a complaint case or not."

8. At this stage before further going into the issue, answer as given to the second question in paragraph 18 of the judgement is as follows:

" 18. .... Therefore answer to the second question that Special Judge can treat the application under Section 156 (3)Cr.P.C. as a complaint case or not ? Answer is "No" in view of Rule 5(1) of the Amended Act."

9. A Special Judge established or specified for the purposes of the Act 1989, is for providing speedy trial and also shall have the power to directly take cognizance of the offence under the Act 1989. It is settled proposition of law that on receipt of a complaint a Magistrate has to apply his judicial mind to the allegations in the complaint and then to take a decision as to whether he would proceed at once to take cognizance of the offence in terms of Section 190 Cr.P.C. or order for investigation under Section 156(3) Cr.P.C.

10. In the case of ***Ram Swarup vs Mohd. Javed Razack & Anr: (2005) 10 SCC 393,*** the Apex Court has held that forwarding a complaint to the police for investigation is not necessary in every case. If, prima facie, an offence is made, cognizance can be taken by the Magistrate himself.

11. Legal position in a situation of filing of a complaint before a Magistrate is very well clear and explicit. A Magistrate or such court, as the case may be, has to apply his judicial mind to the allegations in the complaint against the accused persons and thereafter, he has to make up his mind and proceed as to whether it should be sent to the police station with directions to Officer In-charge for its registration and

investigation in terms of Section 156(3) Cr.P.C. or to take cognizance of the offence as alleged and proceed to examine the complainant and his witnesses and take further steps in this regard as per the Code of Criminal Procedure or even reject the same. The powers of a Magistrate or such court cannot be curtailed so as to place it in a tight compartment to exercise it in a particular direction and way only mechanically without being left to pass any other order as per his wisdom. A court cannot be ordered to pass a particular order and act in a particular way only without any discretion left to its wisdom. It cannot be that by treating an application moved under Section 156(3) Cr.P.C. as a complaint, making an inquiry into it and then proceeding as per Section 204 Cr.P.C., the complainant will not get an effective and efficacious remedy to ventilate his grievances.

12. Section 14(1) of the Act, 1989 reads as under :

"14. (1) For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish an Exclusive Special Court for one or more Districts:

Provided that in Districts where less number of cases under this Act is recorded, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for such Districts, the Court of Session to be a Special Court to try the offences under this Act:

Provided further that the Courts so established or specified shall have powers to take cognizance directly of offences under this Act."

13. Section 193 Cr.P.C. reads as under :

"193. Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

14. A perusal of these two sections makes it clear that there is an express provision under Section 14 (1) of the Act which provides powers to Special Court to directly take cognizance of an offence under the Act 1989. The mode of taking cognizance has to be as per Section 190 Cr.P.C. Since the scheme of Code of Criminal Procedure provides for cognizance to be taken by Magistrates in the manner specified under Section 190 Cr.P.C. and the Session Judges are restricted to directly take cognizance of the offences except where there is specific provision for the same. Hence, if a Sessions Judge or a Special Judge, as the case may be, takes cognizance, the mode of taking cognizance of an offence will be as prescribed under Section 190 Cr.P.C. and hence, the Special Judge, SC/ST (PA) Act is well within his powers to treat an application moved under Section 156(3) Cr.P.C. as a complaint.

15. Rule 5 of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 reads as under :

"5. (1) Every information relating to the commission of an offence under the Act, if given orally to an officer in-charge

of a police station shall be reduced to writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the persons giving it, and the substance thereof shall be entered in a book to be maintained by that police station.

(2) A copy of the information as so recorded under sub-rule (1) above shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in-charge of a police station to record the information referred to in sub-rule (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who after investigation either by himself or by a police officer not below the rank of Deputy Superintendent of Police, shall make an order in writing to the officer in-charge of the concerned police station to enter the substance of that information to be entered in the book to be maintained by the police station."

16 . Section 154 Cr.P.C. reads as under :

"154. (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:

Provided that if the information is given by the woman against whom an offence under section 326A, section 326 B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that -

(a) in the event that the person against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (5A) of section 164 as soon as possible.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

17. The reading of said rules makes it clear that the language of Rule 5 and that of Section 154 Cr.P.C. is akin. Since Rule 5 talks of information to the Officer In-charge of a police station, the said provisions can never be strictly applied on a Special Judge who has been empowered to pass appropriate orders on an application moved under Section 156(3) Cr.P.C.

18. Thus, this Court differs with the view taken in the case of ***Soni Devi (Supra)*** in its second question as decided as to whether it is correct ?

19. Let the matter be placed before a Division Bench of this Court for appropriate decision on the same.

20. Since there is a difference from the view taken in the case of ***Soni Devi (Supra)*** by this Court which is the only argument raised by learned counsel for the applicant and there is a prayer for staying the effect and operation of the impugned order, the same is not allowed.

21. Let the matter be placed before Honourable The Chief Justice for nominating a Bench for deciding the issue in question.

(2022)07ILR A495
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.04.2022

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Application U/S 482 No. 19717 of 2021

Ayush Anurag ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Lalit Kumar, Sri Kamalesh Kumar Nishad, Sri V.P. Srivastava (Senior Adv.)

Counsel for the Opposite Parties:
G.A., Sri Awadhesh Rai

A. Criminal Law - Code of Criminal Procedure,1973-Section 482 - Indian Penal Code,1860-Sections 328, 376, 504, 506 & ¾ POCSO Act - IT Act-Section 66-quashing of entire proceedings-In the present case POCSO Act had leveled against the applicant but in support of the age proof of O.P. Private Party no. document has been filed whereas according to prosecution case the Opposite Private party has taken the admission after passing the XII Class-the High school and intermediate certificates are the most relevant documents for examining and ascertaining the age of the girl-The exercise of power u/s 311 Cr.P.C. should be resorted to only with the object

of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case- The impugned order suffers from illegality as it is only to delay the trial.(Para 1 to 9)

B. The exercise of the power u/s 311 Cr.P.C. cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice. (Para 4,5)

The application is allowed. (E-6)

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard Sri V.P. Srivaastava, Senior Advocate assisted by Sri Kamalesh Kumar Nishrad, learned counsel for the applicant, learned A.G.A. for the State, Sri Awadhesh Rai, learned counsel for O.P. No. 2 and perused the record.

2. This application has been filed with a prayer to quash the order dated 4.9.2021 passed by Special Judge (POCSO Act)/ Additional Sessions Judge, Ghaziabad in S.T. No. 192 of 2019 arising out of Case Crime NO. 1592 of 2016, under sections 328, 376, 504, 506 IPC and section 3/4 POCSO and section 66 I.T. Act , P.S. Sihani Gate, Ghaziabad and also to quash the order dated 12.11.2021 passed by learned Addl. Sessions Judge (Rape and POCSO Act), Court NO. 2, Ghaziabad.

3. It is contended by learned counsel for the applicant that O.P.No. 2 had lodged an F.I.R. on 3.10.2016 as case crime No. 712 of 2016, under sections 328, 376, 504, 506 IPC. P.S. Kotwali Ghaziabad, District Ghaziabad wherein it has been wrongly stated by O.P. No. 2 that prior to this F.I.R. her father has also lodged an F.I.R. in District Varanasi. Thereafter the matter has been investigated and charge sheet has been submitted on 4.3.217 whereupon the cognizance has been taken on 3.4.2017 against the applicant. It is next argued by learned counsel for the applicant that in the present case POCSO Act has also been levelled against the applicant but in support of age proof of O.P. No. 2 no document has been filed whereas according to prosecution case the O.P.No. 2 has taken the admission after passing the XII Class.

4. Now, the question before this court is that Section 311 Cr..P.C. provides as, " ***311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case.*** *Witnesses can be examined at any time, but he can not be permitted in order to fill up the lacuna in the prosecution case.*

5. In support of his contention, learned counsel for the applicant has placed the reliance of **Rajaram Prasad Yadav Vs. State of Bihar and another AIR 2013 SC 3081,** which is reproduced as under:

"while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by

it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice."

6. Learned counsel for the applicant has also place the reliance of **Md. Ghouseuddin Vs. Syed Riazul Hussain and another 2021 Supreme (SC) 858**,paragraph No. 5 of the judgement is quoted below:

"Having heard learned counsel for the parties and going through the record, we are of the considered opinion that even if the question as to the jurisdiction of the High Court need not be over-emphasized, the fact remains that the Trial Court had given sound and tangible reasons for rejecting the application for summoning of the document(s)- moved at such a belated stage and without any justification for such relief. The High Court has completely glossed over this aspect in the impugned judgment. The right to summon document(s) indeed, is available but that has to be exercised when the trial is in progress and not when the trial is completed, including after the statement of accused under section 313 of Cr.P.C. had been recorded. The efficacy of the trial can not be whittled down by such belated application."

7. Learned A.G.A. for the State as well as learned counsel for O.P. No. 2 state that as the section 311 Cr.P.C. provides that it is the satisfaction of the Court that he can recall any evidence at any time. There is no illegally or irregularity in the impugned orders, therefore, the same may not be quashed.

8. Considering the facts, circumstances of the case, submissions made by learned counsel for the applicant, learned A.G.A. and learned counsel for O.P. No. 2. The impugned orders suffer from illegality as it is only to delay the trial. The High School and Intermediate certificates are the most relevant documents for examining and ascertaining the age of the girl. Under such circumstances, the impugned orders dated 4.9.2021 passed by Special Judge (POCSO Act)/ Additional Sessions Judge, Ghaziabad as well as order dated 12.11.2021 passed by learned Addl. Sessions Judge (Rape and POCSO Act), Court No. 2, Ghaziabad are hereby quashed.

9. Accordingly, this application is allowed.

(2022)07ILR A498
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.05.2022

BEFORE

THE HON'BLE SYED AFTAB HUASAIN RIZVI, J.

Application U/S 482 No. 20081 of 2021

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

Counsel for the Applicant:
Sri Mohammad Sakir, Sri Pankaj Kumar Gupta

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Sections 482 & 128-challenge to –recovery warrant- for recovery of arrears the application is maintainable only to the extent of one year prior to the filing of application-the maintenance holder cannot be permitted to accumulate the maintenance for a period more than 12 months and as such no application for execution of maintenance order can be entertained for a period exceeding 12 months immediately preceding the date of application-no recovery warrant could have been issued against the applicant for recovery of arrears of maintenance which has become time barred-the impugned order is not sustainable and is liable to be set aside. (Para 1 to 8)

The application is allowed. (E-6)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the applicant, learned AGA for the State and perused the material on record.

2. This criminal misc. application U/s 482 Cr.P.C. is filed to quash the impugned order dated 05.08.2021 passed by Principal Judge Family Court, Bijnor in case no.868 of 2019 (Sudha Devi vs. Lav Kumar) under Section 128 Cr.P.C. By the impugned order, the learned court below has allowed the application U/s 128 Cr.P.C. filed by opposite party no.2 for recovery of arrears of Rs.36,000/- from 06.01.2011 to 06.01.2013 and consequently issued recovery warrant.

3. The opposite party no.2 instituted a proceeding under Section 125 Cr.P.C. for maintenance which was allowed on 19.01.2000 and Rs. 500/- per month maintenance allowance was granted in favour of the opposite party no.2. Later on she moved an application No.71 of 2005, under Section 127 Cr.P.C. for enhancement of maintenance and this application was allowed on 25.11.2009 and maintenance was enhanced from Rs. 500/- to Rs. 3000/- per month. Thereafter the opposite party no.2 moved an application no.14 of 2013 under Section 128 Cr.P.C. for recovery of arrears of maintenance from 06.01.2011 to 06.01.2013 i.e. 24 months @ Rs.3000/- per month total amounting to Rs. 72,000/- on 12.02.2013. Learned Magistrate after considering the entire evidence and material on record allowed this application in part for recovery of entire one year maintenance allowance of Rs.36,000/- and refused to recover the remaining 12 months arrears of Rs.36,000/- observing that it has become time barred. The opposite party no.2 again moved an application No.406 of 2014 U/s 128 Cr.P.C. for recovery of arrears of maintenance allowance from

06.01.2012 to 06.01.2013 i.e.12 months of Rs.36,000/- before the family court, Bijnor. This application was rejected by the Principal Judge, Family Court on the ground that earlier this point has been decided and no fresh order is required. Thereafter, the opposite party no.2 moved another application No.868 of 2019 on 25.10.2019 under Section 128 Cr.P.C. for recovery of balance amount of arrears of maintenance allowance from 06.01.2011 to 06.01.2013 of Rs. 36,000/- for 12 months. It is alleged in that application that earlier an application was moved for recovery of arrears from 06.01.2011 to 06.01.2013 for total amounting of Rs.72,000/- but the learned trial court has awarded only one years arrears maintenance amounting to Rs.36,000/-. Hence remaining arrears of maintenance for one year amounting to Rs. 36,000/- is still due from the applicant. The learned Principal Judge, Family Court by the impugned order has allowed the aforesaid application and has issued the recovery warrant for recovery of arrears of Rs.36,000/- against the applicant.

4. The contentions of learned counsel for the applicant are that the impugned order is apparently perverse, illegal, arbitrary and bad in the eye of law. The court concerned has earlier refused to recover the two years arrears of maintenance allowance observing that only one year arrears can be recovered and has refused to recover the arrears from 06.01.2011 to 06.01.2012. Recovery of Rs.36,000/- arrears from 06.01.2012 to 06.01.2013 has already been made. The opposite party no.2 moved another application for recovery of remaining amount of Rs. 36,000/- which was rejected on 11.12.2013. But the learned Principal Judge, Family Court on the subsequent application has reviewed the previous order and in illegal manner has allowed the application.

5. The learned AGA not disputed the aforesaid facts.

6. It is admitted fact that monthly maintenance of Rs.3000/- was granted in favour of opposite party no.2 on 25.11.2009. She moved an application for recovery of arrears from 06.01.2011 to 06.01.2013 for 24 months total amounting to Rs.72,000/- on 12.02.2013. This application was partly allowed for recovery of only one year arrears from 06.01.2012 to 06.01.2013 and it was also held that under provisions of law as the application has been moved on 12.02.2013 only one year of maintenance prior to the date of application can be recovered and the court issued recovery warrant for recovery of maintenance from 06.01.2012 to 06.01.2013 of Rs.36,000/- only. The second application moved by the opposite party no.2 was also rejected on the aforesaid ground. The opposite party no.2 thereafter moved a third application which has been allowed by the Principal Judge, Family Court.

Section 125 (3) Cr.P.C. provides as follows:

"If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's (allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be), remaining unpaid after the execution of the warrant, to imprisonment

for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due."

7. From the aforesaid provisions, it is clear that for recovery of arrears the application is maintainable only to the extent of one year prior to the filing of application. The maintenance holder cannot be permitted to accumulate the maintenance for a period more than 12 months and as such no application for execution of maintenance order can be entertained for a period exceeding 12 months immediately preceding the date of application.

8. Considering the aforesaid provision of law, the learned Magistrate vide his order dated 12.02.2015 has allowed the application in part only for recovery of arrears of maintenance for one year i.e. from 06.01.2012 to 06.01.2013 and Rs.36,000/- was recovered and the application was dismissed for recovery of arrears of maintenance from 06.01.2011 to 06.01.2012. The learned Principal Judge Family Court has failed to consider the legal provisions in this respect and has misinterpreted the previous orders and the law. The arrears of maintenance from 06.01.2011 to 06.01.2012 has become irrecoverable. So the impugned order suffers from manifest illegality, no recovery warrant could have been issued against the applicant for recovery of arrears of maintenance which has become time barred. The impugned order is not sustainable and is liable to be set aside.

9. Accordingly, the application is hereby ***allowed*** and the impugned order dated 05.08.2021 passed by Principal Judge, Family Court in case no.868 of 2019 *(Sudha Devi vs. Law Kumar*) under Section 128 Cr.P.C. is hereby quashed.

(2022)07ILR A500
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.07.2022

BEFORE

THE HON'BLE SYED AFTAB HUASAIN RIZVI, J.

Application U/S 482 No. 29733 of 2021

Anwar Ali ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Mohd. Raghib Ali, Sri Saghir Ahmad (Senior Adv.)

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code,1860-Sections 302, 397/34-rejection of default bail application-The Chief Judicial Magistrate awaited for second report submitted by APP and after receiving thereof, heard and rejected the default bail application, whereas the Chief Judicial Magistrate ought to heard and decide the default bail application on the basis of first report-The Chief Judicial Magistrate only in order to anyhow extinguish statutory/ fundamental right of the applicant for default bail has awaited for a second report, whereas the applicant had already availed the remedy and made out a case of default bail prior to the submission of the charge-sheet-Thus, the right of default bail of the applicant cannot be extinguished but even though the CJM denied the applicant, his

statutory as well as fundamental right as provided in Section 167(2) Cr.P.C. and Article 21 of the Constitution of India respectively-The impugned order is not sustainable in the eye of law-Subsequent filing of charge-sheet will not defeat the indefeasible right accrued to the applicant.(Para 1 to 11)

The application is allowed. (E-6)

List of Cases cited:

1. Pragyna Singh Thakur Vs St. of Mah. (2011) 10 SCC 445

2. Bikramjit Singh Vs St. of Punj. (2020) 10 SCC 616

3. M. Ravindran Vs The Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485

4. Rajendra Singh Yadav @ Raju Jahreela Vs St. of U.P., Crl.Misc. Appl. u/s 482 Cr.P.C. No. 10247 of 2021

5. Chhotu Vs St. of U.P. (2020) 5 ADJ 572

6. Harendra Vs St. of U.P. (2020) 5 LLJ 170

7. Gayasuddin @ Gayasuddin Mian Vs St. of Jharkhand (2005) Cr.LJ 4230

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the applicant and learned AGA for the State and perused the material on record.

2. This application U/s 482 Cr.P.C. is filed to quash/ set aside the order dated 25.11.2021 passed in connection with default bail application filed under Section 167(2) Cr.P.C. in case crime no. 327 of 2019 under Section 302, 397/34 IPC, P.S. Mauaima, District Prayagraj by the court of CJM Allahabad. It is further prayed that applicant be released on bail in the aforesaid case crime.

3. On 19.07.2019 at 13:40 hrs, an FIR was lodged by informant Naveen Kumar Jaiswal against three unknown motorcycle riders registered as case crime no.327 of 2019 under Section 397 and 302 IPC at P.S. Mauaima, Prayagraj with respect to the incident dated 19.07.2019 at 9:40 am with regard to loot and murder of Anil Dohre, Branch Manager, Allahabad Bank. During the course of investigation, the name of the applicant came into the light. He moved an application for surrender and on the basis of police report, the applicant surrendered on 26.08.2021 and taken into judicial custody and sent to jail.

4. Learned counsel for the applicant submitted that even after completion of 90 days on 24.11.2021 from the first date of judicial remand, the Investigating Officer has not filed a police report under Section 173(2) Cr.P.C. against the applicant. On 25.11.2021 at 10:00 am the applicant has applied for default bail under Section 167 (2) Cr.P.C. The Chief Judicial Magistrate passed an order and called a report from the Additional Public Prosecutor vide order dated 25.11.2021. In compliance of the aforesaid order, the Additional Public prosecutor submitted its report, thereafter he submitted another report before the Chief Judicial Magistrate, Allahabad. In the intervening time of two reports of the Additional Public Prosecutor, the Investigating Officer has enough time to submit a charge-sheet in the case against the applicant. The Chief Judicial Magistrate after receiving the copy of police report/ charge-sheet registered it as case no.13041 of 2021 and taken cognizance but the reference of the offence is not mentioned therein. So this cognizance order is illegal. The Chief Judicial Magistrate has authorized the detention of the applicant against the procedure established by law in

violation of Article 21 of the Constitution of India. On 25.11.2021, the Chief Judicial Magistrate after receiving the second report, submitted by Additional Public Prosecutor, heard and rejected the default bail application of the applicant-accused. Learned counsel further contended that till the filing of the default bail application and inasmuch as also the first report submitted by Additional Public Prosecutor, the Investigating Officer has not submitted the charge-sheet, whereas according to Section 167 (2) Cr.P.C. the prescribed time limit i.e. 90 days has already expired on 24.11.2021. The second report dated 25.11.2021 submitted by Additional Public Prosecutor reveals that the Investigating Officer was called to submit charge-sheet. The Chief Judicial Magistrate has awaited for second report submitted by Additional Public Prosecutor and after receiving thereof, heard and rejected the default bail application, whereas the Chief Judicial Magistrate ought to heard and decide the default bail application on the basis of first report dated 25.11.2021 submitted by Additional Public Prosecutor. The Chief Judicial Magistrate only in order to anyhow extinguish statutory/ fundamental right of the applicant for default bail has awaited for a second report, whereas the applicant has already availed the remedy and make out a case of default bail prior to the submission of the charge-sheet. Thus, the right of default bail of the applicant cannot be extinguished but even though the Chief Judicial Magistrate has denied the applicant, his statutory as well as fundamental right as provided in Section 167(2) Cr.P.C. and article 21 of the Constitution of India respectively. The impugned order dated 25.11.2021 is against the procedure established by law and is sans of merit and not sustainable in the eye of law. Applicant undertakes that if he is released on bail, he will neither abscond nor tamper the prosecution case and not misuse the liberty of bail and will abide by the terms and conditions if so imposed by the Court. It is also submitted that reliance placed upon the judgment in ***Pragyna Singh Thakur vs. State of Maharashtra (2011) 10SCC 445*** and Constitution Bench Judgment in Sanjay Dutt's case by learned Magistrate for rejecting the application for default bail is misconceived. The Pragyna Singh Thakur case has been observed as per incuriam by subsequent judgment of Hon'ble Supreme Court in ***Bikramjit Singh vs. State of Punjab 2020 (10) SCC 616***. Learned counsel placed reliance on the following citations:

I) Bikramjit Singh vs. State of Punjab, 2020 (10) SCC 616

ii) M. Ravindran vs. The Intelligence Officer, Directorate of Revenue intellegence, 2021 (2) SCC 485

iii) Criminal Misc. Application U/s 482 Cr.P.C. No.10247 of 2021 (Rajendra Singh Yadav alias Raju Jahreela vs. State of U.P.) decided on 15.11.2021

iv) Chhotu vs. State of U.P., 2020 (5) ADJ 572.

v) Harendra vs. State of U.P. 2020 (5) LLJ 170

vi) Gayasuddin alias Gayasuddin Mian vs. State of Jharkhand, 2005 (Cr.LJ 4230).

Learned counsel further submitted that an indefeasible right has accrued to the applicant. Charge-sheet has

been filed after moving of the bail application. Hence impugned order is perverse and against the law.

5. Learned AGA opposing the application submitted that impugned order is perfectly just and legal. Learned Magistrate ha not committed any illegality in rejecting the default bail application. The reasoning recorded by the learned Magistrate cannot be said to be illegal, perverse or erroneous which is based on a judgment in Pragyna Singh Thakur's case (Supra) and Constitution Bench Judgment of Sanjay Dutt's case. No jurisdictional error has been committed by the learned Magistrate in exercising his jurisdiction.

6. The provision of Section 167 (2) Cr.P.C. provides as follows:

"Section 167(2) in The Code Of Criminal Procedure, 1973

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-

(a) 1 the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c)no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police. 1 Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;]. 2 Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.]"

7. It is undisputed that accused has surrendered on 26.08.2020 and was remanded to judicial custody on the same

date while charge-sheet has been filed on 25.11.2021. A three Judge Bench in ***M. Ravindran (Supra)*** has observed that while computing the period of 90 days under Section 167(2) Cr.P.C. the date on which the accused was remanded to judicial custody has to be excluded and the date on which charge-sheet is filed has to be included. According to this period of 90 days will expire on 24.11.2021. The charge-sheet has been submitted on 25.11.2021. It is also established from the record that on 25.11.02021 before filing of charge-sheet, the accused-applicant has moved the bail application on which report was called by the learned Magistrate from the Public Prosecutor. He submitted his report. Thereafter a second report was submitted and meanwhile, charge-sheet was filed. So it is established that accused-applicant has availed his right of bail before filing of charge-sheet. It does not matter whether any order has been passed on the aforesaid application or not.

8. A three Judges Bench of Hon'ble Supreme Court in ***Bikramjit Singh Vs. State of Punjab, 2020 (10) SCC 616*** after considering almost the entire gamut of case law on the point including Sanjay Dutt (supra) has observed as follows in paragraphs- 27 to 31 and 36.

"27. The second vexed question which arises on the facts of this case is the question of grant of default bail. It has already been seen that once the maximum period for investigation of an offence is over, under the first proviso (a) to Section 167(2), the accused shall be released on bail, this being an indefeasible right granted by the Code. The extent of this indefeasible right has been the subject matter of a number of judgements. A beginning may be made with the judgment in Hitendra Vishnu Thakur v. State of Maharashtra (1994) 4 SCC 602, which spoke of "default bail" under the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA") read with Section 167 of the Code as follows:

"19. Section 20(4) of TADA makes Section 167 of Cr.P.C. applicable in relation to case involving an offence punishable under TADA, subject to the modifications specified therein...while clause (b) provided that reference in sub-section (2) of Section 167 to "15 days', "90 days' and "60 days' wherever they occur shall be construed as reference to "60 days', "one year' and "one year' respectively. This section was amended in 1993 by the Amendment Act 43 of 1993 with effect from 22-5-1993 and the period of "one year' and "one year' in clause (b) was reduced to "180 days' and "180 days' respectively, by modification of sub-section (2) of Section 167. After clause (b) of sub-section (4) of Section 20 of TADA, another clause (bb) was inserted which reads:

"20. (4)(bb) in sub-section (2), after the proviso, the following proviso shall be inserted, namely:--

"Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period up to one year, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; and'"

20. ... Sub-section (2) Section 167 of the Code lays down that the Magistrate to

whom the accused is forwarded may authorise his detention in such custody, as he may think fit, for a term specified in that section. The proviso to sub- section (2) fixes the outer limit within which the investigation must be completed and in case the same is not completed within the said prescribed period, the accused would acquire a right to seek to be released on bail and if he is prepared to and does furnish bail, the Magistrate shall release him on bail and such release shall be deemed to be grant of bail under Chapter XXXIII of the Code of Criminal Procedure...Section 167 read with Section 20(4) of TADA, thus, strictly speaking is not a provision for "grant of bail" but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge-sheet , if necessary, in the court. The proviso to Section 167(2) of the Code read with Section 20(4)(b) of TADA, therefore, creates an indefeasible right in an accused person on account of the "default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. It is for this reason that an order for release on bail under proviso (a) of Section 167(2) of the Code read with Section 20(4) of TADA is generally termed as an "order-on-default" as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period. As a consequence of the amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charged where the prosecution fails to put up challan against him on completion of the investigation. With the amendment of clause (b) of sub- section (4) of Section 20 read with the proviso to sub- section (2) of Section 167 of CrPC an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173 Cr.PC. An obligation, in such a case, is cast upon the court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by clause (bb) of Section 20(4). There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. (Hussainara Khatoon case. This legal position has been very ably stated in Aslam Babalal Desai v. State of Maharashtra where speaking for the majority, Ahmadi, J. referred with approval to the law laid down in Rajnikant Jivanlal Patel v. Intelligence Officer, Narcotic Control Bureau, New Delhi wherein it was held that :

'9. ... "13. ... The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds."

21. Thus, we find that once the period for filing the charge- sheet has expired and either no extension under clause (bb) has been granted by the Designated Court or the period of extension

has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20 TADA read with Section 167 of the Code and the Designated Court shall release him on bail, if the accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with Section 167 of the Code, the court must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the "default' of the investigating/prosecuting agency and once such an application is made, the court should issue a notice to the public prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the court under clause (bb) or that the challan has been filed in the Designated Court before the expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of "default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the "default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's "default'... No other condition like the gravity of the case, seriousness of the offence or character of the offender etc. can weigh with the court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20 TADA on account of the "default' of the prosecution."

28. In the Constitution Bench judgement in Sanjay Dutt v. State through CBI (1994) 5 SCC 410, one of the questions to be decided by the Constitution Bench was the correct interpretation of Section 20(4)(bb) of TADA indicating the nature of right of an accused to be released on default bail. The enigmatic expression "if already not availed of" is contained in paragraphs 48 of the aforesaid judgment as follows:

"48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time

to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order.

53. As a result of the above discussion, our answers to the three questions of law referred for our decision are as under:

(2)(b) The "indefeasible right" of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage."

29. The question as to whether default bail can be granted once a charge sheet is filed was authoritatively dealt with in a decision of a three-Judge Bench of this Court in Uday Mohanlal Acharya v. State of Maharashtra (2001) 5 SCC 453. The majority judgment of G.B. Pattanaik, J. reviewed the decisions of this Court and in particular the enigmatic expression "if already not availed of" in Sanjay Dutt. The Court then held :

"13....The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused

and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision of this Court in State of M.P. v. Rustam setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression "if already not availed of", used by the Constitution Bench in Sanjay Dutt. In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the statute-book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such,

could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail...But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our conclusions as follows:

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

6. The expression "if not already availed of" used by this Court in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

30. B.N. Agrawala, J. dissented, holding:

"29. My learned brother has referred to the expression "if not already availed of" referred to in the judgment in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] for arriving at Conclusion 6. According to me, the expression "availed of" does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression "availed of" does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised."

31. The law laid down by the majority judgment in this case was however not followed in Pragya Singh Thakur v. State of Maharashtra. This hiccup in the law was then cleared by the judgment in Union of India v. Nirala Yadav, which exhaustively discussed the entire case law on the subject. In this judgment, a Two-Judge Bench of this Court referred to all the relevant authorities on the subject including the majority judgment of Uday Mohanlal Acharya (supra) and then concluded:

"44. At this juncture, it is absolutely essential to delve into what were the precise principles stated in Uday Mohanlal Acharya case and how the two-Judge Bench has understood the same in Pragyna Singh Thakur. We have already reproduced the paragraphs in extenso from Uday Mohanlal Acharya case and the relevant paragraphs from Pragyna Singh Thakur. Pragyna Singh Thakur has drawn support from Rustam case to buttress the principle it has laid down though in Uday Mohanlal Acharya case the said decision has been held not to have stated the correct position of law and, therefore, the same could not have been placed reliance upon. The Division Bench in para 56 which has been reproduced hereinabove, has referred to para 13 and the conclusions of Uday Mohanlal Acharya case. We have already quoted from para 13 and the conclusions.

45. The opinion expressed in paras 54 and 58 in Pragyna Singh Thakur which we have emphasised, as it seems to us, runs counter to the principles stated in Uday Mohanlal Acharya which has been followed in Hassan Ali Khan and Sayed Mohd. Ahmad Kazmi. The decision in Sayed Mohd. Ahmad Kazmi case has been rendered by a three-Judge Bench. We may hasten to state, though in Pragyna Singh Thakur case the learned Judges have referred to Uday Mohanlal Acharya case but have stated the principle that even if an application for bail is filed on the ground that the charge- sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if the charge-sheet is filed the said right to be enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-Judge Bench decision in Mustaq Ahmed Mohammed Isak case. We are disposed to think so, as the two-Judge Bench has used the words "before consideration of the same and before being released on bail", the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.

46. At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in Uday Mohanlal Acharya case. The learned Judge dissented with the majority as far as interpretation of the expression "if not already availed of" by stating so:

"29. My learned Brother has referred to the expression "if not already availed of' referred to in the judgment in

Sanjay Dutt case for arriving at Conclusion 6. According to me, the expression "availed of' does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression "availed of' does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised."

On a careful reading of the aforesaid two paragraphs, we think, the two-Judge Bench in Pragyna Singh Thakur case has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is a binding precedent. That apart, it has been followed by a three- Judge Bench in Sayed Mohd. Ahmad Kazmi case. Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi case which is based on three-Judge Bench decision in Uday Mohanlal Acharya case, we are obliged to conclude and hold that the principle laid down in paras 54 and 58 of Pragyna Singh Thakur case (which has been emphasised by us: see paras 42 and 43 above) does not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be good law. Our view finds support from the decision in Union of India v. Arviva Industries India Ltd.

36. A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to default bail becomes complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the charge sheet is filed or disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted.

9. The judgment rendered in the case of Bikramjit Singh ***(Supra)*** had been followed in the subsequent three Judges Bench Judgment in the case of M Ravindran ***(Supra)***. The observations made in para 25.1 & 25.2 may be referred which is as follows:

"25.1 Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have

"availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2), CrPCread with Section 36A(4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

25.2 The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge-sheet or a report seeking extension of time by the prosecution before the Court; or filing of the charge-sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court. "

10. From the above discussion, it is clear that charge-sheet has been submitted after statutory period of 90 days and before filing of charge-sheet, the accused has moved application for bail. Subsequent filing of charge-sheet will not defeat the indefeasible right accrued to the applicant-accused. Learned Magistrate has failed to appreciate the facts and law on the point and order passed by learned Magistrate is against the law.

11. In view of above, present application succeeds and is hereby allowed. Accordingly, impugned order dated 25.11.2021 passed by Chief Judicial Magistrate, Prayagraj is hereby quashed. Application for default bail filed by applicant shall stand allowed. Accordingly, applicant shall be released on bail on his furnishing a personal bond and two sureties of like amount to the satisfaction of court concerned. However, in the interest of justice following conditions are also imposed.

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the date fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under section 229-A I.P.C.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under section 82 Cr.P.C., may be issued and if applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under section 174-A I.P.C.

(iv) The applicant shall remain present, in person, before the trial court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial

court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(2022)07ILR A513
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.07.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Bail Application No. 8561 of 2019

Kuldeep ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Mrs. Suniti Sachan, Divya Tripathi

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 439 - Indian Penal Code, 1860-Sections 498-A, 304-B & 302 - Dowry Prohibition Act, 1961-Section ¾-application-allowed-applicantremained in jail for 6 years yet trial not concluded-out of 18 prosecution witnesses only two were examined-wife of the applicant and the daughter were died-no criminal history - the role of accused is quite different from his father and mother-the applicant cannot seek parity - However, in the wake of heavy pendency of cases in the courts, there is no likelihood of any early conclusion of trial-Hence, the applicant is released on bail. (Para 1 to 18)

B. It was held by the Apex Court in numerous judgments that under-trials cannot indefinitely be detained pending trial. no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter-Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail.(Para 9)

The application is allowed. (E-6)

List of cases cited:

1. U.O.I. Vs K.A. Najeeb (2021) AIR SC 712

2. Paras Ram Vishnoi Vs The Director, CBI, CRLA No. 693 of 2021 (Arising out of SLP (Crl) No. 3610 of 2020

3. Gokarakonda Naga Saibaba Vs St. of Mah. (2018) 12 SCC 505

4. Kamal Vs St. of Har. (2004) 13 SCC 526

5. Takht Singh Vs St. of M.P. (2001) 10 SCC 463

6. Dataram Singh Vs St. of U.P. & anr. (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This case is taken up in the revised call.

2. Heard Ms. Divya Tripathi, learned counsel for the applicant, Sri Anirudha Singh, learned A.G.A.-I for the State and perused the record.

3. The applicant, Kuldeep, has moved this second bail application seeking bail in Case Crime No.189 of 2016, under Sections 498-A, 304-B, 302 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Achalganj, District Unnao.

4. The first bail application was rejected by Hon'ble Mr. Justice Karunesh Singh Pawar vide order dated 16.04.2019 passed in Criminal Misc. Case No. 3503 (B) of 2017. This second bail application

has been placed before this regular Bench in the light of Hon'ble The Chief Justice's order dated 20.10.2021 as the instant bail application has been released by Hon'ble Karunesh Singh Pawar, J.

5. While rejecting the first bail application on 16.04.2019, a co-ordinate Bench of this Court was pleased to observe as under:

"Heard learned counsel for the applicant, learned AGA for the State and perused the record.

The contention of the learned counsel for the applicant is that the applicant is falsely implicated in the present case. There was no demand of dowry made by the applicant from his wife. It is contended that there is no evidence to prove the said allegations made in the FIR regarding the demand of dowry and the cruelty that has been alleged in the FIR thus, the FIR is false. The postmortem report as well as the statement of witnesses does not supported the case of prosecution. The deceased has committed suicided as she was depressed and the applicant and his family members have no role in the alleged incident. There is no previous criminal history of the applicant. The applicant is in jail since August, 2016 and the applicant will not misuse the liberty if he is enlarged on bail. It is lastly contended that the co-accused mother and father of the applicant have been granted bail by this Court which is annexed as Annexure-5 to this bail application.

Learned counsel for the complainant and learned A.G.A. opposed the prayer for bail and has submitted that parity with the bail order of mother and father cannot be claimed by the present accused-applicant and their bail were granted on different ground which are not available to the present accused-applicant (husband). It is contended that there are antemortem injuries one bite mark and another is abraded contusion apart from ligature mark which has not been explained. It is a heinous offence, both the wife of the applicant and the daughter were died. In this case under Section 304B IPC, the burden of proof is on the accused-applicant. The applicant-accused has miserably failed to give any explanation of murder of both the deceased wife and minor daughter. The statement of Neetu Gupta, the complainant corroborates the prosecution story. The mother of the deceased has also corroborates the prosecution story.

The learned counsel for the applicant submitted that deceased family members i.e., Ritu (sister), Amit (brother), Ram Sevak (uncle) and Raja Ram (another uncle) had also committed sucide and Ram Swaroop (father) has also died due to heavy consumption of alcohol. Therefore, the deceased was having a family history of suicide.

In reply to this, the learned AGA has submitted that it has no co-relation with the present case and moreover the two persons have lost their life in this case i.e., one is deceased Rajani and another is her minor daughter Yashi.

Without expressing any opinion on the merits of the case and considering the submissions advanced, I find that no good ground is made out for enlarging the applicant on bail.

The bail application of the applicant Kuldeep involved in Case Crime

No. 189 of 2016, under Section 498A, 304B, 302 IPC and 3/4 Dowry Prohibition Act, Police Station Achalganj, District Unnao is, accordingly, rejected. "

6. Learned counsel for the applicant has submitted that three years period have been passed from the order dated 16.04.2019 but the trial has not been concluded.

7. Learned counsel for the applicant has submitted that she is conscious about the fact that this is the second bail application, therefore, she cannot raise those grounds which could have been taken in the first bail application but she is pressing the present application only on the ground that the applicant is in jail for about 6 years yet the trial has not been concluded.

8. Apart from above submissions, the learned counsel for the applicant also submits that applicant is in jail since 12.08.2016 and has already undergone a substantial period of about six years in jail and till date trial has not yet been concluded.

9. Learned counsel for the applicant further submits that in compliance of order dated 30.05.2022 passed by this Court, she has filed the supplementary affidavit dated 02.06.2022 which is on record and in para 5 of the supplementary affidavit filed in support of the bail application it has been mentioned that out of 18 prosecution witnesses only 02 prosecution witnesses have been examined and charge sheet has been filed on 01.10.2016 and further submits that it will take much time for conclusion of trial. Therefore, in the light of the dictum of the Hon'ble Apex Court in re; **Union of India vs. K.A. Najeeb reported in AIR 2021 Supreme Court 712 and Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation passed in Criminal Appeal No.693 of 2021 (Arising out of SLP (Crl) No.3610 of 2020),** wherein it has been held that if the accused person is in jail for substantially long period and there is no possibility to conclude the trial in near future, the bail application may be considered. Besides, learned counsel for the applicant has referred the dictum of the **Hon'ble Apex Court in re; Gokarakonda Naga Saibaba v. State of Maharashtra, (2018) 12 SCC 505**, wherein it has been held that if all fact / material witnesses have been examined, the bail application of the accused may be considered and they were entitled for bail. Para-16 of the case **K.A.Najeeb** (supra) is being reproduced here-in-below:-

"This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of

time, Courts would ordinarily be obligated to enlarge them on bail."

10. The Apex Court in the case of **Paras Ram Vishnoi** (supra) has observed as under:-

"On consideration of the matter, we are of the view that pending the trial we cannot keep a person in custody for an indefinite period of time and taking into consideration the period of custody and that the other accused are yet to lead defence evidence while the appellant has already stated he does not propose to lead any evidence, we are inclined to grant bail to the appellant on terms and conditions to the satisfaction of the trial court."

11. In support of her contention, learned counsel for the applicant has placed reliance of Hon'ble Apex Court judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

12. Learned counsel for the applicant has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463,** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

Learned counsel for the applicant further submits that ratio of law applicable in aforesaid cases is also applicable in the case of the applicant, therefore, the applicant be enlarged on bail by this Court sympathetically.

13. Several other submissions regarding legality and illegality of the allegations made in the F.I.R. have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused, have also been touched upon at

length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. The applicant undertakes that in case he is released on bail he will not misuse the liberty of bail and will cooperate in trial. It has also been pointed out that the applicant is not having any criminal history and he is in jail since 12.08.2016 and that in the wake of heavy pendency of cases in the courts, there is no likelihood of any early conclusion of trial.

14. Learned A.G.A. opposed the prayer for bail by submitting that applicant is involved in heinous crime and further submitted that in compliance of this Court's order dated 04.01.2022, a communication dated 12.01.2022 of Additional Sessions Judge, Court No.1, Unnao was received in the office and from perusal of the same, it transpires that only two prosecution witnesses were examined. The said letter is on record.

15. On being confronted on the point about the progress of trial and period of incarceration of the present applicant, learned Additional Government Advocate has submitted that this is being a matter of record, therefore, he has nothing to say.

16. After perusing the record in the light of the submissions made at the Bar and after taking an overall view of all the facts and circumstances of this case, at the very outset, this Court anguish towards the poor progress of trial, the trial must have been concluded by now and the learned trial court is having powers to take coercive method to conclude the trial and also armed with the provisions of Section 309 Cr.P.C., therefore, this Court is unable to comprehend as to how there is no good progress in the trial, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, and considering that applicant is in jail since 12.08.2016 and the trial has not yet been concluded and out of 18 witnesses only two witnesses have been examined as per the communication dated 12.01.2022 of the Additional Sessions Judge, Court No.1, Unnao and the averment made in para 5 of the supplementary affidavit by the applicant as well as considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the cases of **Dataram Singh vs. State of U.P. and another, reported in (2018) 3 SCC 22, Union of India vs. K.A. Najeeb reported in AIR 2021 Supreme Court 712** and **Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation** passed in **Criminal Appeal No.693 of 2021 (Arising out of SLP (Crl) No.3610 of 2020), Gokarakonda Naga Saibaba v. State of Maharashtra, (2018) 12 SCC 505, Kamal Vs. State of Haryana, 2004 (13) SCC 526 and Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463**, this Court is of the view that the applicant may be enlarged on bail.

17. The prayer for bail is granted. The application is **allowed.**

18. Let the applicant, **Kuldeep**, involved in Case Crime No.189 of 2016, under Sections 498-A, 304-B, 302 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Achalganj, District Unnao, be enlarged on bail on his executing a

personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(i) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(ii) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(iii) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(iv) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(v) In case, the applicant misuses the liberty of bail and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(vi) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

(vii) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(viii) 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.

19. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

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

21. Being a peculiar case, the trial court is directed to conclude the trial of this case preferably, within a period of six months from today without granting any unnecessary adjournment to either parties except there is any legal impediment or order of higher Court.

(2022)07ILR A518
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.07.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 13762 of 2021

Ashish Mishra @ Monu ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Brij Mohan Sahai, Sri Prabhu Ranjan Tripathi, Sri Salil Kumar Srivastava

Counsel for the Opposite Party:
G.A., Sri Ajai Kumar, Sri Amarjeet Singh Rakhra, Sri Shashank Singh, Sri Vivek Kumar Rai

A. Criminal Law - Code of Criminal Procedure, 1973-Section 439 - Indian Penal Code, 1860-Sections 147, 148, 149, 307, 326, 427, 34, 302 & 120-B - Arms Act, 1959 - Section 30 & Motor Vehicles Act,1988-Section 177-application-rejection- criminal conspiracy and murder-a traditional wrestling competition was organized, in which Deputy Chief Minister was Chief Guest-the Thar vehichle was registered in the name of the applicant and he was seen in the said vehicle recovered from the spot, although the applicant was not seen driving it-There were two FIRs lodged by witnesses having being threatened and the two witnesses assaulted despite protection provided by the State-statement of injured persons and other eye witnesses supported the prosecution story-in the said incident by the vehicle of the applicant and his followers, about eighteen protesters were crushed-The cross-version to the present case does not help the accused.(Para 1 to 94)

The application is rejected. (E-6)

List of Cases cited:

1. Upkar Singh Vs Ved Prakash & ors. (2004) 13 SCC 292

2. Padam Singh Vs St. of U.P. (2000) 1 SCC 621

3. Vijayee Singh Vs St. of U.P. (1990) 3 SCC 190

4. Nanha s/o Nabhan Kha Vs St. of U.P. (1992) SCC Online All 871

5. Sanjay Chandra Vs CBI (2012) 1 SCC 40

6. Mirza Akbar Vs Kind Emperor (1940) AIR Privy Council 176

7. Gurcharan Singh Vs St.(Delhi Admn.) (1978) 1 SCC 118

8. Satender Kumar Antil Vs CBI & anr., Misc. Appl. No. 1849 of 2021, (SLP Crl. No. 5191 of 2021)

9. P. Chidambaram Vs ED (2020) 13 SCC 791

10. Alister Anthony Pareira Vs St. of Mah. (2012) AIR SC 3802

11. Kanwar Singh Meena Vs St. of Raj.(2012) 12 SCC 180

12. Prasanta Kumar Sarkar Vs Ashis Chatterjee & anr. (2010) 14 SCC 496

13. Mahipal Vs Rajesh Kumar @ Polia & anr.(2020) 2 SCC 118

14. Shahzad Hasan Khan Vs Ishtiaq Hasan Khan & anr.(1987) 2 SCC 684

15. Ramesh Bhavan Rathod Vs Vishanbhai Hirabhai Makwana (Koli) & ors.. (2021) 6 SCALE 41

16. Saibal Kumar Gupta & ors.. Vs B.K. Sen & anr. (1961) 3 SCR 460

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri G.S. Chaturvedi, learned Senior Counsel, connected through Video Conferencing, assisted by Sri Salil Kumar Srivastava, Sri B.M. Sahai, Sri Prabhu Ranjan Tripathi and Sri Rahul Srivastava, learned Advocates for the applicant and Sri Amarjeet Singh Rakhra, learned counsel assisted by Sri Shashank Singh, Sri Vivek Rai and Ms. Anumita Chandra, learned Advocates appearing for one of the victims, Jagjeet Singh as well as Sri Vinod Kumar Shahi, learned Additional Advocate General, assisted by Sri Prachish Pandey, learned AGA for the State.

2. Applicant seeks bail in Case Crime No. 219 of 2021, under Sections 147, 148,

149, 307, 326, 427, 34, 302, 120-B IPC, Section 30 Arms Act, 1959 and Section 177 Motor Vehicles Act, 1988, Police Station Tikuniya, District Lakhimpur Kheri, during the pendency of trial.

3. The counter affidavits filed on behalf of the victim as well as the State and the rejoinder affidavits are already on record. The written submissions filed by the parties at the conclusion of arguments are also taken on record.

4 . For the sake of brevity, the prosecution story is not being repeated here, as the same is already discussed in earlier orders.

RIVAL CONTENTIONS :

ARGUMENTS ON BEHALF OF THE APPLICANT:

5. Sri Gopal Chaturvedi, learned Senior Counsel has submitted that applicant has been falsely implicated in present case. He has further submitted that in the ancestral village of applicant i.e. Banveerpur, a traditional wrestling competition is organized annually. As such on 3.10.2021, a public meeting was also organized in the wrestling competition, in which the Deputy Chief Minister, Mr. Keshav Prasad Maurya, was the Chief Guest. Learned Senior Counsel has categorically stated that in the name of farmers, some leaders of the opposition parties, in association with anti-social elements, decided to protest the visit of the Chief Guest in village, Banveerpur, against a statement made by the father of applicant, namely, Ajay Mishra "Teny", regarding protest of the farmers in relation to the three Agricultural Laws. It is stated that the helicopter of the Chief Guest was to be landed at Maharaja Agrasen Play Ground Helipad, Tikuniya and thereafter, the Chief Guest had to proceed by road to the place of wrestling competition. However, without any permission, a number of protesters, who were armed with lathis, swords etc., gathered there along with notorious persons and encroached the entire area and even dug up the helipad, making it impossible to land the helicopter there. He has further stated that the description of the incident as narrated in the F.I.R. is false, rather three persons including the driver of the vehicle of applicant were killed by the protesters and no such incident, as alleged in the F.I.R., had taken place.

6. Learned Senior Counsel has further submitted that on being chased by the protesters, the driver of the vehicle tried to run away from there in order to save himself as well as the applicant, but since the road, which was only 12 ft. wide, and on which, admittedly (in the F.IR. itself) the protesters were standing on both sides of the road, the vehicle overturned and fell into the ditch on the side of the road. He has next submitted that one F.I.R. No. 220 of 2021, u/s 143, 147, 148, 149, 323, 324, 336, 302, 109 I.P.C., P.S. Tikuniya, District Kheri, was also lodged by one Sumit Jaiswal stating therein that on 3.10.2021, a wrestling competition was scheduled to be held at the village of Ajay Mishra "Teny", in which Deputy Chief Minister, Mr. Keshav Prasad Maurya, Government of U.P. was the Chief Guest. It is alleged in the F.I.R. that the informant, along with other persons, went to receive the Chief Guest. The informant was in the Thar vehicle, which was being driven by one Hari Om Mishra. However, on the way, the protesters attacked the vehicles, in which the driver of the Thar vehicle, namely, Hari Om Mishra received head injury and he

stopped the vehicle on the side of the road. Thereafter, the driver was dragged from the vehicle by the protesters. The informant and others somehow succeeded to run away from the spot to save their lives, but the driver, Hari Om Mishra and two others were not so lucky and were caught by the protesters and later on, as per information, were killed by them. There being a cross version of the present case, the applicant is entitled for bail.

7. Learned Senior Counsel has also vehemently pointed out that Crime No. 220/2021 lodged from the accused side is a sort of cross version on the ground that both the sides have sustained injuries including the death of eight persons and the lodging of subsequent FIR by way of cross version is permissible under law on the basis of Full Bench judgment of Supreme Court in the case of ***Upkar Singh vs. Ved Prakash & others1,*** and as such the present bail application is sought to be decided on the basis of evidence of both the cases arising out of same transaction relating to the same occurrence at the same point of time and same place as propounded by Full Bench judgment of Supreme Court and the contents of paras 23 & 24 of the aforesaid judgment of three Judges is being quoted below:

"23. Be that as it may, if the law laid down by this Court in T.T. Antony case is to be accepted as holding that a second complaint in regard to the same incident filed as a counter-complaint is prohibited under the Code then, in our opinion, such conclusion would lead to serious consequences. This will be clear from the hypothetical example given hereinbelow i.e. if in regard to a crime committed by the real accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question, consequently he will be deprived of his legitimated right to bring the real accused to books. This cannot be the purport of the Code.

24. We have already noticed that in the T.T. Antony case this Court did not consider the legal right of an aggrieved person to file counterclaim, on the contrary from the observations found in the said judgment it clearly indicates that filing a counter-complaint is permissible."

8. Sri Gopal Chaturvedi, learned Senior Counsel, has argued that a false and concocted story of firing has been cooked up by the prosecution. As per the FIR itself, after the said incident, the applicant is stated to have run away firing as a cover, but admittedly there is no such firearm injury sustained by any of the deceased person or injured person either. Learned Senior Counsel, to buttress his arguments, has placed much reliance on the autopsy report of deceased farmers, wherein not a single firearm injury has been observed by the doctor. During the course of investigation, the statement of the doctor, who conducted the autopsy of the deceased farmers, was recorded under Section 161 Cr.P.C., in which, he has opined that all these injuries may have been caused in an accident. Learned Senior Counsel has also submitted that the protesters brutally killed three persons, namely, Hari Om Mishra, Shubham Mishra and Shyam Sunder, who were traveling in the ill-fated Thar vehicle. He has further submitted that the applicant was called during the course of investigation and he joined and cooperated

in the investigation and never misused the liberty given by the Investigating Agency.

9. Regarding the criminal history of the applicant, learned Senior Counsel has submitted that in Case Crime No. 92 of 2005, u/s 147, 323, 504, 506, 452 I.P.C., P.S. Tikuniya, District Kheri, the applicant has been acquitted by the trial court vide judgment and order dated 24.03.2018 passed in Criminal Case No. 1497 of 2017 (State Vs. Ashish Mishra @ Monu). A copy of the judgment and order dated 24.03.2018 is on record. The applicant has no other case pending against him. The other case was withdrawn by the State.

10. Learned Senior Counsel has submitted that as per the admitted case of the prosecution, the Thar vehicle was being driven by Hari Om Mishra, and the applicant was sitting on the left side, therefore, the case of prosecution of crushing the protesters by the applicant is improbable.

11. Learned Senior Counsel for the applicant has submitted that the applicant went to jail on 10.10.2021, and was released on 15.2.2022. He surrendered in compliance of the order of the Apex Court on 24.4.2022 and is in jail since then. He has complied with the order of the Apex Court and has even cooperated in investigation. The charge-sheet has already been filed and the applicant is ready to cooperate in the trial and there is no likelihood of him misusing the liberty, in case, he is enlarged on bail.

12. Learned Senior Counsel has further stated that the applicant was enlarged on bail by this Court vide order dated 10.2.2022 (corrected vide order dated 14.2.2022). The Supreme Court has not rejected the bail application. Rather, it has remanded it back for consideration on the ground that the victim has not been heard. The said order shall not affect the merits of the case as the case of the applicant for bail is clearly made out.

13. Learned Senior counsel has stated that as per paragraph 43 of the order of the Supreme Court, the case has been remanded back to the High Court for fresh adjudication in a fair, impartial and dispassionate manner. Paragraph 43 of the said order reads as follows :-

"43. This Court is tasked with ensuring that neither the right of an accused to seek bail pending trial is expropriated, nor the "victim' or the State are denuded of their right to oppose such a prayer. In a situation like this, and with a view to balance the competing rights, this Court has been invariably remanding the matter(s) back to the High Court for a fresh consideration. We are also of the considered view that ends of justice would be adequately met by remitting this case to the High Court for a fresh adjudication of the bail application of the Respondent-Accused, in a fair, impartial and dispassionate manner, and keeping in view the settled parameters which have been elaborated in paragraphs 30 & 31 of this order."

14. Learned Senior Counsel has further referred to paragraph 46 of the order of Supreme Court, wherein no opinion has been expressed on the facts or merits and all questions of law have been left open for this Court to consider and decide preferably within a period of three months. Paragraph 46 of the said order reads as follows :-

"46. We set aside the impugned order dated 10.02.2022 (corrected on

14.2.2022) and remit the matter back to the High Court. Respondent No.1 shall surrender and be taken into custody as already directed in paragraph 39 above. We have not expressed any opinion either on facts or merits, and all questions of law are left open for the High Court to consider and decide. The High Court shall decide the bail application afresh expeditiously, and preferably within a period of three months. The appeal is disposed of in the above terms."

15. Learned Senior Counsel has stated that the bail applications of the co-accused persons, Lavkush, Ankit Das, Sumit Jaiswal and Shishupal, which have been rejected by this Court vide order dated 9.5.2022, passed in Criminal Misc. Bail Application Nos. 2986 of 2022, 1853 of 2022, 2461 of 2022 and 2699 of 2022, shall have no bearing on the case of the applicant, as he was not a party in personam in the case decided by the co-ordinate Bench of this Court.

16. Learned Senior Counsel has further stated that the prosecution has not come with clean hands as the case was later on modified from being that of gunshot injuries to that of injuries due to crushing by vehicles. The applicant was admittedly not driving the said Thar vehicle, rather was sitting by the side of the driver, and it was the driver, who might have panicked due to rage of the public at large. The case is of mob lynching and there was so hue and cry at the place of occurrence that there was no chance of anybody hearing the applicant saying *"teach them a lesson.*"

17. Counsel for the applicant, Sri B.M. Sahai, has stated that the applicant has not abused the bail and has complied with the conditions thereof, when he was accorded bail. He should again be enlarged on bail. The police has filled up the lacuna in the prosecution case by roping in the new witnesses. There is no possibility of applicant daring to commit such an offence, who happened to be a political person, as there is no possibility of three vehicles crushing 15,000 persons, who are said to have gathered at the place of occurrence.

18. Learned counsel has further stated that the provisions of Section 144 Cr.P.C. were applicable to the agitating farmers as well and they have categorically flouted the proclamation under Section 144 Cr.P.C., as they are stated to have even dug up the helipad meant for the landing of the helicopter of the Deputy Chief Minister, making it non-functional. The procession by any means cannot be termed as peaceful.

19. Learned counsel has further stated that initially at the time of lodging of the FIR, Sections 279, 338 and 304-A IPC were mentioned, but the same have been deleted later on by the investigating agency with the permission of the C.J.M. concerned. This implies that the vehicles were being driven at a normal speed.

20. Learned counsel has further placed reliance on para 40 of the remand order dated 18.4.2022, passed by the Apex Court, wherein it has been observed as follows:-

"40. ..... regardless of the stringent provisions in a penal law or the gravity of the offence, has time and again recognized the legitimacy of seeking liberty from incarceration. To put it differently, no accused can be subjected to unending detention pending trial, especially when the law presumes him to be innocent until

proven guilty. Even where statutory provisions expressly bar the grant of bail, such as in cases under the Unlawful Activities (Prevention) Act, 1967, this Court has expressly ruled that after a reasonably long period of incarceration, or for any other valid reason, such stringent provisions will melt down, and cannot be measured over and above the right of liberty guaranteed under Article 21 of the Constitution. (See Union of India v. K.A. Najeeb, (2021) 3 SCC 713)."

21. Learned counsel has further stated that in paragraph 28 of the order of the Apex Court, it has been propounded that the grant of bail under Section 439 Cr.P.C. is one of wide amplitude and this discretion is unfettered. On the contrary, the High Court or the Sessions Court must grant bail after the application of a judicial mind, following well-established principles, and not in a cryptic or mechanical manner.

22. Sri Salil Kumar Srivastava, learned counsel arguing on behalf of the applicant, has stated that the capturing of helipad in order to show protest is itself an offence, which is established by the statements of the witnesses, which have been annexed to the counter affidavit filed on behalf of the victim. This shows the malice at the part of the protestors.

23. Learned counsel has further stated that one Punto car from the side of the applicant was ransacked by the protesters with an ulterior motive, which goes to show their defiance of law.

24. Learned counsel has next stated that the statement recorded under Section 164 Cr.P.C. of one witness, namely, Prabhujeet Singh categorically indicates that he had seen one Satish Rana running away from the Thar vehicle and later on, he is said to have seen Sumit Jaiswal running from the said vehicle firing in air. The said statement is on page number 164 of the counter affidavit filed by the victim/complainant, indicating the absence of applicant at the scene of occurrence.

25. Sri Salil Kumar Srivastava, learned counsel, has further stated that the district administration has provided one gunner each to all the ninety-eight witnesses and moreover, their family members are being provided proper security and a coverage of CCTV cameras alongwith a barrier on the road to their residence and thus, there is no possibility of any person hampering or tampering with the prosecution witnesses.

26. Learned counsel for applicant has further stated that in the statement of another witness, namely, Simranjeet Singh, recorded under Section 164 Cr.P.C., copy whereof has been filed in the rejoinder affidavit, it has been stated that the applicant and the co-accused person, Sumit Jaiswal are said to have taken the refuge in a sugarcane field after firing in air.

27. Learned counsel has placed much reliance on the site plan, wherein no sugarcane field finds mention. The said discrepancy categorically falsifies the prosecution story that applicant had alighted from Thar vehicle after firing and had taken shelter in the sugarcane field.

28. Sri Salil Kumar Srivastava, learned counsel, has further stated that from the side of the applicant, three persons were put to death and three had sustained grievous injuries including fractures, which have not been explained by the prosecution. The said non-explanation of the injuries

caused is fatal to the prosecution and the applicant is entitled for bail on this ground. Learned counsel has placed reliance on the judgement of the Supreme Court in ***Padam Singh vs. State of U.P.2,*** wherein it has been held that:-

"5. ....when the prosecution does not explain the injury sustained by the accused at about the time of the occurrence or in the course of occurrence, the court can draw the inference that the prosecution has suppressed the genesis and origin of the occurrence and has thus, not presented the true version. It is also well settled that where the evidence consists of interested or inimical witnesses, then, non-explanation of the injury on the accused by the prosecution assume greater importance....."

29. Learned counsel has placed much reliance on the judgement of the Supreme Court passed in ***Vijayee Singh vs. State of U.P3.***, which is quoted below:
10. It was further observed that:

"... in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable.

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

30. Learned counsel has next stated that it is undisputed fact that in the charge sheet, after filing of the bail application, new sections were added and a correction/amendment application was moved in this Court which was allowed vide order dated 18.1.2022 and the sections so mentioned in the charge sheet were amended in the memo of the bail application, which has already been undertaken in the original memo of the bail application. Pursuant thereto, Sections 279/338/304A IPC were deleted and Sections 307/326/427/34 IPC, Section 30 Arms Act and Section 177 Motor Vehicles Act, 1988 were added.

31. Learned counsel has further argued that the FIR is the foundation stone of the offence and the story as narrated in it, has been later on completely changed by the prosecution, which itself is indicative of false implication. It is not a case of improvement or embellishment, rather a case of turning the case upside down.

32. Learned counsel has further stated that right of the private defence as contemplated under Section 97/103 IPC is available to the accused side as even according to the prosecution case, the three persons sitting in Thar vehicle were murdered and three others are stated to have sustained grievous injuries. There was no possibility of applicant being present there and escaping.

33. Learned counsel has next stated that the investigating agency inspected the place of occurrence and also reconstructed/re-created the alleged occurrence and in the inspection report of

recreation, it has been mentioned that at the time of occurrence, the Thar vehicle was running at a normal speed from the place of meeting i.e. Maharaja Agrasen Inter College ground upto 98 meters approximately, till turning to Kalesharan and thereafter, due to some reason, the speed of Thar vehicle was increased from its normal speed. It is also submitted that while reconstructing the alleged occurrence, the inspection team installed the dummy of farmers at both sides of the road and the dummy Thar vehicle alongwith two other dummies of Fortuner and Scorpio vehicles by running with normal speed upto 98 meters approximately, from Maharaja Agrasen Inter College were collided with the dummies of farmers after increasing the speed of the vehicles, which corroborates the factum of loosing of mental equilibrium of the driver of Thar vehicle, Hari Om Mishra, who has been murdered by the complainant side.

34. Learned counsel has further stated that the story set up by the prosecution is false as the ballistics expert report of the weapons seized from the applicant side does not support the same.

35. Learned counsel has placed reliance on the call detail report (CDR) which reveals that the mobile no. 9721258797 of the applicant Ashish Mishra @ Monu was attended 25 times within a span of 40 minutes between 2.48 pm and 3.28 pm on 3.10.2021, and the location report of the said mobile reveals his presence at the same place throughout the day. Thus, the plea of alibi of the applicant of having been present at the place of dangal finds support from the CDR and location report available. The said fact finds support from the statement of a considerable number of witnesses, who have filed their notarial affidavits and submitted through registered posts demonstrating that the applicant was not present at the place of occurrence but rather, he was present at the place of dangal. The SIT has deliberately not recorded their statements under Section 161 Cr.P.C.

36. Learned counsel has further stated that the charge-sheet under Sections 188 and 143 IPC has also been filed against the protesters indicative of their malice having formed unlawful assembly, disobeying the order duly promulgated by the public servant.

37. Learned counsel has submitted that in the present subject matter, charge sheet has been filed under Sections 34, 149 and 120-B IPC which is against the principles of constructive criminality. It was the complainant side, which was aggressor and not the applicant. The three accused persons in the cross FIR are in jail. Much reliance has been placed on para 60 of the judgement of Allahabad High Court in ***Nanha S/o Nabhan Kha vs. State of U.P.4***, which reads as under:

"60. As regards the second part of the referred question whether it is duty of the co-accused to disclose in his bail application the fact that on an earlier occasion the bail application of another co-accused in the same case has been rejected. The prior rejection of the bail application of one of the accused cannot preclude the court from granting bail to another accused whose case has not been considered at the earlier occasion. The accused who comes up with the prayer for bail and who had no opportunity of being heard or placing material before the Court at the time when

the bail of another accused was heard and rejected, cannot be prejudiced in any other manner by such rejection."

38. Learned counsel has further placed reliance on the judgment of Supreme Court in ***Sanjay Chandra vs. Central Bureau of Investigation5,*** which reads as under:

"18. In his reply, Shri. Jethmalani would submit that as the presumption of innocence is the privilege of every accused, there is also a presumption that the appellants would not tamper with the witnesses if they are enlarged on bail, especially in the facts of the case, where the appellants have cooperated with the investigation. In recapitulating his submissions, the learned senior counsel contended that there are two principles for the grant of bail - firstly, if there is no prima facie case, and secondly, even if there is a prima facie case, if there is no reasonable apprehension of tampering with the witnesses or evidence or absconding from the trial, the accused are entitled to grant of bail pending trial. He would submit that since both the conditions are satisfied in this case, the appellants should be granted bail.

.....

21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.

.....

39. Coming back to the facts of the present case, both the Courts have refused the request for grant of bail on two grounds: The primary ground is that the offence alleged against the accused persons is very serious involving deep rooted planning in which, huge financial loss is

caused to the State exchequer ; the secondary ground is that the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.

40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

41. This Court in Gurcharan Singh v.. State (Delhi Admn.)6, observed that two paramount considerations, while considering petition for grant of bail in a non-bailable offence, apart from the seriousness of the offence, are the likelihood of the accused fleeing from justice and his tampering with the prosecution witnesses. Both of them relate to ensure the fair trial of the case. Though, this aspect is dealt by the High Court in its impugned order, in our view, the same is not convincing.

42. When the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. Every person, detained or arrested, is entitled to speedy trial, the question is: whether the same is possible in the present case."

39. Learned counsel has also referred the judgment of Privy Council in ***Mirza Akbar vs. Kind Emperor7,*** which reads thus:

"This being the principle, their Lordships think the words of Sec. 10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships' judgment, the words "common intention" signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the

conspirators to which the statement can have reference. In their Lordships' judgment Sec. 10 embodies this principle. That is the construction which has been rightly applied to Sec. 10 in decisions in India, for instance, in Emperor v. Ganesh Raghunath, I.L.R. 55 Bom. 839 (1931) and Emperor v. Abani I.L.R. 38 Cal. 169. In these cases the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of the conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past."

40. Learned counsel has referred to the judgment of the Supreme Court in ***Satender Kumar Antil vs. Central Bureauu of Investigation & another8***, which reads thus:

"66. What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in the case of P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791, after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence. After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis..."

41. He has also placed reliance on the case law of ***P. Chidambaram v. Directorate of Enforcement9,*** which reads as under:-

"23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle.

But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.

CONTENTIONS OF THE VICTIM/COMPLAINANT:

42. Learned counsel for the victim/complainant, Sri Amarjeet Rakhra, at the outset, has vehemently opposed the prayer for bail of the applicant on the ground that the bail rejection order of the applicant at the Court of Sessions does not include all the sections, wherein the bail is being sought by the applicant from this Court. The bail application in the added sections i.e. 307, 326, 427, 34 IPC, 30 Arms Act and 177 Motor Vehicles Act, 1988, has been directly moved before the High Court without taking recourse to the Sessions Court, Kheri, which is not permissible under law.

43. Learned counsel has further stated that applicant is the mastermind of the crime and is the main accused person to whom the lead role has been assigned. He is the only named accused person in the FIR, who is alleged to have been involved in the gruesome and cold-blooded murder of five innocent, unarmed persons. The bail application of four co-accused persons, who were not named in the FIR and whose role was of assisting, aiding and conspiring with the applicant in the commission of the said offence, have already been rejected by a detailed and reasoned order of this Court dated 9.5.2022 passed in Criminal Misc. Bail Application Nos. 2986 of 2022, 1853 of 2022, 2461 of 2022 and 2699 of 2022.

44. Learned counsel has next stated that as far as rejection of bail is concerned, there may not strictly be parity, yet propriety and consistency in judicial approach demands that this Court may reject the bail application of the applicant, Ashish Mishra @ Monu, whose role in the commission of crime is much more prominent than of the co-accused persons, whose bail applications have been rejected.

45. Learned counsel has further argued that the applicant, who is the son of Union Minister of State For Home, and who himself is a political person, was a contender on BJP ticket from Nighasen Constituency for Uttar Pradesh Assembly Elections held in the year 2022. The applicant has a criminal history of two more cases in addition to the present case. Learned counsel has stated that the power, the applicant yields, can be appreciated from the fact that in one of the cases, the applicant has been acquitted, while the other case has been withdrawn by the State Government. The character, behavior, means, position and standing of the accused, when viewed in juxtaposition of crime in question, is such that releasing him on bail would result in justice being thwarted.

46. Learned counsel, Sri Rakhra has further stated that appreciating the fact that free and fair investigation was not possible due to the status and profile of the applicant and sensing the seriousness of the offence committed by him, none other than the Apex Court had constituted a Special Investigation Team (SIT) of five senior police officers and the said team was headed by a retired Judge of Punjab and Haryana High Court.

47. Learned counsel for the victim has further stated that in addition to this, notwithstanding the powers of the trial court in this regard, the Apex Court, while

sensing the gravity of the situation, had directed the State Government to provide security/armed gunners to the prosecution witnesses in the present case and it was also directed that the statements of the witnesses under Section 164 Cr.P.C. may be recorded by the Magistrate, to prevent the possibility of the witnesses being pressurized, threatened or won over by the accused.

48. Learned counsel has next stated that despite the protection provided to the witnesses, two of them, namely, Diljyot Singh and Hardeep Singh have been assaulted and threatened by the associates and supporters of the applicant warning them to dare depose against the applicant. A copy of the FIR No. 46 of 2022, P.S.- Tikuniya, District- Kheri, lodged on 11.3.2022 and FIR No. 126 of 2022 lodged on 11.4.2022 at P.S.- Bilaspur, District- Rampur, have also been annexed to the counter affidavit, which indicates that the release of the applicant shall lead to witnesses being won over by him.

49. Learned counsel has next stated that gravity of the offence and the severity of the punishment in the event of conviction are also the relevant factors, which weigh heavily against the relief of bail being granted to the applicant.

50. The applicant alongwith his associates has been charge-sheeted for causing a premeditated and cold-blooded murder of as many as five persons (four farmers and one journalist) and injuring thirteen other persons. The offence committed by applicant includes murder, which is punishable with death or imprisonment for life.

51. Learned counsel has contended that there are other injured witnesses, who have given the statement that the applicant was the inmate of the Thar vehicle that had deliberately run over them with an intention to cause their death and the inmates are said to have been seen and heard exhorting to kill the farmers. The witnesses had seen the applicant getting off from Thar vehicle and running towards the fields under the cover of his own firing. Learned counsel has placed reliance on the statements of several witnesses recorded under Section 164 Cr.P.C. to the effect. Learned counsel has referred to the call detail record (CDR) of the applicant, wherein he is said to have made extra judicial confession. Learned counsel has referred the statements of witnesses, namely, Taufeek Ahmad, Arun Kumar Gupta and Yasin Mohammad in support of the said contention. Learned counsel has also referred the statements of independent witnesses, the photographer and the police officials, who have stated that the applicant was missing from the site of wrestling competition at the time of offence thereby negating his plea of alibi.

52. Learned counsel has further stated that the motive to commit crime is also proved and the applicant had full knowledge of the fact that the road route from which the Chief Guest was to travel, had been altered and yet the applicant, in a premeditated and cold-blooded manner, went on the route of the retrieving farmers running at a high speed with a view to teach them a lesson and ran them over from behind.

53. Learned counsel has also stated that the FSL report conclusively establishes the fact that the fire arms (pistol and rifle) of the applicant were used, thus corroborating the statement of the eye witnesses.

54. Learned counsel has stated that the prosecution allegations are further substantiated by the CCTV camera footages/DVR suggesting that on the date of incident i.e. 3.10.2021, the three vehicles (carrying the applicant and other co-accused persons) headed to the place of incident, with other miscreants/assailants clinging to them.

55. Learned counsel has stated that there are other video clips to prove that the unarmed farmers, who were running to their homes, were trampled and crushed under the wheels of the Thar vehicle and the other two vehicles, namely, Fortuner and Scorpio, coming from behind.

56. Learned counsel for the victim/complainant has stated that the arguments tendered by the counsels for the applicant such as inconsistency of the injuries sustained by the deceased with the version of the FIR are not tenable, the fact is that the charge sheet having already been filed and the circumstance has already been dealt with by the Apex Court at the time of setting aside the bail granted to the applicant.

57. Learned counsel has further stated that the police officers and the district authorities to name a few, Awdhesh Kumar Yadav, Vishambher Yadav, SDM Swati Shukla, have categorically stated that the three vehicles in question were being driven at a high speed and despite their efforts to stop them, the vehicles in question drove past them and crushed the innocent farmers. There are statements of twenty witnesses, who have testified that they saw the applicant in the Thar jeep running over the farmers.

58. Learned counsel has further submitted that eight witnesses have stated before SIT that they saw and heard the applicant abetting and asking the driver of the Thar vehicle to kill the protestors by crushing them.

59. Learned counsel has stated that the said vehicles have been used as a weapon in view of the settled case law of the Supreme Court referred in the order of the Supreme Court. The ratio of this case is applicable to the present case. Para 45 of the judgement of the Supreme Court in the case of ***Alister Anthony Pareira vs. State of Maharashtra10,*** reads hereinunder:-

"45. In Prabhakaran v. State of Kerala, 2007 (14) SCC 269, this Court was concerned with the appeal filed by a convict who was found guilty of the offence punishable under Section 304 Part II IPC. In that case, the bus driven by the convict ran over a boy aged 10 years. The prosecution case was that the bus was being driven by the Appellant therein at the enormous speed and although the passengers had cautioned the driver to stop as they had seen children crossing the road in a queue, the driver ran over the student on his head. It was alleged that the driver had real intention to cause death of persons to whom harm may be caused on the bus hitting them. He was charged with offence punishable under Section 302 IPC. The Trial Court found that no intention had been proved in the case but at the same time the accused acted with the knowledge that it was likely to cause death, and, therefore, convicted the accused of culpable homicide not amounting to murder punishable under Section 304 Part II IPC and sentenced him to undergo rigorous imprisonment for five years and pay a fine of Rs.15,000/- with a default sentence of imprisonment for three years. The High Court dismissed the appeal and the matter reached this Court.

46. While observing that Section 304A speaks of causing death by negligence and applies to rash and negligent acts and does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death and that Section 304A only applies to cases in which without any such intention or knowledge death is caused by a rash and negligent act, on the factual scenario of the case, it was held in Prabhakaran case that the appropriate conviction would be under Section 304 IPC and not Section 304 Part II IPC. Prabhakaran does not say in absolute terms that in no case of an automobile accident that results in death of a person due to rash and negligent act of the driver, the conviction can be maintained for the offence under Section 304 Part II Indian Penal Code even if such act (rash or negligent) was done with the knowledge that by such act of his, death was likely to be caused. Prabhakaran turned on its own facts.

47. Each case obviously has to be decided on its own facts. In a case where negligence or rashness is the cause of death and nothing more, Section 304A may be attracted but where the rash or negligent act is preceded with the knowledge that such act is likely to cause death, Section 304 Part II Indian Penal Code may be attracted and if such a rash and negligent act is preceded by real intention on the part of the wrong doer to cause death, offence may be punishable under Section 302 Indian Penal Code."

60. Learned counsel has further stated that 37 witnesses have got their statements recorded u/s 161 Cr.P.C. that they saw the applicant and his associates firing from the weapons as a cover and running away from the scene of occurrence.

61. Learned counsel has placed much reliance on the statement of photographer Manish Gupta, who has stated that of the twenty photographs clicked by him, none of them shows the applicant at the scene of occurrence between 02:03:49 and 04:03:42.

62. Learned counsel has stated that by the FIR No. 220 of 2021 from the side of the applicant, a cross version has been tried to be created and the FIR has been registered on the next date of incident in which the name of the applicant is deliberately missing who was sitting in the Mahindra Thar car.

63. Learned counsel has stated that a perusal of the final report prepared by the SIT reveals that with a view to deal with the protesting farmers and teaching them a lesson, the applicant Ashish Mishra @ Monu, as a premeditated plan, collected his friends and associates and lodged them at Shiva Hotel, Tikuniya. The co-accused persons, Ankit Das, Lateef @ Kale, Nandan Singh Bhist, Satyam Tripathi and Shekhar Bharti, all associates of Ashish Mishra @ Monu, gathered at Lakhimpur Kheri with the arms and ammunition notwithstanding the fact that Section 144 Cr.P.C. was in place and it was not permissible to carry firearms in the region. The applicant, Ashish Mishra @ Monu, the applicant got piqued and wanted to take revenge from the protesting farmers because the Punto vehicle carrying his supporters was damaged to some extent in the protest. In addition to it, the hoardings bearing the photographs of the applicant and his father, Ajay Mishra @ Teny (Union Minister of State for Home) were damaged and due to the protest of the farmers, the

then Deputy Chief Minister, Keshav Prasad Maurya, had to alter the route to the wrestling venue. With the anger and revenge in mind, the applicant is said to have left the wrestling venue armed with firearms, alongwith his associates and conspired to teach the protesting farmers a lesson and with this intent, drove his Mahindra Thar vehicle over the farmers, who were returning home after peaceful demonstration.

64. Learned counsel has stated that as a malafide intent, the applicant has attempted to place all the blame on the driver- Hari Om Mishra, who is no more, while as a matter of fact, he was nothing more than a tool to execute the evil designs of the applicant. Learned counsel has further referred the portion of the remand order of the Apex Court dated 18.4.2022, wherein it has been observed that :-

"35. The High Court has completely lost sight of the principles which conventionally govern the Court's discretion when deciding the question whether or not to grant bail, held that while the allegations in the FIR that the accused used his firearm and the subsequent postmortem and injury reports may have some limited bearing, there was no legal necessity to give undue weightage to the same."

65. He has argued that while remitting the Bail Application to the High Court for adjudication afresh, the Apex Court has cited certain earlier decisions given by it on the principles which should govern the discretion of bail vested with the Courts.

66. It has been held in ***Kanwar Singh Meena vs. State of Rajasthan.11***, that:

"10. Each criminal case presents its own peculiar factual scenario and therefore, certain grounds peculiar to a particular case may have to be taken into account by the court.....The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes they ultimately result in weakening the prosecution case and have adverse impact on the society.

67. In ***Prasanta Kumar Sarkar vs. Ashis Chatterjee & Anr.12***, it has been held that:-

"9. ..... It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

"(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail."

68. In the case of ***Mahipal vs. Rajesh Kumar alias Polia & Anr.13,*** it has been held that:-

"12. The determination of whether a case is fit for the grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a *prima facie* view of the involvement of the accused are important. No straitjacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for the grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter for trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused subserves the purpose of the criminal justice system. Where bail has been granted by a lower court, an appellate court must be slow to interfere and ought to be guided by the principles set out for the exercise of the power to set aside bail."

69. In ***Shahzad Hasan Khan vs. Ishtiaq Hasan Khan and Another14***, it is held that :-

"8. Having regard to the facts and circumstances of this case we are of the opinion that the learned judge committed serious error in recalling his order dated June 3, 1986 and enlarging the respondent on bail. The occurrence took place, in broad daylight, in a busy market place and there are a number of eye witnesses to support the case against the respondent who was named as an assailant in the First Information Report. Immediately after the occurrence he could not be traced (it was alleged that he had absconded) for more than a month, attempts were made on his behalf to tamper with evidence. In view of these facts and circumstances respondent 1 was not entitled to bail if the seriousness of the matter was realized and a judicious approach was made...."

70. In ***Ramesh Bhavan Rathod vs. Vishanbhai Hirabhai Makwana (Koli) and others15,*** it is held that:-

"20. The first aspect of the case which stares in the face is the singular absence in the judgement of the High Court to the nature and gravity of the crime. The incident which took place on 9 May 2020 resulted in five homicidal deaths. The nature of the offence is a circumstance which has an important bearing on the grant of bail. The orders of the High Court are conspicuous in the absence of any awareness or elaboration of the serious nature of the offence. The perversity lies in the failure of the High Court to consider an important circumstance which has a bearing on whether bail should be granted."

CONTENTIONS OF THE STATE:

71. Sri Vinod Kumar Shahi, learned A.A.G. assisted by Sri Prachish Pandey, learned AGA for the State has reiterated the arguments tendered by learned counsel for the victim/complainant and has stated that in the peculiar circumstances, there are three first informants including the victim, who is being represented through his advocate.

72. Learned A.A.G. has stated that the present clash between the accused persons

and the farmers was not a face to face one, rather the applicant and the other accused persons came from the back at a fast speed and crushed five innocent persons to death and injured thirteen others.

73. Learned A.A.G. has further stated that the point raised by the defence that no one sustained any gunshot injuries, carries no weight because the first informant Jagjeet Singh himself has stated that he was not an eye witness to the incident and as the FIR is not an encyclopedia of events, it cannot be said that the prosecution version stands falsified.

74. Learned A.A.G. has further argued that the carrying of kirpans by a Sikh is by his religious belief, and some of the farmers were carrying lathis, which does not fall within the category of deadly weapons, and which categorically proves that the innocent farmers were not the aggressors at all. The autopsy report corroborates the modus operandi of the applicant and other accused persons as five innocent persons were put to death in a most brutal, barbaric and gruesome manner.

75. Learned A.A.G. has also stated that in compliance of the order of the Apex Court, all the witnesses have been provided protection by the State Government and despite that, the applicant has threatened and even got the two witnesses assaulted. The charge sheet filed by the SIT is elaborate and well documented and the applicant was found the main perpetrator of the events that took place on 3.10.2021.

76. Sri V.K. Shahi, learned A.A.G. has submitted that on the directions of the Supreme Court, the investigation of the present case as well as of F.I.R. No.220 of 2021 was conducted by the SIT under the monitoring of Justice (Retd.) Rakesh Kumar Jain, Hon'ble Judge, Punjab & Haryana High Court and supervised by S.B. Shiradkar, A.D.G., Intelligence Headquarter, Nanded, Maharashtra with the members (1) Ms. Padmaja Chauhan, I.G., I.P.S., (2) Dr. Preetinder Singh, D.I.G., IPS.

77 . Learned A.A.G. further submitted that in the said incident, by the vehicle of the applicant and his followers, about eighteen protesters were crushed of which four protesting farmers namely, Nakshatra Singh, Daljeet Singh, Lavpreet Singh, Gurvinder Singh and one journalist Raman Kashyap had expired and thirteen other persons were injured.

78. Learned A.A.G. has submitted that the statements of all the injured persons were recorded during the course of investigation u/s 161 Cr.P.C. The statements of other eye witnesses were also recorded and they have supported the prosecution story. He further submitted that the statements under Section 164 Cr.P.C. were also recorded of few of the witnesses and all the witnesses of the fact have supported the prosecution version that the applicant reached the spot with his vehicle followed by other vehicles at a high speed and barged into them and crushed the protesters. Thereafter, he had run away firing as cover. Learned A.A.G. has also submitted that the statements of the doctors, who conducted the autopsy of the body of the deceased persons as well as medico legal examination of injured persons, were also recorded, in which, all of them have categorically stated that injuries found on the body of the deceased persons may have been caused by hitting from a vehicle. Sri Shahi also submitted that in the video clip, it is also found that vehicles are reaching the spot.

79. Learned A.A.G. has placed much reliance on the FSL report of the weapons

of the accused persons, which categorically indicates that the said weapons were used. He has lastly submitted that in the incident, involvement of 17 persons was found along with the applicant, out of which, three persons, namely, Hari Om Mishra, Subham Mishra and Shyam Sunder were killed by the crowd of the protesters and after detailed investigation, charge sheet has been submitted against rest of the 14 persons including the applicant.

CONCLUSION:

80. Had both the sides observed a bit of restraint, we would not have seen the loss of eight invaluable human lives. As per the arguments tendered by both the parties, five persons (four farmers and one journalist) from the side of the first informant/victim are said to have died in the incident, and three persons are said to have been put to death from the side of the applicant. In addition to it, 13 persons sustained injuries from the side of informant and 3 from the side of applicant.

81. Both the sides have referred certain pictures and audio visuals that were taken up from social media. The media has an indispensable role in highlighting the matters pertaining to public utility at large. The media is supposed to provide news to the society, but sometimes we have seen that individual views are overshadowing the news thus putting an adverse effect on truth. Of late, media is seen overstepping upon the sanctity of judiciary in high profile criminal cases, as was evident in the cases of Jessica Lal, Idrani Mukherjee and Aarushi Talwar etc.

82. The three Judge Bench led by Chief Justice of India, R.M. Lodha, found the issue to be very serious and even considered to frame a few guidelines in order to balance the interest and rights of the stake holders.

83. The vital difference between the convict and accused has to be looked into by keeping at stake the cardinal principles of "presumption of innocence until proven guilty' and "guilt beyond reasonable doubt'. Media trial apart from taking up the investigation on its own leads to forming public opinion against the suspect even before the court takes cognizance of the case as a result the accused who should have been presumed innocent is treated a criminal. The excessive publicity of the suspect in the media before the trial in a court of law, either incriminates a fair trial or results in characterizing the accused or suspect as the one who has certainly committed the crime. The reason the jury members were kept aloof of the access to media was obvious. Classic examples of the menace are the cases of K.M. Nanawati and O.J. Simpson.

84. In the case of ***Saibal Kumar Gupta and Ors. v. B.K. Sen and Anr.16,*** the Supreme Court held that when there is an ongoing trial by one of the regular tribunals of the country then trial by newspapers must be prohibited. This is based upon the view that such action by the newspaper of doing an investigation tends to interfere with the course of justice, whether the investigation tends to prejudice the accused or the prosecution.

85. Now the problem has been multiplied by the electronic and social media especially with the use of tool kits. At various stages and forums, it has been seen that ill-informed and agenda driven debates are being undertaken by media running Kangaroo Courts.

86. It is true that hearing of the bail plea cannot be converted into a mini trial, but owing to the circumstances, the parties i.e. the applicant, the victim and the State have been heard at length. It is also very true that after the amendment in the Cr.P.C. and by adding Section 2 (wa) and proviso to Section 24(8) the rights of the victim are on a higher pedestal than that of the complainant provided under Section 301 Cr.P.C.

87. The District Administration had issued a proclamation under Section 144 Cr.P.C., which was in effect on the date of incident and was equally applicable to not only the applicant and his associates, but also to the agitating/protesting farmers. The same has not been followed by either of the parties.

88. The change of route of the Chief Guest was an open secret, as it was known to one and all including the applicant and the protestors.

89. The trial has not yet started as charge have not been framed, so the ambiguity in sections, if any, in the final report can be corrected at the stage of framing of charge.

90. The controversy of some sections not finding mentioned in the bail rejection order of the Court of Sessions has already been put to rest by this Court vide order dated 18.1.2022, and it does not require fresh adjudication.

91. Several inconsistencies, embellishments and improvements have been referred by the defence in the statements of witnesses to the site plan, which cannot be delved into at this stage, rather are to be seen by the trial court concerned.

92. It is also true that the prosecution cannot claim parity as a right to the co-accused whose bail applications have been rejected by this Court, but yet the presence of the three vehicles at the spot from one of which the applicant was seen coming out is a crucial circumstance weighing against the applicant. The said Thar vehicle was registered in the name of father of the applicant and he was seen in the said vehicle recovered from the spot, although the applicant was not seen driving it. There are two FIRs lodged by the witnesses having being threatened. The cross-version to the present case does not help the accused.

93. T aking into consideration the complicity of the applicant, there being apprehension of the witnesses being influenced, severity of punishment as drawn from the nature and gravity of the accusations, after taking due consideration of the submissions of the parties, and the settled case law of ***Alister Anthony Pareira (supra),*** without expressing any opinion on the merits of the case, I do not find it a fit case for bail.

94. The bail application of the applicant-***Ashish Mishra @ Monu*** is hereby rejected.

95. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

(2022)07ILR A539
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 34 of 2016

United India Insurance Co. Ltd.
...Appellant
Versus
Radheshayam & Ors. ...Respondents

Counsel for the Appellant:
Sri Anchal Mishra

Counsel for the Respondents:
Sri Amit Mishra, Sri Ved Prakash Yadav

Civil Law – Motor Vehicles Act, 1988 - Sections 2(28), 2(30), 2(31), 2(35), 2(47), 66, 103, 103(1)(A) , 149, 149(2)(B) & 158- Insurance Act, 1938 - Section - 64(Vb) — Insurers' Appeal - challenging the award – Accident & Insurance Policy is not disputed - insurance company disputed their liability – by raising a moot question that, whether the insurers are obliged to pay the compensation in terms of the insurance policy, for the reason that no route permit has been authorized the owner or the corporation operating offending bus to ply the same on specified route? - held, corporation do not require a permit for every vehicle that they operate with its number mentioned on the permit, they can detail any vehicle on any route of theirs - the presumption, therefore, arises clearly is that the offending vehicle was being operated on a route for which the corporation held a permit - no force whatsoever in the contention of the appellant-insurance company - both the appeal fail and are dismissed.

(Para - 15, 22, 23)

Appeal Dismissed. (E-11)

List of Cases cited: -

1. The Oriental Insurance Co. Ltd. Vs Kripa Ram & ors., F.A.F.O. No. 194 of 2011, decided on 17.08.2017

2. Oriental Insurance Co. Ltd., Barabanki Vs Smt. Mithlesh & ors., 2017 (4) ADJ 111

3. Oriental Insurance Co. Ltd., Lko. Vs Smt. Daya Devi & ors., 2017 (4) ADJ 778 (LB)

4. Oriental Insurance Co. Ltd., Lko. Vs Smt. Saroj & ors., 2021 (6) ADJ 346 (LB)

5. U.P.S.R.T.C. through Regional Manager, 6 Sapru Marg, Lucknow Vs The Oriental Insurance Ltd. through Regional Manager, Regional Office, Balmiki Marg, Lalbagh, Lucknow, dated 25.08.2010

6. Uttar Pradesh State Road Transport Corp. Vs Kulsum & ors., (2011) 8 SCC 142

(Delivered by Hon'ble J.J. Munir, J.)

1. This judgment will dispose of FAFO No.34 of 2016 and FAFO No.33 of 2016, both of which relate to the same motor accident and give rise to identical questions of facts and law. Both the appeals have, accordingly, been heard together. FAFO No.34 of 2016 shall be treated as the leading case.

2. In the leading appeal, the Insurance Company has challenged the judgment and award passed by the Motor Accident Claims Tribunal/ Additional District Judge, Court No.2, Sultanpur dated 13.10.2015, in MACP No.36 of 2014. By the award impugned, the Tribunal has held the claimant-respondents entitled to a compensation in the sum of Rs.3,54,000/- along with simple interest at the rate of 7% per annum from the date of institution of

the claim petition until realization. The liability to pay the compensation has been fastened upon the United India Insurance Company Limited, who are the insurers of the offending vehicle. The Insurance Company have, therefore, appealed the impugned award primarily seeking to unshackle themselves of the liability to indemnify the owner under the insurance policy.

3. In the leading appeal, the deceased is Suresh Kumar @ Lallu, who died in the fatal accident. Compensation for his death in the motor accident is the subject matter of action. The claimants are his dependents.

4. In the connected appeal, the deceased is Smt. Dhanpatti Devi, mother of Suresh Kumar @ Lallu, who also met a fate the same as her son, Suresh Kumar in the same road accident. The claimants in this appeal are the dependents of the late Dhanpatti Devi wife of Radheyshyam. The Insurance Company, in this appeal too, say that they ought not to be saddled with the liability to indemnify in terms of the insurance policy.

5. In both the appeals, there were some other issues about the quantum of compensation also raised in the grounds, but at the hearing, the learned Counsel for the appellant-Insurance Company, Mr. Anchal Mishra has confined his submissions to the liability of the Insurance Company to satisfy the award.

6. The question on which the learned Counsel for the Insurance Company has addressed the Court is : Whether in view of the provisions of Section 103(1-A) of the Motor Vehicles Act, 1988 (for short, "the Act') [as amended vide Uttar Pradesh Act 5 of 1993, sec. 2 (w.r.e.f. 16-1-1993)], the absence of a route permit authorizing a particular bus to ply on a specified route would discharge the insurer of his liability on a policy issued in favour of the owner, if the bus, placed at the disposal and under the control of a State Transport Undertaking on contract, plies on a route without such permit?

7. The facts giving rise to the leading appeal are:

On 22.10.2013 at about 11:40 a.m., Suresh Kumar @ Lallu was proceeding on a bicycle along with his mother, Smt. Dhanpatti Devi on the Varanasi-Lucknow State Highway, returning home after darshan at the Devi Mari Mai Dhaam. As the mother and son reached a place near the BDDV Mahila Maha Vidyalaya, Madanpur Paniar, a Volvo Bus, bearing Registration No. UP-32-CZ-0403, approached from the Jaunpur side. It was driven negligently and at a high speed. The bus hit the bicycle from the rear side. The accident resulted in Suresh Kumar @ Lallu's death on the spot. The claimant-respondents, who are dependents of Suresh Kumar @ Lallu, instituted the claim petition giving rise to this appeal, demanding a compensation in the sum of Rs.35,82,000/-. The claimants proceeded against the owner M/s. Logistics Private Limited under care of Santosh Kumar Jha, resident of Opposite Ambedkar Bus Stand, Alambagh, Lucknow. In addition, the driver of the bus, Vinay Kumar Sharma was also arrayed as a party.

8. The insurers of the vehicle, United India Insurance Company Limited through the Manager, Regional Office United Indian Insurance Company Limited,

Second Floor, Kapoorthala Bagh Complex, Aliganj, Lucknow were also arrayed as a party.

9. The driver of the offending vehicle, who was opposite party no.1 to the claim petition, filed a separate written statement denying the accident. He, however, said that the vehicle was insured with the United India Insurance Company Limited. He was driving the vehicle under a valid and effective driving licence. The bus was working on contract under the control of the Uttar Pradesh State Road Transport Corporation (for short, "the Corporation'). The Corporation ought to have been made a party. To like effect is the separate written statement, paper No. 13 ख filed on behalf of the owner.

10. The Insurance Company filed their own written statement, paper No. 10ख. They denied most of the claimants' case for want of knowledge. However, in their special pleas, it was stated that the claimants had not presented the necessary documents to hold the Insurance Company liable, such as the FIR, the charge-sheet, the site-plan, the postmortem report, the registration certificate, the road tax payment papers, the route permit and the insurance certificate.

11. According to the appellant-Insurance Company, the claim was barred by Section 149(2)(b) of the Act read with Section 64VB of the Insurance Act, 1938. The Insurance Company went to the extent of denying having insured the offending bus. It was also pleaded that the claim petition was barred by Section 158 of the Act.

12. Upon the pleadings of parties, the following issues were framed (translated into English from Hindi):

(1) Whether on 22.10.2013 at about 11:40 a.m. at the B.D.D.V. Mahila Maha Vidyalaya located within the limits of Village Madanpur Paniar, P.S. Lambhua, District Sultanpur, when the deceased Suresh Kumar @ Lallu along with his mother, Dhanpatti Devi, was cycling his way back after Darshan, Bus bearing Registration No. UP-32CZ-0403 proceeding from the Jaunpur side, driven negligently and at a high speed by its driver, who was intoxicated, hit the bicycle from the rear side, leading to Suresh Kumar @ Lallu's death on the spot and that of his mother, Dhanpatti Devi on 22.10.2013 at the District Hospital, Sultanpur?

(2) Whether the offending vehicle in question No. UP-32CZ-0403 had all valid papers, such as registration, insurance etc., that were effective, if yes, its effect?

(3) Whether the driver of the offending vehicle in question No. UP-32CZ-0403 had an effective and valid driving licence, if yes, its effect?

(4) Whether the petition is bad for non-joinder of necessary parties?

(5) Whether the claimants are entitled to any compensation, if yes, from whom and how much?

13. The claimants examined PW-1, Radheyshyam and PW-2, Ramesh Kumar in support of their case and by way of documentary evidence, produced through a list of documents a photostat copy of the FIR, postmortem report, inquest report, registration certificate, fitness certificate, driving licence, insurance certificate. In addition, through another list, paper No. 16ग, a copy of the FIR, a copy of the charge

sheet, a copy of the site-plan, a copy of the postmortem report were filed. No oral evidence was led by any of the opposite parties to the claim petition, including the appellant-Insurance Company. The owner and the driver, however, filed documentary evidence, being the offending vehicle's registration certificate, fitness certificate, the driver Vinay Kumar's driving licence, the insurance certificate, the document regarding payment of tax, a copy of the contract with the State Road Transport Corporation and a copy of deed (of agreement) with the Corporation.

14. Heard Mr. Anchal Mishra, learned Counsel for the appellant-Insurance Company in support of this appeal and Mr. Ved Prakash Yadav, learned Counsel appearing on behalf of the claimant-respondents. No one appeared on behalf of respondent no.7, the owner.

15. In this appeal, the moot question involved is whether the appellant-Insurance Company are obliged to pay the awarded compensation in terms of the insurance policy, for the reason that no route permit has been produced, authorizing the owner or the Corporation operating the offending vehicle to ply the particular vehicle on the specified route. It is submitted by Mr. Anchal Mishra, learned Counsel for the appellant-Insurance Company that unless the particular vehicle, which is a private vehicle insured by the owner, has a valid route permit to operate on the route, where the accident occurred, the Insurance Company would not be liable to indemnify. In support of his contention, the learned Counsel for the appellant-Insurance Company has placed reliance on the decision of a Division Bench of this Court in **F.A.F.O. No.937 of 2009, U.P.S.R.T.C. through Regional Manager, 6 Sapru Marg, Lucknow v. The Oriental Insurance Ltd. through Regional Manager, Regional Office, Balmiki Marg, Lalbagh, Lucknow, decided on 25.08.2010.** The said case is related to a Corporation's Bus, about which it was contended that it was not proved by production of a valid route permit that the Bus had a permit to ply on the route where the accident occurred. On that ground, the Insurance Company had denied its liability to indemnify the Corporation. Relying on the provisions of Section 66 of the Act, it was held that the requirement of route permit to ply on a particular route was necessary, whether the owner of the transport vehicle was an individual or the State Transport Corporation. In **U.P.S.R.T.C. v. Oriental Insurance Company Ltd.** *(supra)*, it was held:

"Further, " Motor Vehicle", "permit", "Public Service Vehicle" and Transport Vehicle are defined under Section 2 sub-section (28) (31) (35) and 47) of the Motor Vehicle Act 1988:-

"(28) "Motor Vehicle" or "Vehicle" means any mechanically propelled vehicle adapted for use upon road whether the power of propulsion is transmitted thereto from an external and internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding[twenty-five cubic centimeters];

(31) "permit" means a permit issued by a State or Regional Transport Authority or an authority prescribed in this

behalf under this Act authorising the use of a motor vehicle as transport vehicle;

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward , and includes a maxicab, a motorcab, contract carriage , and stage carriage;

(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle;"

Chapter V of the Act deals with control of transport vehicles and in the said chapter section 66 provides as under:-

"66. Necessity for permits. (1) No owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorising him in use of the vehicle in that place in the manner in which the vehicle is being used."

Moreover in the said chapter Sections 70, 71 and 72 provides the procedure for application for stage carriage permit , procedure of Regional Transport Authority in considering application for stage carriage permit and grant of stage carriage permit respectively.

In view of the said provision as find place in Chapter V of the Act, legal position which emerges out that the vehicle which either owned by private individuals or by Corporation or by any authority can operate on a route in order to carry the passengers only when it holds a valid permit to use the said vehicle as a transport vehicle in public place subject to conditions as mentioned in sub section (3) of Section 66 of the Act."

Second submission as made by the learned counsel for the appellant that at the time of accident the bus was covered with valid documents i.e. permit, registration , insurance and even if it was not covered by the valid permit as per the practice and procedure adopted by the Corporation that vehicles are sent on the route on the basis of the permit issued to another vehicle as such the appellant is not liable to pay the compensation but the same is payable by insurance company is factually incorrect and wrong submission. In this regard issue no. 3 was framed by the Tribunal and while deciding the said issue finding of fact has been given by the Tribunal that at the time of accident, bus was covered by valid insurance policy but the same was operated without valid permit, so the insurance company was not liable to pay any compensation. Said findings given by the Tribunal are perfectly valid and in accordance with law as provided under section 66 of the Act, as stated above which specifically provides that transport vehicle can only operate on the route with a valid permit and in the present case , it is not disputed by the learned counsel for the appellant that bus in question at the time of accident was not covered by valid permit issued as per the provisions as provided under Sections 70,71, and 72 of the Act.

Further even otherwise while deciding the issue no. 3 , the Tribunal has also given a categorical finding that the Corporation/ appellant could not claim the benefit of the provisions of Section 103 of the Act because the mandatory provisions and the directions as provided under

Section 101 and 102 of the Act has not been complied by the Corporation."

16. This Court may notice the principle that the owner of a commercial vehicle can place it through a contract at the disposal of the State Transport Corporation, who would then be regarded as its owner under Section 2(30) of the Act, entitled to operate the bus on any route under a permit issued to the Corporation, irrespective of the fact whether the particular vehicle had a permit for that route. The Corporation are entitled, by virtue of Section 103(1-A) of the Act [as amended vide Uttar Pradesh Act 5 of 1993, sec. 2 (w.r.e.f. 16-1-1993)], to ply one vehicle or the other owned by the State Transport Undertaking or a vehicle that is placed at their disposal by its owner under an arrangement entered into between such owner and the Corporation for the use of the said vehicle by the latter, on any route for which the Corporation holds a permit. The insurance policy would enure to the benefit of the person, who is lawfully plying the vehicle, which would include the Corporation as the term owner has been given an expanded meaning under Section 2(30) of the Act. It is not the law that each time a vehicle is placed at the disposal of another person, or for that matter the Corporation, a new policy has to be taken out. This point is settled in view of the decision of the Supreme Court in **Uttar Pradesh State Road Transport Corporation v. Kulsum and others, (2011) 8 SCC 142.**

17. But, the issue that Mr. Anchal Mishra has raised is not just about the insurance policy issued in favour of the owner, enuring to the benefit of the Corporation, when the vehicle was placed at the Corporation's disposal and the State undertaking were operating it, under their control, pursuant to an agreement for the purpose. The issue is whether a route permit for the offending vehicle, authorizing the Corporation to ply it on the route, where the accident occurred, was necessary to produce in order to fasten liability upon the Insurance Company. Broadly speaking, there is a difference between the liability of an Insurance Company to indemnify a commercial vehicle operating in a public place in that, that while a private operator of a commercial vehicle must hold a route permit for a specific vehicle operating on a specified route, under Section 66 of Chapter VI of the Act, the State Road Transport Corporation by virtue of Section 103(1-A) of the Act, as amended in its application in Uttar Pradesh, can operate any vehicle owned by them or placed at their disposal on a route for which they hold a route permit. The question was examined in a number of decisions of this Court. In **F.A.F.O. No. 194 of 2011, The Oriental Insurance Co. Ltd. vs. Kripa Ram and ors., decided on 17.08.2017,** it was held by Mahendra Dayal, J:

"10. The plain reading of Section 103 of the Act clearly reveals that the procedure for issuance of permit in favour of U.P. S.R.T.C., is contained in it. Once an independent provision for issuance of permit as stipulated in Chapter-VI of the Act has been made, no permit under Section 66 of the Act would be necessary.

11. A perusal of Section 103 (1A) also clearly reveals that the State Transport undertaking is required to take permit only in respect of a particular route. There is no requirement that the vehicle number should also find place in such permits. Once a motor vehicle is operated by U.P.S.R.T.C.

it will, be fully covered under the provisions of Chapter-VI of the Act. There is no reason as to why the stipulation incorporated in the Insurance Policy may require satisfaction of permit issued under Section 66 of the Act.

12. It has also been submitted by the learned counsel for the respondent No. 3 that similar issue came for consideration before this Court several times and the controversy has been finally settled that the permit required for U.P.S.R.T.C. buses, does not require the registration number of the buses to be mentioned therein.

13. The learned counsel for the respondent No. 3 has referred to a judgment of the Division Bench of this Court rendered in FAFO No. 1090 of 2011, decided on 23.7.2015. In this case also similar question was raised and the Division Bench held that once the requirement for issuance of permit for notified route or notified area has been made, the argument of learned counsel for the appellant that bus number must be mentioned on the permit, cannot be accepted. It was also held that no such statutory requirement is contemplated either under the Act or under the Rules. A Co-ordinate Bench of this Court also had an occasion to examine this aspect of the matter in FAFO No. 462 of 2016 and FAFO No. 504 of 2014. In both the cases the Co-ordinate Bench came to the conclusion that Section 103 of the Motor Vehicles Act envisages the procedure of issuance of permit in favour of U.P.S.R.T.C. The Honb'le Single Judge, while deciding the appeals considered the matter in detail and found that once a motor vehicle operated by U.P.S.R.T.C. is covered under Chapter VI of the Act, no permit as provided under Section 66 of the Act is required. It was also considered by the Court that Rule 130 of the U.P. Motor Vehicle Rules 1998 prescribes the procedure for issuance of permit in favour of U.P.S.R.T.C. The prescribed form for obtaining permit is Form No. S.R. 46. This form also clearly mentions the issuance of permit under Section 103 of the Act. The other vehicles which are operated privately or issued permit in form S.R. 29 are regulated by Section 66 of the Act."

18. The question again fell for consideration before this Court in **Oriental Insurance Co. Ltd., Barabanki v. Smt. Mithlesh and others, 2017 (4) ADJ 111 (LB)**. In Smt. Mithlesh (supra), it was held:

"11. A plain reading of the provisions extracted above, clearly shows that Section 98 gives an overriding effect to the provisions contained in Chapter VI of the Motor Vehicles Act, 1988. Section 103 sub-section (1) contains non-obstante clause, therefore, any provision contained in Chapter V inconsistent with the provisions of Chapter VI of the Act would have no application.

12. Insofar as the question of issuance of permit is concerned, Section 103 (1) of the Act clearly envisages the mechanism for issuance of permits in favour of UPSRTC. Once an independent provision for issuance of permits is stipulated under the statute, to say that for operating a vehicle by UPSRTC under Section 103(1A) of the Motor Vehicles Act, 1988, a permit under Section 66 of the Act would be necessary, in my humble consideration, such a proposition of law is misconceived and does not deserve acceptance. The rejection of contention is further strengthened when we look at the definition of owner as defined under

Section 2(30) of the Act quoted hereinabove.

13. Section 103 was inserted by U.P. Act No. 5 of 1993 w.e.f. 17.1.1993 and is applicable insofar as the present case is concerned. Once a motor vehicle operated by UPSRTC is fully covered under the provisions of Chapter VI of the Act, there is no reason as to why the stipulation incorporated in the insurance policy may require satisfaction of permit issued under Section 66 of the Act for a vehicle covered under the provisions of Section 103 read with Section 103 (1A) of the Act.

14. There is yet another reason as to why meaning of stipulation in the insurance policy be not confined and interpreted within the ambit of Section 66. The stipulation itself provides for a permit issued under the provisions of Motor Vehicles Act, 1988. The condition in the insurance policy is wide enough to bring all the types of permits conceived under the Act within the cover of insurance policy, as such, the question raised by the appellant on the strength of Section 66 of the Act is without any legal foundation. The plea advanced by learned counsel for the appellant was also considered in the light of relevant Rules i.e. U.P. Motor Vehicle Rules, 1998. Rule 130 of the above Rules prescribes the procedure for issuance of permits in favour of UPSRTC in Form SR-46. Form SR-46 as is prescribed for the vehicles operated by UPSRTC clearly mentions the issuance of such a permit under Section 103 of the Act, whereas, the vehicles operated privately are to be issued a permit in Form SR-29 which is regulated under Section 66 of the Act. This is however, not to suggest that a privately operated vehicle may not have a permit under Section 66 of the Act. It may be fruitful to bear in mind that private operators first of all purchase a vehicle which is bound to have a permit and then comes operation of a vehicle on the notified route; but for a State Undertaking, a route under a scheme comes into existence first which follows by a permit and operation of vehicle in terms of permit comes last.

15. Once the prescribed statutory norms for the purposes of issuance of permit stand at variance, there is no reason as to why the permits issued under Chapter V and Chapter VI of the Act may not be treated to be satisfying the condition of insurance policy placed reliance upon. The two chapters being mutually exclusive provide for distinct permits which have to operate interdependently."

19. The same principle has been endorsed by this Court in **Oriental Insurance Co. Ltd., Lko. v. Smt. Daya Devi and others, 2017 (4) ADJ 778 (LB),** and again, in a much later decision in **Oriental Insurance Co. Ltd., Lko. v. Smt. Saroj and others, 2021 (6) ADJ 346 (LB).**

20. Here, the learned Counsel for the appellant-Insurance Company has attempted to raise the further issue that the Corporation were not impleaded as a party, though they were necessary parties, and on that account, the permit held by the Corporation for the route on which the offending vehicle was operated by them in terms of the contract between the owner and the Corporation could not be produced. It is further urged that if the Corporation were not impleaded, it was the duty of the owner to have placed on record the permit held by the Corporation to ply on the route, where the accident occurred.

21. It must be recorded that there is no plea raised on behalf of the appellant-Insurance Company in their written statement about non-joinder of the Corporation as a necessary party to the proceeding. The plea was raised on behalf of the Owner and the Driver and Issue No. 4 about non-joinder of the Corporation as a necessary party was framed at their instance. However, at the hearing, the said issue was not pressed and none of the opposite parties to the claim petition, including the appellant-Insurance Company, pressed for a decision on the said issue. Thus, so far as non-impleadment of the Corporation is concerned, it does not appear to be a case which the Insurance Company are entitled to agitate now. So far as the fundamental plea that the Corporation's permit for the route, in any case, was required to be brought on record, if not by the non-party Corporation, by the claimants, who seek compensation, it must be remarked that the Corporation are an establishment of the State, wholly owned and controlled by it. There is a presumption of fact-quite rebuttable about regularity attached to all official actions, a principle embodied under clause (e) of Section 114 of the Evidence Act, 1872. The provisions of Section 114(e) of the Evidence Act are based on a salutary principle, and assuming that the Evidence Act does not apply proprio vigore to proceedings before the Motor Accident Claims Tribunal, the principle there based on time-tested wisdom does certainly apply. There is no reason why the Corporation would ply a vehicle of theirs on a route, where they do not hold permit. A copy of the agreement between the authorized signatory on behalf of the owner and the Regional Manager of the Corporation for the Lucknow Region is on record as paper No. 15ग. A perusal of Clause 29 of the said agreement, where the owner has been described as the second party and the State Road Transport Corporation as the first party, reads:

"Permit of the undertaking Bus will be in the name of First Party and the fees spent to obtain the permit will be borne by the First Party."

22. The offending vehicle was being operated by the Corporation in terms of the agreement dated 25.10.2000, which carries a covenant that the Corporation would operate on the basis of a permit taken out by them and the expenses whereof the Corporation would bear. Bearing in mind the principle about regularity in official actions, it has to be presumed that the Corporation were operating on a route for which they held a permit. The provisions of sub-Section (1-A) of Section 103 show that the Corporation do not require a permit for every vehicle that they operate with its number mentioned on the permit. They can detail any vehicle on any route of theirs, including a vehicle that has been leased out to them or which they operate under an agreement from its owner. The presumption, therefore, that arises clearly is that the offending vehicle was being operated on a route for which the Corporation held a permit. The accident occurred on that route. It was for the appellant-Insurance Company, under the circumstances, to prove by affirmative evidence, that the Corporation did not have a permit to operate on the route where the accident occurred. The presumption about regularity in official actions is rebuttable, and this presumption too could be rebutted. But, it was not. The appellant-Insurance Company did not lead any evidence, whatsoever, to show that on the date of accident on the route, the offending vehicle was plying, the Corporation did not hold a valid permit to operate.

23. In the circumstances, there is no force whatsoever in the contention that the appellant-Insurance Company raise in this appeal. No other point was pressed.

In re. : FAFO No. 33 of 2016

24. This appeal is again by the Insurance Company and arises out of the claim relating to the death of Smt. Dhanpatti Devi, the other victim of the accident, who was riding the bicycle along with her son, Suresh Kumar @ Lallu on 22.10.2013. The other details and issues need not be gone into as the relevant facts and the issue, on the basis of which the award here has been sought to be impeached, are the same as those involved in the leading appeal. No additional point has been pressed in this appeal by Mr. Anchal Mishra, learned Counsel for the appellant-Insurance Company.

25. In the result, both the appeals **fail** and are **dismissed** with costs throughout. The interim orders passed are hereby vacated.

(2022)07ILR A548
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.06.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 500 of 2002

The Oriental Insurance Co. Ltd.
...Appellant
Versus
Smt. Tulsa & Ors. ...Respondents

Counsel for the Appellant:
Sri Pramod Kumar

Counsel for the Respondents:
Sri T.C. Seth, Sri P.K. Rai,Sri Prem KumarSingh, Sri R.K. Dwivedi

Civil Law - Motor Vehicles Act, 1988 - Sections 145(c), 147, 147(1)(b)(i) & 149: - Appeal by Insurance Company - challenging the Award - seeking relieve itself from liability to pay compensation - deceased travelling on the board of a tractor trolley & died when tractor-trolley was turned-turtle due to rash & negligent driving on a public road when same was proceeded to the cremation ground in the funeral rites - tribunal shrifted the objection as taken by the insurance company that tractor was insured only for agricultural purposes not for passenger vehicle - Awarded of Rs. 78,000/- with 9% interest - Court held that, insurers cannot be held liable at all under the policy to satisfy the award or indemnify the owner - finding recorded by tribunal is patently flawed - impugned award set-aside - appeal succeed - compensation shall be recovered from the owners - insurer stand discharged from its liability. (Para - 7, 8, 13, 14, 16, 17)

Appeal allowed. (E-11)

List of Cases cited: -

1. Oriental Insurance Co. Ltd.Vs Brij Mohan & ors., (2007) 7 SCC 56

2. New India Assurance Co. Ltd. Vs Asha Rani, (2003) 2 SCC 223 : 2003 SCC (Cri) 493 : (2002) 8 Supreme 594

3. New India Assurance Co. Vs Satpal Singh, (2000) 1 SCC 237 : 2000 SCC (Cri) 130

4. National Insurance Co. Ltd. Vs Bommithi Subbhayamma, (2005) 12 SCC 243

5. United India Insurance Co. Ltd. Vs Tilak Singh, (2006) 4 SCC 404 : (2006) 2 SCC (Cri) 344

6. National Insurance Co. Ltd. Vs Baljit Kaur, (2004) 2 SCC 1 : 2004 SCC (Cri) 370

7. National Insurance Co. Ltd. Vs Laxmi Narain Dhut, (2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142 : (2007) 4 Scale 36

8. Oriental Insurance Co. Ltd. Vs Meena Variyal, (2007) 5 SCC 428 : (2007) 2 SCC (Cri) 527 : (2007) 5 Scale 269

9. New India Assurance Co. Ltd. Vs Vedwati & ors., (2007) 9 SCC 486

10. Oriental Insurance Co. Ltd. Vs Devireddy Konda Reddy, (2003) 2 SCC 339 : 2003 SCC (Cri) 540

11. National Insurance Co. Ltd. Vs Ajit Kumar, (2003) 9 SCC 668 : 2003 SCC (Cri) 1915

12. New India Insurance Co. Vs Darshana Devi & ors., (2008) 7 SCC 416

13. National Insurance C. Ltd. Vs Smt. Leela alias Vimla, 2014 SCC OnLine All 16209

14. Mohan Kushwaha & ors. Vs Ghanshyam & anr., 2011 SCC OnLine All 2570

15. United India Insurance Co. Ltd. Vs Serjerao, 2008 ACJ 254 (SC)

16. National Insurance Co. Ltd. Vs Vs Chinnamma, 2004 ACJ 1909 (SC)

17. Oriental Insurance Co. Ltd. Vs Biddo Devi (Deceased) & ors., 2018 SCC OnLine All 6027

(Delivered by Hon'ble J.J. Munir, J.)

1. This is an appeal by the Insurance Company, arising out of the judgment and award passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.2, Unnao dated 05.07.2002 in Motor Accident Claim Petition No. 276 of 1999. The Insurance Company seeks to relieve itself of the liability to pay the compensation awarded.

2. On the 4th of November, 1999, the deceased, Kali Shanker, accompanied one Radhey Lal, a native of his village, was proceeding to participate in the last rites of the latter's mother, who had passed away. The members of the funeral procession, if it could be called that, boarded an attached trolley to the tractor bearing Registration No. UP-35/9751 in order to ferry the mortal remains of Radhey Lal's mother to the cremation ground. At about half past eleven in the morning hours, as the tractor reached a place called Gadan Khera within the local limits of Police Station Kotwali Unnao, close-by to Jagat Mohan Memorial School, the tractor-trolley turned turtle. It happened because of the driver's negligence. The accident resulted in grievous injuries to Kali Shanker, who succumbed by the time he was conveyed to the hospital. Information in this regard was given to Police Station Kotwali, Unnao. The Police caused the dead body of Kali Shanker to be subjected to autopsy on 05.11.1999. On the 6th of November, 1999, Kali Shanker's son, Jagdish got a First Information Report lodged regarding the incident. Chhota son of Chetau, opposite party to the claim petition, is the tractor owner. He died pending the claim petition and, therefore, his sons, Shivpal and Rajpal, were substituted. Besides his sons, Lal Bahadur son of Binda and Vishun son of Jagan were also impleaded as opposite parties nos.4 and 5 - all four as co-owners in Chhota's stead.

3. The Oriental Insurance Company Limited, 249/1, Civil Lines, Unnao through its Branch Manager are the the tractor's insurers. The aforesaid Insurance Company, who shall hereinafter be referred to as the 'insurers', are the appellants.

4. A joint written statement was filed by respondent nos. 2 to 5 to the claim petition, that is to say, the co-owners of the

offending tractor and one on behalf of the insurers. It would be apposite to mention that while alive, Chhota too had filed a written statement.

5. The original owner, Chhota as well as the succeeding co-owners took a stand that the offending tractor was not involved in the accident. That apart, they said that the liability, if any, would be that of the insurers.

6. On the pleadings of parties, the following issues were framed (translated into English from Hindi):

(1) Whether on 04.11.1999 at 11:30 in the day near Jagat Mohan Memorial School, tractor bearing Registration No. UP-35/9751 was driven at high speed and negligently, in consequence of which the tractor-trolley turned turtle, leading to Kali Shanker's death?

(2) Whether at the time of the aforesaid accident, the tractor driver had a valid and effective driving licence?

(3) Whether at the time of the aforesaid accident, the tractor and trolley were insured with the insurers?

(4) Whether at the time of the accident, the tractor and the trolley were being operated in violation of the Motor Vehicles Act?

(5) Whether the claimants are entitled to any compensation and from whom?

(6) Whether the claimants are entitled to any relief and from whom?

7. There is not much quarrel between parties about the factum of accident before this Court, which was held by the Tribunal to have resulted from the rash and negligent driving of the tractor-trolley. On the second issue, the Tribunal found that the driver had a valid driving license, effective from 08.09.1999 to 02.11.2002. On the third issue, the Tribunal noted that the insurers had raised an objection that the tractor was insured with them for the purpose of doing agricultural work and the trolley was not at all insured, rendering them not liable to pay compensation. The Tribunal made a short shrift of this objection, disposing it of with the remark that the objection is not tenable as the insurance cover note that has been produced in original shows that at the time of accident, the tractor was insured with the insurers from 05.11.1998 to 04.11.1999.

8. While deciding Issue Nos. 4, 5 and 6, the Tribunal has dealt with the quantum of compensation payable and determined it at a sum of Rs. 78,000/- payable with interest at the rate of 9% per annum from the date of presentation of the claim petition. The claimants have not preferred any cross-objection or a separate appeal, seeking enhancement of the quantum.

9. Heard Mr. Pramod Kumar, learned Counsel for the insurers and Mr. Prem Kumar Singh, learned Counsel for the claimant-respondent nos. 1, 2 and 3.

10. The deceased was a passenger, who was travelling on the tractor-trolley. The trolley does not appear to have been registered or insured as a separate vehicle for carrying even goods. It could never have been registered as a passenger vehicle or insured as such. The policy covering the tractor is a Kisan Package Insurance Policy, which apparently limits the liability of the insurers to third parties in case of death or bodily injury to any person caused by or

arising out of the use of the tractor for agricultural purposes. The tractor is neither a passenger vehicle nor a goods vehicle. The trolley was absolutely unregistered and uninsured, as already said. In this case, the deceased was travelling on the trolley to the cremation ground to participate in the last rites of Radhey Lal's mother. The tractor was travelling on a public road. It was not at all engaged in any kind of agricultural operations. The deceased was certainly not the owner or the driver of the tractor.

11. The question about the liability of the Insurance Company to pay compensation in the case of death of a passenger travelling on a tractor-trolley arose for consideration before the Supreme Court in **Oriental Insurance Co. Ltd. v. Brij Mohan and others, (2007) 7 SCC 56**. It was held in **Oriental Insurance Co. Ltd. v. Brij Mohan (supra)** :

"10. Furthermore, the respondent was not the owner of the tractor. He was also not the driver thereof. He was merely a passenger travelling on the trolley attached to the tractor. His claim petition, therefore, could not have been allowed in view of the decision of this Court in New India Assurance Co. Ltd. v. Asha Rani [New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223 : 2003 SCC (Cri) 493] wherein the earlier decision of this Court in New India Assurance Co. v. Satpal Singh [(2000) 1 SCC 237 : 2000 SCC (Cri) 130] was overruled. In Asha Rani [New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223 : 2003 SCC (Cri) 493] it was, inter alia, held : (SCC p. 235, paras 25-27)

"25. Section 147 of the 1988 Act, inter alia, prescribes compulsory coverage against the death of or bodily injury to any passenger of "public service vehicle'. Proviso appended thereto categorically states that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in a goods vehicle would be limited to the liability under the Workmen's Compensation Act. It does not speak of any passenger in a "goods carriage'.

26. In view of the changes in the relevant provisions in the 1988 Act vis-à-vis the 1939 Act, we are of the opinion that the meaning of the words "any person' must also be attributed having regard to the context in which they have been used i.e. "a third party'. Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.

27. Furthermore, sub-clause (i) of clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle 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."

(See also National Insurance Co. Ltd. v. Bommithi Subbhayamma [(2005) 12 SCC 243] and United India Insurance Co. Ltd. v. Tilak Singh [(2006) 4 SCC 404 : (2006) 2 SCC (Cri) 344] .)

11. Although the effect of 1994 amendment in the Motor Vehicles Act did not call for consideration in Asha Rani

[New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223 : 2003 SCC (Cri) 493], a three-Judge Bench of this Court had the occasion to consider the said question in National Insurance Co. Ltd. v. Baljit Kaur [(2004) 2 SCC 1 : 2004 SCC (Cri) 370] in the following terms : (SCC pp. 7-8, paras 17-19)

"17. By reason of the 1994 amendment what was added is "including owner of the goods or his authorised representative carried in the vehicle'. The liability of the owner of the vehicle to insure it compulsorily, thus, by reason of the aforementioned amendment included only the owner of the goods or his authorised representative carried in the vehicle besides the third parties. The intention of Parliament, therefore, could not have been that the words "any person' occurring in Section 147 would cover all persons who were travelling in a goods carriage in any capacity whatsoever. If such was the intention, there was no necessity of Parliament to carry out an amendment inasmuch as the expression "any person' contained in sub-clause (i) of clause (b) of sub-section (1) of Section 147 would have included the owner of the goods or his authorised representative besides the passengers who are gratuitous or otherwise.

18. The observations made in this connection by the Court in Asha Rani case [New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223 : 2003 SCC (Cri) 493] to which one of us, Sinha, J., was a party, however, bear repetition : (SCC p. 235, para 26)

"26. In view of the changes in the relevant provisions in the 1988 Act vis-à-vis the 1939 Act, we are of the opinion that the meaning of the words "any person' must also be attributed having regard to the context in which they have been used i.e. "a third party'. Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.'

19. In Asha Rani [New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223 : 2003 SCC (Cri) 493] it has been noticed that sub-clause (i) of clause (b) of sub-section (1) of Section 147 of the 1988 Act speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. Furthermore, an owner of a passenger-carrying vehicle must pay premium for covering the risks of the passengers travelling in the vehicle. The premium in view of the 1994 amendment would only cover a third party as also the owner of the goods or his authorised representative and not any passenger carried in a goods vehicle whether for hire or reward or otherwise."

12. Interpretation of the contracts of insurance in terms of Sections 147 and 149 of the Motor Vehicles Act came up for consideration recently before a Division Bench of this Court in National Insurance Co. Ltd. v. Laxmi Narain Dhut [(2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142 : (2007) 4 Scale 36] wherein it was held : (SCC p. 714, paras 23-24)

"23[24]. As noted above, there is no contractual relation between the third party and the insurer. Because of the statutory intervention in terms of Section

149, the same becomes operative in essence and Section 149 provides complete insulation.

24[25]. In the background of the statutory provisions, one thing is crystal clear i.e. the statute is beneficial one qua the third party. But that benefit cannot be extended to the owner of the offending vehicle. The logic of fake licence has to be considered differently in respect of the third party and in respect of own damage claims."

It was further observed : (SCC pp. 718-19, paras 33-35)

"33[36]. It is also well settled that to arrive at the intention of the legislation depending on the objects for which the enactment is made, the court can resort to historical, contextual and purposive interpretation leaving textual interpretation aside.

34[37]. Francis Bennion in his book Statutory Interpretation described "purposive interpretation' as under:

"A purposive construction of an enactment is one which gives effect to the legislative purpose by--

(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose, or

(b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose.'

35[38]. More often than not, literal interpretation of a statute or a provision of a statute results in absurdity. Therefore, while interpreting statutory provisions, the courts should keep in mind the objectives or purpose for which statute has been enacted. Justice Frankfurter of US Supreme Court in an article titled as "Some Reflections on the Reading of Statutes' (47 Columbia Law Review 527), observed that,"legislation has an aim, it seeks to obviate some mischief, to supply an adequacy, to effect a change of policy, to formulate a plan of Government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statutes, as read in the light of other external manifestations of purpose.' "

(See also Oriental Insurance Co. Ltd. v. Meena Variyal [(2007) 5 SCC 428 : (2007) 2 SCC (Cri) 527 : (2007) 5 Scale 269] .)

12. The question whether a passenger travelling in a goods vehicle was a third party fell for consideration of the Supreme Court in **New India Assurance Co. Ltd. v. Vedwati and others, (2007) 9 SCC 486**, where it was held:

"6. "4. This Court had occasion to deal with cases of passengers travelling in goods vehicles which met with accident resulting in death of such person or bodily injury. Such cases belong to three categories i.e. (1) those covered by the old Act; (2) those covered by the Act; and (3) those covered by amendment of the Act in 1994 by the Motor Vehicles (Amendment) Act, 1994 (hereinafter referred to as "the Amendment Act').

5. The present appeals belong to the second category.

6. In Satpal Singh case [(2000) 1 SCC 237 : 2000 SCC (Cri) 130] this Court proceeded on the footing that provisions of

Section 95(1) of the old Act are in pari materia with Section 147(1) of the Act, as it stood prior to the amendment in 1994.

7. On a closer reading of the expressions "goods vehicle', "public service vehicle', "stage carrier' and "transport vehicle' occurring in Sections 2(8), 2(25), 2(29) and 2(33) of the old Act with the corresponding provisions i.e. Sections 2(14), 2(35), 2(40) and 2(47) of the Act, it is clear that there are conceptual differences. The provisions read as follows:

Old Act

"2. (8) "goods vehicle" means any motor vehicle constructed or adapted for use for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers;

***

(25) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a motorcab, contract carriage, and stage carriage;

***

(29) "stage carriage" means a motor vehicle carrying or adapted to carry more than six persons excluding the driver which carries passengers for hire or reward at separate fares paid by or for individual passengers either for the whole journey or for stages of the journey;

***

(33) "transport vehicle" means a public service vehicle or a goods vehicle;'

The Act (New Act)

"2. (14) "goods carriage" means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods;

***

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage;

***

(40) "stage carriage" means a motor vehicle constructed or adapted to carry more than six passengers excluding the driver for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey;

***

(47) "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;'

(emphasis in original)

8. "Liability' as defined in Section 145(c) of the Act reads as follows:

"145. (c) "liability", wherever used in relation to the death of or bodily injury to any person, includes liability in respect thereof under Section 140;'

9. Third-party risks in the background of vehicles which are the

subject-matter of insurance are dealt with in Chapter VIII of the old Act and Chapter XI of the Act. Proviso to Section 147 [of the Act] needs to be juxtaposed with Section 95 of the old Act. Proviso to Section 147 of the Act reads as follows:

"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 a 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.'

It is of significance that the proviso appended to Section 95 of the old Act contained clause (ii) which does not find place in the new Act. The same reads as follows:

"(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises,'

The difference in the language of "goods vehicle' as appearing in the old Act and "goods carriage' in the Act is of significance. A bare reading of the provisions makes it clear that the legislative intent was to prohibit goods vehicle from carrying any passenger. This is clear from the expression "in addition to passengers' as contained in the definition of "goods vehicle' in the old Act. The position becomes further clear because the expression used is "goods carriage' is solely for the carriage of "goods'. Carrying of passengers in a goods carriage is not contemplated in the Act. There is no provision similar to clause (ii) of the proviso appended to Section 95 of the old Act prescribing requirement of insurance policy. Even Section 147 of the Act mandates compulsory coverage against death of or bodily injury to any passenger of "public service vehicle'. The proviso makes it further clear that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923 (in short "the WC Act'). There is no reference to any passenger in "goods carriage'.

10. The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefor.

11. Our view gets support from a recent decision of a three-Judge Bench of this Court in New India Assurance Co. Ltd. v. Asha Rani [(2003) 2 SCC 223 : 2003 SCC (Cri) 493 : (2002) 8 Supreme 594] in which it has been held that Satpal Singh case [(2000) 1 SCC 237 : 2000 SCC (Cri) 130] was not correctly decided. That being the position, the Tribunal and the High Court were not justified in holding that the insurer had the liability to satisfy the award."

This position was also highlighted in Oriental Insurance Co. Ltd. v. Devireddy Konda Reddy [(2003) 2 SCC 339 : 2003 SCC (Cri) 540] , SCC pp. 341-43, paras 4-11. Subsequently also in National Insurance Co. Ltd. v. Ajit Kumar [(2003) 9 SCC 668 : 2003 SCC (Cri) 1915] , in National Insurance Co. Ltd. v. Baljit Kaur [(2004) 2 SCC 1 : 2004 SCC (Cri) 370] and in National Insurance Co. Ltd. v. Bommithi Subbhayamma [(2005) 12 SCC 243] the view in Asha Rani case [(2003) 2 SCC 223 : 2003 SCC (Cri) 493 : (2002) 8 Supreme 594] was reiterated."

13. Now, **Vedwati** *(supra)* was a case relating to a goods vehicle. The case of a tractor is all the more different and the insurers, by no means, can be held liable to indemnify the owner for an injury sustained by a person travelling on a tractor as a passenger; or the trolley attached to the tractor. The same view was reiterated by the Supreme Court in **New India Insurance Company v. Darshana Devi and others, (2008) 7 SCC 416,** where the deceased was a person travelling on the tractor's mudguard, that was ferrying a consignment of Safeda to Hoshiarpur.

14. The aforesaid view of the law has been followed by this Court in **National Insurance Company Ltd. v. Smt. Leela alias Vimla, 2014 SCC OnLine All 16209**, which was also a fatal accident, where the deceased was travelling on a tractor. It was held that a passenger travelling on a tractor, which is not a transport vehicle but one that can be used for agricultural purpose alone, would not make the Insurance Company liable to indemnify the owner for the compensation awarded in case of death of a passenger. To like effect is the decision of this Court in **Mohan Kushwaha and others v. Ghanshyam and another, 2011 SCC OnLine All 2570,** where it was held:

"9. The argument has no substance inasmuch as it is settled that a tractor is not a transport vehicle and can only be used for agricultural purposes. It cannot carry passengers.

10. It is equally settled that tractor and trolley are two different motor vehicles and have to be insured separately. The trolley in the present case was not insured.

11. In Oriental Insurance Co. Ltd. v. Brij Mohan, 2007 ACJ 1909 (SC), the Supreme Court held that as the tractor-trolley was not insured in addition to the tractor and the tractor was not being used for agricultural purposes for which it was insured, the claim of the labourer travelling in the trolley on being injured in an accident was not maintainable against the insurance company and the owner of the vehicle was liable for the compensation. The aforesaid decision was followed by the Apex Court in United India Insurance Co. Ltd. v. Serjerao, 2008 ACJ 254 (SC). It was held that liability regarding labourers travelling in trolleys is only upon the owner

of tractor-trolley and the insurance company is not liable to indemnify the loss.

12. Similar view has been expressed by the Apex Court in National Insurance Co. Ltd. v. V. Chinnamma, 2004 ACJ 1909 (SC). In the said case the tractor and the trolley attached to it were used for transporting vegetables for sale in the market and not for agricultural purposes. It was held that the tractor was meant to be used for agricultural purposes. It cannot be used as a transport vehicle. The trailer or the trolley attached to the tractor would also be required to be used for agricultural purposes unless registered otherwise. In view of aforesaid facts and cir cumstances, there is no force in the appeal and the same is dismissed as devoid of merit."

15. The same principle has been followed in a more recent decision of this Court in **Oriental Insurance Company Ltd. v. Biddo Devi (Deceased) and others, 2018 SCC OnLine All 6027.**

16. Bearing in mind the fact that the deceased was travelling on board a tractor-trolley on a public road, proceeding to the cremation ground to participate in the funeral rites of Radhey Lal's mother, it was certainly not a case of an injury or death sustained by a third party in the course of use of the tractor for an agricultural purpose. The insurers cannot be held liable at all under the policy to satisfy the award or indemnify the owner. The finding recorded by the Tribunal, therefore, on Issue No. 3 is patently flawed and liable to be set aside.

17. In the result, this appeal **succeeds** and is ***allowed***. The impugned award dated 05.07.2002 passed by the Tribunal is modified. It is ordered that the compensation awarded shall be recoverable from the owners. The insurers shall stand discharged of their liability. The statutory deposit of Rs. 25,000/- made in this appeal shall be permitted to be withdrawn by the insurers.

18. Costs easy.

(2022)07ILR A557
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.06.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 509 of 2013

Rajesh Kumar ...Appellant
Versus
Smt. Nanhakai & Ors. ...Respondents

Counsel for the Appellant:
Sri Ashish Verma, Sri Rajesh Kumar Shukla, Sri Shakeel Ahmad Ansari

Counsel for the Respondents:
Sri Rajesh Trivedi, Sri Subash Chandra Gulati

Civil Law - Motor Vehicles Act, 1988 - Section 173 - Indian Penal Code, 1860 - Sections 337, 338, 304 & 427- Civil Procedure Code, 1908 - Order XLI , Rule 27 - Owner's Appeal - Award - 'hit & run' case - Insurance company taken Plea (i) 'Non-joinder of necessary party' (ii) claimants are fails to supplied the cover note or the policy, driving licences (DL) as well as copies of the FIR, charge-sheet, site plane, injury report, post-mortem report etc (iii) Motorcycle was driven by a person different from the owner - Application to admit additional evidence - Tribunal decided the question of admissibility of a Photostat copy of the DL or the insurance Policy in favour of the insurers - and relived the insurers from

their liability to pay the compensation is inadmissible - court held that, it was the duty of insurers to rebut and/or lead the evidences to establish that the vehicle was not insured or DL was fake - the police report is result of an official act and cannot be totally discounted - conclusion to the contrary, recorded by the tribunal holding that offending vehicle was not ridden by the owner is not sustainable - held, owner had a valid DL & insurance - hence, appeal allowed, award modified, compensation would be paid by the insurers.(Para - 11, 20, 21, 24, 27, 28)

Appeal - allowed. (E-11)

List of Cases cited: -

1. National Insurance Co. Ltd. New Delhi Vs Jugal Kishore & ors. (1988 (1) SCC 626),

2. Baij Nath Chaudhary Vs Sardar Avtar Singh & ors. (FAFO No. 838/1995 decided on 11.12.2019),

(Delivered by Hon'ble J.J. Munir, J.)

1. This is an owner's appeal, arising out of a judgment and award passed by the Motor Accident Claims Tribunal, awarding compensation to the claimants, but relieving the insurers of their liability.

2. The accident giving rise to this claim happened on 03.07.2009 at about 12:00 noon within the local limits of Police Station Mohanlalganj. The deceased, Ram Kumar alias Kunware was proceeding on a bicycle along with his daughter. As he reached the Dahiar Turn, a motorcycle bearing Registration No. UP-32CQ-7136 proceeded from the side of Mohanlalganj, which was driven at a high speed and negligently. It hit Ram Kumar, leading to grievous injuries. He was rushed to the Government Hospital, Mohanlalganj, but before any aid could be extended, he passed away. The claimants are six in number. Smt. Nanhakai is the deceased's widow, whereas Rupesh, Dileep and Sandeep are his sons. Km. Mamta and Km. Renu are the deceased's daughters. When the cause of action arose, out of the five children of the deceased, Rupesh alone was a major, aged 20 years. Dileep was aged 17 years, whereas Sandeep, 15. Km. Mamta and Km. Renu were aged 12 years and 8 years respectively. All the six claimants are arrayed as respondent nos. 1 to 6 to this appeal. The owner of the motorcycle is the appellant, whereas respondent no. 7, the National Insurance Company Limited through its Zonal Manager, Nawal Kishore Road, Hazaratganj, Lucknow is arrayed as respondent no. 7.

3. The claim petition was brought by the six respondents to this appeal, who shall hereinafter be called the 'claimants', arraying Rajesh Kumar and the National Insurance Company Limited as the two opposite parties. Rajesh Kumar shall hereinafter be referred to as 'the owner' whereas the National Insurance Company Limited aforesaid shall be called 'the insurers', unless the context necessitates a particular reference.

4. The claimants asked for a compensation in the sum of Rs.15,30,500/-. The Tribunal, after trying the petition, has allowed it in part, awarding a compensation of Rs.3,16,800/- with 7% interest from the date of the award (for short, 'the impugned award') until realization. The awarded compensation has been directed to be paid by the owner, relieving the insurers of their liability.

5. Aggrieved, this appeal has been preferred by the owner.

6. Eschewing unnecessary details about the owner's and the insurers' case pleaded in the written statement, it would

suffice to record that the owner has denied the accident and said that he reached the site of accident after it had already taken place. He stopped by the wayside upon coming across the accident. He was surrounded by the locals and implicated as the perpetrator. The stand of the owner is not to the effect that he was not the one who was riding the offending motorcycle. To the contrary, the owner's stand is that his vehicle was not involved in the accident, but while riding it, he chanced upon the site of accident. His vehicle was duly insured with the insurers and he was riding it with a valid and effective driving licence. His registration certificate and all necessary documents were in order. The owner raised a plea that liability, if any, would be that of the insurers.

7. The insurers put in their written statement, where they not only denied the factum of the accident or the involvement of the offending vehicle, but also pleaded that the claimants have neither supplied a copy of the cover note or the policy, so as to enable the insurers to ascertain whether the offending vehicle was insured with them. It was also stated in the insurers' pleadings that the claimants had not served a copy of the First Information Report, the charge-sheet in the criminal case and the site-plan. Also, a copy of the injury report, postmortem report etc. were not available in order to enable the insurers to ascertain the cause of death, and if it was referable to the injuries sustained by the deceased. A plea was also raised on behalf of the insurers that the claimants have neither impleaded the rider, who was operating the motorcycle at the relevant time or filed a copy of his driving license. Thus, apart from raising a plea of non-joinder of necessary party, that is to say, the rider, the crux of the insurers' case was that the motorcycle was operated by a person different from the owner, Rajesh Kumar.

8. It must be remarked here that the name of the motorcyclist operating the offending vehicle, has figured later on in the evidence as one Satish Kumar, a man different from its owner, Rajesh Kumar.

9. On the pleadings of parties, the Tribunal framed the following issues (translated into English from Hindi) :

(1) Whether on 30.07.2009 at about 12:00 noon at Mohanlalganj, Lucknow when the deceased, Ram Kumar @ Kunware was riding his bicycle along with his daughter, the rider of motorcycle bearing Registration No. UP-32CQ-7136, riding it at a high speed and negligently, hit the bicycle, that led the deceased to sustain injuries, causing his death by the time he reached hospital?

(2) Whether on the date and time of the accident, the offending motorcycle No. UP-32CQ-7136 was insured with opposite party no.2 and its insurance was valid and effective?

(3) Whether on the date and time of the accident, the rider of the offending motorcycle No. UP-32CQ-7136 was in possession of a valid and effective driving licence?

(4) Whether the accident occurred on account of contributory negligence of the deceased riding the bicycle?

(5) Whether the rider of the motorcycle is a necessary party and his non-impleadment to the claim petition makes it bad for non-joinder?

(6) Whether the claimants are entitled to any relief? If yes, from whom and how much?

10. In support of the claim, the claimants led documentary evidence, which includes a copy of the FIR relating to Crime No. 417 of 2009, under Sections 337, 338, 304, 427 IPC, Police Station Mohanlalganj, District Lucknow, Paper No. C5/2, and a photostat copy of the postmortem report, Paper Nos. C5/3 and 5/4. In addition, more documentary evidence was filed through a subsequent list, Paper No. C16 that includes a certified copy of the charge-sheet, a certified copy of the check FIR, a certified copy of the site-plan, a certified copy of the accident inspection report, a certified copy of the postmortem report, registration certificate of the offending motorcycle and the insurance papers. The insurers filed a certified copy of the deceased's family register, a photostat copy of the ration card, a copy of an order dated 28.12.2009 passed by the Circle Officer, Mohanlalganj. Along with these papers, a photostat copy of Rajesh Kumar's driving licence was also filed. The claimants examined Nanhakai as PW-1, the widow of the deceased and Km. Renu, the deceased's daughter, who was the pillion rider of the ill-fated bicycle, as PW-2. No oral evidence was led on behalf of the owner or the insurers.

11. Before commencement of hearing in the appeal, an application under Order XLI Rule 27 CPC was made on behalf of the owner, seeking to bring on record the original insurance policy and the driving licence. Before the application was considered and allowed, the learned Counsel for the insurers was required to seek instructions and verify the genuineness of the owner's driving licence and the insurance policy relating to the Insurance Company. This opportunity was granted vide order dated 27.11.2021. The application to admit additional evidence was allowed vide order dated 06.12.2021. Both the documents, that is to say, the insurance policy and the driving licence, were admitted to record and marked as Appellant Exhibits Nos. A1 and A2. The hearing of the appeal proceeded immediately thereafter and judgment was reserved.

12. Heard Mr. Rajesh Kumar Shukla, learned Counsel for the owner, Ms. Pooja Arora, Advocate holding brief of Mr. S.C. Gulati, learned Counsel appearing on behalf of the insurers and Mr. Rajesh Trivedi, learned Counsel for the claimants.

13. The learned Counsel for the owner has argued that his motorcycle was never involved in the accident and it was a case of 'hit and run'. He happened to reach the scene of occurrence riding his motorcycle, the offending vehicle and was framed in the case by the locals. This issue has been examined by the Tribunal and the evidence of PW-2, Renu, who was the pillion rider of the ill-fated bicycle along with the deceased, has been believed to hold the owner's motorcycle as the offending vehicle. The Tribunal has also concluded, from the evidence of PW-2, that the offending vehicle was being driven at a high speed and negligently, which resulted in the fatal accident. The Tribunal has also looked into the site-plan to hold it to be a case of the motorcyclist's negligence.

14. This Court has looked into the evidence of PW-2 as well, who is a very important witness, and must say that the conclusions of the Tribunal on the first issue cannot be faulted. Rather, the owner

does not dispute the fact that he was riding the offending vehicle and chanced upon the accident, which caused him to stop as an onlooker. His case is that he was implicated, because the real perpetrator had fled. There is not a shred of evidence to suggest any case of false implication or there being another vehicle that did a 'hit and run'. The finding returned by the Tribunal on the first issue, that the offending vehicle is the one responsible for the accident, therefore, is flawless and must receive our affirmation.

15. It is the second and the third issues, where there has been serious contention between parties about the fact whether the offending vehicle was driven by the owner, that is to say, Rajesh Kumar, or by another man called Satish Kumar, son of Sundar Lal. This name does not figure in the pleadings of the insurers, but has been mentioned in the FIR lodged by the deceased's son, Rupesh.

16. The contention of the learned Counsel for the owner is that the mention of Satish Kumar's name in the FIR is a matter of incorrect information, inasmuch as the informant was not an eye-witness. He lodged the information on the basis of whatever was conveyed to him by his sister, or may be, some other person present at the site of the accident. The FIR was lodged very promptly, that is to say, within an hour and a half of the occurrence. In the circumstances, there is a strong possibility about the name of the rider being mistaken or misunderstood at any step in the communication from the eye-witness to the informant. Learned Counsel for the owner emphasizes that the Police, after ascertainment of the identity of the offending vehicle's rider, charge-sheeted the owner and not Satish Kumar, who is, in no way, connected to the accident. It is submitted that the owner does not dispute his presence on the spot though he denies the involvement of his vehicle in the accident, a fact not believed by the Tribunal. As such, to hold that it was some Satish Kumar who was driving the offending vehicle and not the owner, is acknowledgment of a patently unbelievable stand by the insurers to wriggle out of their liability under the policy.

17. The contention of the learned Counsel for the insurers, on the other hand, is that even if the owner had a valid driving licence and an insurance policy also, purchased from them, that was valid and effective on the date of accident, the insurers would nevertheless not be liable, because the vehicle was driven by another man called Satish Kumar. According to the learned Counsel for the insurers, it has not been shown that Satish Kumar too had a valid and effective driving licence on the date of accident. It is also argued that the claimants are in collusion with the owner, inasmuch as in the FIR lodged by the deceased's son, the rider of the offending vehicle has been clearly named as Satish Kumar with his parentage, but later on, the Police, during investigation, have deliberately framed the owner as the one responsible for the fatal accident. Learned Counsel for the insurers submits that it is clearly a case of an unauthorized man called Satish Kumar driving the owner's vehicle without a valid driving licence and causing the accident, but later on, in order to saddle the insurers with the liability, the owner in collusion with the claimants and the Police has taken the responsibility upon himself.

18. This Court has considered the rival submissions on the point and carefully perused the record.

19. The Tribunal in its finding has relieved the insurers of the liability firstly

on the ground that a photostat copy of the driving licence and the insurance policy, besides the registration certificate, have been filed that are not even attested.

20. The other ground that has weighed with the Tribunal to relieve the insurers of their liability is an acceptance of the insurers' case that the offending vehicle was driven by a man, going by the name Satish Kumar and not the owner. As already noticed, a case of collusion between the owner, the claimants and the Police has been mooted by the insurers to shake off their liability under the insurance policy. So far as the question of admissibility of a photostat copy of the driving license or the insurance policy, or for that matter, the registration certificate is concerned, the Tribunal has gone wrong in holding the same to be inadmissible. Once photostat copies of these documents were produced by the claimant or even if not produced, it was the duty of the Insurance Company to have verified the existence of an insurance policy issued by them in relation to the offending vehicle and also the genuineness of the license, upon which reliance was placed by the claimants. Of course, so far as the driving license is concerned, the burden of the Insurance Company to verify its genuineness would not be in derogation of their case that the vehicle was not driven by the owner, whose license was put in evidence, but by another man Satish Kumar. Likewise, in case of the registration certificate, it was the duty of the insurers to have verified the fact whether the offending vehicle was plying under a valid registration certificate, issued by the competent Registration Authority. The claimants cannot be subjected to the burden of producing and proving the original or attested copies of these documents. In this connection, reference may be made to the decision of the Supreme Court in **National Insurance Company Ltd., New Delhi v. Jugal Kishore and others1** which was a motor accident claim case arising under the Motor Vehicles Act, 19392. Apart from the principles laid down there, specific to Section 95 of the Act of 1939, a principle of wide import in the matter of burden of proof regarding production of the Insurance Policy and the Driving License in an accident claim case was stated thus :

10. Before parting with the case, we consider it necessary to refer to the attitude often adopted by the Insurance Companies, as was adopted even in this case, of not filing a copy of the policy before the Tribunal and even before the High Court in appeal. **In this connection what is of significance is that the claimants for compensation under the Act are invariably not possessed of either the policy or a copy thereof. This Court has consistently emphasised that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. This duty is greater in the case of instrumentalities of the State such as the appellant who are under an obligation to act fairly.** In many cases even the owner of the vehicle for reasons known to him does not choose to produce the policy or a copy thereof. **We accordingly wish to emphasise that in all such cases where the Insurance Company concerned wishes to take a defence in a claim petition that its liability is not in excess of the statutory liability it should file a copy of the insurance policy along with its defence. Even in the instant case had**

it been done so at the appropriate stage necessity of approaching this Court in civil appeal would in all probability have been avoided. Filing a copy of the policy, therefore, not only cuts short avoidable litigation but also helps the court in doing justice between the parties. The obligation on the part of the State or its instrumentalities to act fairly can never be over-emphasised.

(Emphasis by Court)

21. Following the aforesaid decision of the Supreme Court, this Court in **Baij Nath Chaudhary v. Sardar Avtar Singh and others3** held that it was the duty of the insurers to rebut and/or lead evidence to establish that the vehicle was not insured with it or that the driver's license was fake. The objection, in any case, is no longer available, inasmuch as the originals of the driving license and the insurance policy were produced before this Court and sought to be admitted in evidence through an application under Order XLI Rule 27 CPC. That application has been allowed and both the documents have been admitted to record and marked as exhibits. Therefore, before this Court, it cannot be contended in any case that the offending vehicle was not insured with the insurers or that the driving license produced was fake. In fact, no evidence to dispute any of the papers regarding the offending vehicle has been led by the insurers. But, the vehicle plied on authorized papers, notwithstanding the insurers' case about the motorcycle being driven by Satish Kumar, a person other than the owner, who is alleged by the claimants to be operating the motorcycle, has to be examined. It is so because the Tribunal has opined that it was not the owner who was driving the motorcycle on the fateful day, but Satish Kumar, whose name has figured in the First Information Report. About Satish Kumar, if he be the rider operating the offending motorcycle, not an iota of evidence has been placed on record to show that he held a valid driving license by any of the parties. Therefore, if Satish Kumar were indeed operating the motorcycle, the insurers may or may not be liable. The insurers could still be liable, because they have not come up with a positive stand and evidence after due inquiry, that Satish Kumar, who, according to them, was operating the motorcycle, did not hold a valid license, so as to constitute a violation of the insurance policy covering the offending vehicle.

22. But, in this case, this Court may not be required to go that far. It would first have to be determined whether for a fact, the Tribunal was right in opining that it was not the owner who was operating the motorcycle on the date of accident, but another man called Satish Kumar. The Tribunal, in order to opine that way, has taken note of an order dated 28.12.2009 issued by the Circle Officer (of Police) that mentions the fact that Rupesh Kumar, the first informant, had said that the Police had wrongfully charge-sheeted Rajesh Kumar. The Tribunal has taken the aforesaid piece of evidence, together with the First Information into consideration, where Satish Kumar has been named as the person operating the offending vehicle at the time of the accident, by the first informant Rupesh Kumar. The Tribunal has connected these two facts with the failure of the claimants to examine Rupesh Kumar as a witness on their behalf. The Tribunal has also taken into account the testimony of P.W.1 Smt. Nanhakai to the effect that her son had told this witness that it was Satish Kumar who was operating the offending vehicle. About the testimony of P.W.2, Renu, who is the only eye-witness of the

accident, the Tribunal has remarked that she too has not denied the fact that Satish Kumar was operating the vehicle and has not testified about the fact as to who was actually operating it. The Tribunal has also taken into account the circumstance that Satish Kumar had sustained injuries, whereas Rajesh Kumar had none. The conclusions of the Tribunal may seem based on a thorough consideration of the evidence on record, but this Court, for reasons indicated, is of opinion that the conclusions reached on the basis of evidence on record are not sound. The Tribunal has been much influenced by the fact that in the First Information Report lodged by Rupesh Kumar, Satish Kumar with his parentage has been named as the man operating the offending vehicle at the time of the accident.

23. This Court has noted as well that the First Information Report was lodged by Rupesh Kumar within an hour and a half of the accident and he was not an eye-witness. He has lodged the report upon information by others; may be by his sister Renu. Now, as Renu's testimony would show, she could identify the person operating the offending vehicle at the time of the accident, but did not know his name. Any information passed on by her to the first informant or gathered by the informant from other sources could be much flawed. It is true that a police report, charge-sheeeting a person in the criminal case subject matter of motor accident claim, is not conclusive about the identity of the rider, or for that matter, any fact that is up for trial before the Tribunal, but the police report is certainly a valid piece of evidence. The Police, after investigation, contrary to the man named in the FIR as the one riding the motorcycle, have concluded that it was the owner who was riding the offending vehicle and operating it at the time of the accident.

24. A police report filed after investigation is the result of an official act and cannot be totally discounted, when it comes to fixing the identity of the person who was operating the offending vehicle. Quite apart, of the highest relevance, is the evidence of P.W.2, Renu, who is the only eye-witness of the accident. This witness was cross-examined, where she has said that she did not know the name of the man who was operating the motorcycle, but he is present in Court. This reference is obviously to Rajesh Kumar and not Satish, because Satish was not a party to the case and there is no record that he ever appeared before the Tribunal. The remark of the Tribunal that it was Satish Kumar who was operating the vehicle, as the deposition by P.W.1 on information from her son has not been denied by P.W.2, is not borne out from the record. P.W.2, in her testimony, including the cross-examination, has nowhere accepted the fact that it was Satish Kumar who was operating the offending vehicle. Rather, the testimony of P.W.2 indicates that no question was put to her at any point of time or a suggestion given that it was Satish Kumar, who was operating the offending vehicle. The further remark of the Tribunal, therefore, that P.W.2 has not said anything in her evidence as to who was operating the offending vehicle, is contrary to the record. She has pointed out to a person standing in Court that he was the man operating the offending vehicle, but has not taken the man's name, because she did not know it, a fact which she has clearly asserted. If the man standing in Court, who is very unlikely to have been Satish Kumar, whom the witness said was the one operating the vehicle, was indeed Satish Kumar, the evidence about that

man's identity could be produced by the insurers by calling him as a witness, or requesting the Court to ascertain it. Far from it, no suggestion was given to P.W.1 that the man whom she was identifying was Satish Kumar.

25. So far as P.W.1 Nanhakai is concerned, like her son, the first informant Rupesh Kumar, she was not an eye-witness of the accident and her evidence that it was Satish Kumar who was operating the offending vehicle is a remote hearsay based upon her son's information, who had himself heard about the fact and not seen it.

26. On going through a xerox copy of the record, on the basis of which this appeal has been heard, this Court did not find any medical examination report on record regarding the injuries sustained by Satish Kumar, on the foot of which, the Tribunal has remarked that Satish Kumar has sustained injuries, whereas Rajesh Kumar has not. There is no other evidence discernible from the record that led the Tribunal to say this. The circumstantial evidence, on the foot of which the Tribunal has supported its conclusions to hold that it was Satish Kumar who was operating the offending vehicle, therefore, also appears to be unreliable.

27. The conclusion, therefore, would be that the offending vehicle was ridden by the owner at the relevant time and not Satish Kumar. The conclusion, to the contrary, recorded by the Tribunal is not sustainable. The owner had a valid driving license and insurance policy, and there is no other facet of the quarrel between parties about a breach of the terms of the policy, entitling the insurers to be relieved of their obligation to satisfy the award.

28. In the result, this appeal **succeeds** and stands **allowed**. The impugned award passed by the Tribunal is **modified** to the extent that the compensation awarded and directed to be paid by the owner shall be payable by the insurers.

29. Costs easy.

(2022)07ILR A565
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 747 of 2013

Angad Tiwari & Anr. ...Appellants
Versus
National Insurance Co. Ltd. & Anr. ...Respondents

Counsel for the Appellants:
Sri Mukesh Singh

Counsel for the Respondents:
Sri Deepak Mehrotra, Sri Vikas Pandey

(A) Civil Law – Motor Vehicles Act, 1988 - Sections 168, 173 - UP Motor Vehicles Rules, 1998 - Rule-220-A(2)(i), 220-A(3), 220-A(3)(iii), 220-A(4) - Indian Penal Code,1860 - Section-275, 304-A, 337, 338 & 427: - **Claimant's Appeal - non-joinder of party - appreciation of evidence & factum of accident - denial of liabilities by insurers - accident cause by offending vehicle being driven negligently & hit the tempo at high speed - deceased was died on spot - owner of truck & driver filed their DL, Insurance papers, etc - No any oral or documentary evidence from insurance company filed only raise issue of non-joinder of parties - Tribunal framed issues - after considering all the documentary & oral evidences, decided all the issues positively - held, non-joinder of**

the owner & driver of tempo not fatal to the claim. (Para - 7)

(B) Civil Law – Motor Vehicles Act, 1988 - Sections 168 & 173 - UP Motor Vehicles Rules, 1998 - Rule-220-A(2)(i), 220-A(3), 220-A(3)(iii), 220-A(4) - Indian Penal Code,1860 – Sections 275 & 304-A, 337, 338 & 427 - claimant's Appeal - quantum of compensation - determination - income & future prospectus - deceased between age of 15-20 years - in absence of any evidence about skilled profession - tribunal rightly holds Rs. 100/- per day as earned by an unskilled labour - income would be Rs. 3000/- pm - tribunal has erred in not adding anything towards entitlement of future prospectus - future prospects is no longer *res interga in view of law laid down in case of* *Pranay Shethi'* case - held, future prospects are to be determined in accordance with the UP Rules, 1998 which provides a statutory guide & scale for assessment of such prospects. (Para - 12, 13)

(C) Civil Law – Motor Vehicles Act, 1988, Section -168, 173, UP Motor Vehicles Rules, 1998, Rule-220-A(2)(i), 220-A(3), 220-A(3)(iii), 220-A(4), Indian Penal Code, Section-275, 304-A, 337, 338, 427: - **Claimant's Appeal - quantum of compensation - determination - Multiplier & Deduction - as deceased was in age bracket of 15-20 years - instead of the multiplier of '13' should be applied instead of '18' as per the law laid down in case of Sarla Verma's as well as being deceased was bachelor, 50 % is appropriate to be deducted as personal & living expenses.** (Para - 16, 19)

(D) Civil Law – Motor Vehicles Act, 1988, Section - 163-A, 168, 173, UP Motor Vehicles Rules, 1998, Rule 220-A(3), 220-A(3)(ii), 220-A(6): - claimant's Appeal - quantum of compensation - determination of compensation towards conventional heads - bearing in mind the price index, falling bank interest, escalation of rates in different cases - Rules, 1998 do not serve as realistic index to award compensation - as such law laid down in case of Pranay Sethi would be applicable - hence, appeal succeeds & allowed with costs - compensation enhanced as from Rs. 2,54,000 to a sum of Rs. 5,96,000/- with 7% rate of interest - impugned award modified accordingly. (Para - 22, 24, 34)

Appeal Dismissed. (E-11)

List of Cases cited: -

1. Laxmi Devi & ors. Vs Mohammad Tabbar & anr., (2008) 12 SCC 165

2. National Insurance Co. Vs Pranay Sethi & ors., (2017) 16 SCC 680

3. New India Assurance Co. Ltd Vs Urmila Shukla & ors., 2021 SCC OnLine SC 822

4. Sarla Verma Vs DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002

5. United India Insurance Company Ltd. Vs Satinder Kaur @ Satwinder Kaur & ors., 2020 SCC OnLine SC 410

6. Amrit Bhanu Shali & ors. Vs National Insurance Co. Ltd. & ors., (2012) 11 SCC 738

7. Magma General Insurance Co. Ltd. Vs Nanu Ram alias Chuhru Ram & ors., (2018) 18 SCC 130

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a claimants' appeal under Section 173 of the Motor Vehicles Act, 1988 (for short, "the Act') seeking enhancement of the award made by the Motor Accident Claims Tribunal (for short, "the Tribunal').

2. The facts giving rise to this appeal are these:

On 28.03.2012 at about 02:30 p.m., one Rahul Tiwari was on board a *Vikram* tempo bearing Registration No. UP-42AT-

2014 owned by his father, Angad Tiwari. He was proceeding on board the said vehicle along with some of his friends in a funeral procession from Gonda to Ayodhya. The tempo was moving on the left side of the road towards Ayodhya. As the vehicle reached near village Balapur on the Nawabganj-Katra Road within the local limts of P.S. Nawabganj, District Gonda, Rahul Tiwari met some relatives of his. The tempo was parked on the left hand side of the road and Rahul Tiwari was engaged in a conversation with the relatives. Suddenly, a tanker bearing Registration No. HR38K/0913 came on from the Nawabganj side driven recklessly at a high speed. The tanker hit the tempo and those standing around it, leading to Rahul Tiwari's death besides that of some others on the spot. Still others from amongst occupants of the Tempo were left injured. The deceased was employed on a vehicle bearing Registration No. UP43T/1057 as a Khalasi, a job that yielded him an income in the sum of Rs. 7000/- per mensem. He further earned a sum of Rs. 3000/- per month from his agricultural pursuits. The deceased Rahul Tiwari, therefore, had a monthly income of Rs. 10,000/-.

3. A First Information Report about the accident was lodged, giving rise to Crime No. 115 of 2012, under Sections 275, 337, 338, 304A and 427 IPC, P.S. Nawabganj, District Gonda. It is on the basis of these facts that the two claimants here, who are the father and the mother of the deceased Rahul Tiwari, instituted a claim petition before the Motor Accident Claims Tribunal, Faizabad. They claimed in compensation for the untimely death of their son, a sum of Rs. 21,60,000/- together with interest. The National Insurance Company Limited, Civil Lines, Faizabad through its Manager were impleaded as opposite party no. 1 to the claim petition, who are respondent no. 1 to this appeal. Smt. Urmila Rungta, who was the owner of the offending vehicle-tanker, was impleaded as opposite party no. 2 to the claim petition and respondent no. 2 to this appeal. Both the Insurance Company and the owner filed their separate written statements. The Insurance Company and the owner both denied the involvement of the offending vehicle. The owner further pleaded that the driver of the offending vehicle, Prahlad had a valid and effective driving licence on the date of accident and the vehicle was insured with respondent-Insurance Company from 14.01.2012 to 13.01.2013. The liability, if any, would, therefore, fall on the shoulders of the Insurance Company.

4. Upon pleadings of parties, the following issues were framed (translated into English from Hindi):

(1) Whether on 28.03.2012 at about 02:30 in the day at village Balapur Nawabganj-Katra Road falling under the Police Station Nawabganj, District Gonda when the deceased Rahul Tiwari was proceeding on a Vikram tempo with his friends towards Ayodhya, and had parked the tempo on the left hand side of the road to talk to some relatives, tanker bearing Registration No. HR38K/0913 driven by its driver negligently and at a high speed hit the tempo and its occupants who were standing resulting in the death of Rahul Tiwari and some others?

(2) Whether the driver of the tanker bearing Registration No. HR38K/0913 had a valid driving licence at the time of the accident?

(3) Whether at the time of accident, the tanker bearing Registration No. HR38K/0913 was insured with opposite party no. 1?

(4) Whether the claim petition is bad for non-joinder of the owner and the driver of the tempo?

(5) Whether the claimants are entitled to compensation? If yes, from whom and how much?

5. In support of the claim petition, claimant-appellant no. 1 Angad Tiwari has testified as CPW-1 and Harishyam Tiwari as CPW-2. Documentary evidence was also filed, which includes the Ration Card, a copy of the First Information Report, the Registration Certificate of the offending vehicle, the driving licence of the vehicle's driver, the offending vehicle's insurance papers, its permit, the offending vehicle's fitness certificate, its pollution clearance certificate, the accident inspection report, the charge sheet filed in the criminal case and a copy of the family register. No evidence was led on behalf of the insurance company, either oral or documentary.

6. On behalf of the owner of the offending vehicle, the registration certificate of the said vehicle, its permit, fitness certificate and the driving licence of its Driver, Prahlad were filed.

7. Issue no. 1 was answered in favour of the claimant-appellants, holding the offending vehicle to be responsible for the accident on account of being driven negligently and at a high speed. It was held that the offending vehicle hit the tempo and the persons standing around it, resulting in the death of Rahul Tiwari and others. Issue nos. 2 and 3 were both answered in favour of the claimant-appellants, holding that the driver of the offending vehicle held a valid and effective driving licence on the date and time of the accident and the offending vehicle was insured with respondent-Insurance Company. In answering Issue No. 4, the non-joinder of the owner and the driver of the tempo was held to be not fatal to the claim.

8. In working out the compensation payable to the claimants, the Tribunal held the deceased to be aged between 15-20 years, though it was asserted that he was 21 years old. The Tribunal held that there was no proof about the income of the deceased, and, therefore, the deceased's income had to be worked out on a notional basis, relying on the decision of the Supreme Court in **Laxmi Devi and others vs. Mohammad Tabbar and another, (2008) 12 SCC 165**. The annual income was held to be Rs. 36,000/-. This notional income was worked out on the basis of an unskilled daily wager's prevalent wages, which were, in the opinion of the Tribunal, not more than Rs. 100/- per day. Since the deceased was unmarried, 50% was directed to be deducted towards his personal expenses. The annual dependency of the claimants was, therefore, held to be Rs. 18000/-. The Tribunal applied a multiplier of "13' by taking into consideration the age of the dependents, both of whom were held to be, on an average, aged 47 years. The age of the deceased was not made the basis to determine the applicable multiplier. Thus, to the annual income of Rs. 18,000/-, a multiplier of 13 was applied to arrive at a total dependency of Rs. 2,34,000/-. To the aforesaid figure were added, under the conventional heads, funeral expenses, compensation for the loss of estate and love and affection, a sum of Rs. 5000/-, Rs. 5000/- and Rs. 10,000/- in that order. Adding up the figure of Rs. 20,000/- under the conventional heads to the substantive total dependency of Rs. 2,34,000/-, the Tribunal passed an award directing the Insurance Company to pay the claimants a

sum of Rs. 2,54,000/- with 6% simple interest per annum from the date of institution of the claim petition until realization. Both the claimants were held entitled to an equal share of the compensation. It was further directed that a sum of Rs. 50,000/- in favour of each of the claimants shall be invested with a Nationalized Bank, in an interest bearing account, for a period of five years. It is the aforesaid order that the claimant-appellants have assailed in this appeal, seeking enhancement of the compensation awarded.

9. Heard Mr. Mukesh Singh, learned Counsel for the claimant-appellants and Mr. Deepak Mehrotra, learned Counsel appearing on behalf of the Insurance Company.

10. It is submitted by the learned Counsel for the claimants that the award made is grossly inadequate and deserves to be enhanced. He submits that the Tribunal has erred in inferring the income of the deceased on a notional basis and pegging it down to a figure of Rs.100/- per day. It is also argued that the multiplier of 13, applied on the basis of the age of the dependents, is manifestly illegal, inasmuch as what is relevant is the age of the deceased. It is also submitted that nothing has been added to the deceased's income towards future prospects, which he is entitled to in view of the decision of the Constitution Bench of the Supreme Court in **National Insurance Company vs. Pranay Sethi and others, (2017) 16 SCC 680**. It is argued that going by the principles laid down in **Pranay Sethi** *(supra)*, the Tribunal has also erred in granting a miserably low compensation under the conventional heads.

11. Mr. Deepak Mehrotra, learned Counsel for the Insurance Company has supported the impugned award and says that it is a just award, which ought not to be disturbed by this Court.

12. This Court has considered the submissions advanced on behalf of both parties and carefully perused the record. There is not much to be said in criticism of the Tribunal's opinion about the income of the deceased. The reason is that there is hardly any evidence offered on behalf of the claimants to establish the deceased's income from his employment as a *Khalasi* on a commercial vehicle or the other component earned out of agricultural exploits. The Tribunal may not be perfectly right in determining the deceased's income on a notional basis, considering the fact that the deceased was a young man, held to be aged between 15-20 years; asserted by the claimants to be 21 years old. The deceased, no doubt, was in the prime of his youth and has to be credited with actual income from his exertions. The Tribunal, however, is not wrong in estimating the deceased's income on the basis of that earned at the relevant time by an unskilled labourer, because there is no evidence about any skilled profession that the deceased pursued, or about his income from employment in agriculture. Therefore, this Court is of opinion that the Tribunal was right in holding the deceased's income to be Rs.100/- per day on the basis of contemporary daily-wages earned by an unskilled labourer. In consequence, the monthly income of the deceased would be Rs.3000/-, which the Tribunal has rightly determined. The Tribunal has erred in not adding anything towards future prospects. The deceased, at his youthful age, had the entire future open to him and would, in course of time, earn much higher wages. The question about the entitlment to compensation on account of future prospects is no longer res integra in view of

the law laid down by the Supreme Court in **Pranay Sethi,** where it is held:

"56. The seminal issue is the fixation of future prospects in cases of deceased who are self-employed or on a fixed salary. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

57. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardisation, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardisation on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration

the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

58. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] thinks it appropriate not to add any amount and the same has been approved inReshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] . Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self-employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts."

13. The question, however, to be considered is whether the future prospects are to be awarded in accordance with the principles laid down in **Pranay Sethi** or under Rule 220-A(3) of the Uttar Pradesh Motor Vehicles Rules, 1998 (for short, "the Rules of 1998') framed under the Act. This issue engaged the attention of the Supreme Court in **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822.** The aforesaid decision was rendered by their Lordships of the Supreme Court in the context of a motor accident claim that arose from the State of Uttar Pradesh and, therefore, squarely applies to the determination of future prospects in the State of U.P. The said decision holds that future prospects are to be determined in accordance with the Rules of 1998, which provide a precise statutory guide and scale for assessment of such prospects. In **Urmila Shukla** *(supra),* the question that arose before their Lordships is set forth in Paragraph No.4 of the report. It reads:

"4. The basic ground of challenge by the appellant is that sub-rule 3(iii) of Rule 220A is contrary to the conclusions arrived at by the Constitution Bench of this Court in National Insurance Company Ltd v. Pranay Sethi reported in (2017) 16 SCC 680."

14. In answer to the question, it was held in **Urmila Shukla** thus:

"9. It is to be noted that the validity of the Rules was not, in any way, questioned in the instant matter and thus the only question that we are called upon to consider is whether in its application, sub-Rule 3(iii) of Rule 220A of the Rules must be given restricted scope or it must be allowed to operate fully.

10.The discussion on the point inPranay Sethiwas from the standpoint of arriving at "just compensation" in terms of

Section 168 of the Motor Vehicles Act, 1988.

11.If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision inPranay Sethicannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated inPranay Sethicannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs."

15. There is little doubt that future prospects in the State of Uttar Pradesh have to be determined in accordance with the Rules of 1998 and not by the principles laid down in **Pranay Sethi.** Rule 220-A(3) confers greater benefit upon the claimant and going by the principle in **Urmila Shukla**, it embodies the preferred principle to apply in order to determine future prospects. The deceased was aged below 40 years and, therefore, the claimants are entitled to add 50% to his monthly emoluments by way of future prospects.

16. So far as the deduction towards personal expenses of the deceased goes, the decision of the Supreme Court in **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another, (2009) 6 SCC 121** that has been approved in the decision of the Constitution Bench of the Supreme Court in **Pranay Sethi and followed in United India Insurance Company Ltd. v. Satinder Kaur alias Satwinder Kaur and others, 2020 SCC OnLine SC 410**, lays down the clear principle that "for bachelors, normally, 50% is deducted as personal and living expenses", to borrow the precise expression of their Lordships. In **Sarla Verma** *(supra),* it has been held:

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra [(1996) 4 SCC 362], the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically.

Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

17. It must be remarked that the scale regarding deduction towards personal and living expenses of a deceased bachelor is also 50% under Rule 220-A(2)(i) of the Rules of 1998, unless the family of the bachelor is large and dependent on the income of the deceased, in which case the deduction shall be one-third. The case here is not one where the deceased, who was decidedly a bachelor, left behind a large family, dependent on his income. He has left behind two dependents who are his parents. Therefore, in the opinion of this Court, deduction of 50% would apply, whether the rule in **Sarla Verma** is applied or the provisions of Rule 220-A(2)(i) are followed.

18. The multiplier adopted by the Tribunal, in the opinion of this Court, is grossly inadequate. The Tribunal seems to have applied the multiplier, going by the age of the dependents. The multiplier is to be determined in accordance with the age of the deceased; not his dependents. In this connection, reference may be made to the decision of the Supreme Court in **Amrit Bhanu Shali and Ors. vs National Insurance Co. Ltd. and Ors., (2012) 11 SCC 738. In Amrit Bhanu Shali** *(supra)*, it was held:

"15. The selection of multiplier is based on the age of the deceased and not on the basis of the age of the dependent. There may be a number of dependents of the deceased whose age may be different and, therefore, the age of the dependents has no nexus with the computation of compensation.

16. In Sarla Verma [(2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] this Court held that the multiplier to be used should be as mentioned in Column (4) of the table of the said judgment which starts with an operative multiplier of 18. As the age of the deceased at the time of the death was 26 years, the multiplier of 17 ought to have been applied. The Tribunal taking into consideration the age of the deceased rightly applied the multiplier of 17 but the High Court committed a serious error by not giving the benefit of multiplier of 17 and bringing it down to the multiplier of 13."

19. The deceased here was placed in the age bracket of 15-20 years and going by his age, the multiplier, as mentioned in Paragraph No.42 of the judgment of the Supreme Court in **Sarla Verma**, would be 18; and not 13, that the Tribunal has applied.

20. So far as the compensation awarded under the conventional heads is concerned, the principles laid down by the Constitution Bench in **Pranay Sethi** are of decisive importance, where it is observed:

"48. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule to the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra [UP SRTC v. Trilok Chandra, (1996) 4 SCC 362] . Recently, in Puttamma v. K.L. Narayana Reddy [Puttamma v.K.L. Narayana Reddy, (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574] it has been reiterated by stating : (SCC p. 80, para 54)

"54. ... we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:

"3. General damages (in case of death):

The following general damages shall be payable in addition to compensation outlined above:

(i)	Funeral expenses	Rs 2000
(ii)	Loss of consortium, if beneficiary is the spouse	Rs 5000
(iii)	Loss of estate	Rs 2500
(iv)	Medical expenses -- actual expenses incurred before death supported by bills/vouchers but not exceeding	Rs 15,000"

50. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra [UP SRTC v.Trilok Chandra, (1996) 4 SCC 362] and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs 1,00,000 was granted towards consortium inRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . The justification for grant of consortium, as we find fromRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , is founded on the observation as we have reproduced hereinbefore.

51. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh[Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . It has granted Rs 25,000 towards

funeral expenses, Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. ThoughRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] refers to Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] , it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads."

(Emphasis by Court)

21. The award of compensation under the conventional heads, particularly, the one for loss of consortium, came up for consideration of the Supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram *alias* Chuhru Ram and others, (2018) 18 SCC 130. In Magma General Insurance Company Ltd**. *(supra)*, it has been held:

"21. A Constitution Bench of this Court in Pranay Sethi[National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, "consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse : [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149]

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation". [Black's Law Dictionary(5th Edn., 1979).]

21.2. Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training".

21.3. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

22. Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognised that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

23. The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium. Parental consortium is awarded to children who lose their parents in motor vehicle accidents under the Act. A few High Courts have awarded compensation on this count [Rajasthan High Court in Jagmala Ram v. Sohi Ram, 2017 SCC OnLine Raj 3848 : (2017) 4 RLW 3368; Uttarakhand High Court in Rita Rana v. Pradeep Kumar, 2013 SCC OnLine Utt 2435 : (2014) 3 UC 1687; Karnataka High Court in Lakshman v. Susheela Chand Choudhary, 1996 SCC OnLine Kar 74 : (1996) 3 Kant LJ 570] . However, there was no clarity with respect to the principles on which compensation could be awarded on loss of filial consortium.

24. The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under "loss of consortium" as laid down inPranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] . In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs 40,000 each for loss of filial consortium."

(Emphasis by Court)

22. Again, Rule 220-A(4) of the Rules of 1998 provides for compensation under the non-pecuniary heads, but the scale of compensation or damages provided under Rule 220-A(4) do not confer better and greater benefit upon the claimants compared to the liquidated figures under each head stipulated in **Pranay Sethi**. The principle in **Pranay Sethi** envisages 10% upward revision to be done for the compensation payable under the conventional heads, bearing in mind the price index, falling bank interest, escalation of rates in different cases. The Rules of 1998, that have been amended to introduce Rule 220-A more than ten years ago, in the year 2011, do not serve as a realistic index to award compensation under the

conventional heads. The determination of compensation in **Pranay Sethi** would, therefore, be applicable. Now, by the decision in **Pranay Sethi**, for the loss of estate and funeral expenses, a sum of Rs.15,000/- each would be payable.

23. So far as compensation for the loss of filial consortium is concerned, the claimants, who are the mother and the father of the deceased, would be entitled to Rs.40,000/- each.

24. In the circumstances, the compensation payable stands to be revised as follows:

(i)Monthly Income (of the deceased) = 3000/-

(ii)Monthly Income + Future Prospects (monthly income x 50%) = 3000+1500= 4500/-

(iii)Annual Income (of the deceased) = 4500 x 12= 54,000/-

(iv)Annual Dependency = Annual Income - 50% deduction towards personal expenses of the deceased = 54,000 - 27,000 = 27,000/-

(iv)Total Dependency = Annual Dependency x Applied Multiplier = 27,000 x 18=4,86,000/-

(v) Claimants' entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium = 15,000 + 15,000 + 40,000+40,000 = 1,10,000/-

The total compensation would therefore, work out to a figure of Rs.4,86,000 + Rs.1,10,000= 5,96,000/-

33. The aforesaid sum of money would carry simple interest @ 7% *per annum* in accordance with Rule 220-A of the Rules of 1998 from the date of institution of claim petition until realization. However, the sum of money already deposited (paid or invested in terms of the impugned award or interim order of this Court) shall be adjusted.

34. In the result, this appeal **succeeds** and is **allowed** with costs throughout. The impugned award is modified and the compensation enhanced to a sum of Rs.5,96,000/- (Rupees Five Lac Ninety Six Thousand only). The said sum of money shall be payable by the Insurance Company. The claimants shall be entitled to simple interest @ 7% on the sum of compensation awarded from the date of institution of the claim petition until realization. The inter se apportionment of compensation and the other directions made by the Tribunal shall remain intact.

(2022)07ILR A577
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 966 of 2016

Smt. Renu Devi & Ors. ...Appellants
Versus
Gufran Ahmad & Ors. ...Respondents

Counsel for the Appellants:
Sri Pranab Kumar Ganguli

Counsel for the Respondents:
Sri Pradeep Kumar Tiwari, Sri Pranjal Mehrotra, Sri Pawan Kumar Mishra

(A) Civil Law – Motor Vehicles Act, 1988 - Sections 165, 166, 168 & 173: - Appeal - against rejection of claim petition - whether incident is an accident or murder - incident took place while chasing a truck by a police Jeep - Truck driver deliberately hit the Jeep and broken the barrier of a toll plaza - deceased constable sustained serious injuries and died during treatment - Tribunal has not taken a holistic view of the matter - gave finding that, truck driver used his truck as a weapon for causing death therefore it was a murder and not a case of an accident due to rash & negligent driving as such no compensation can be granted - Court - upturn the finding of tribunal - since, the incident occurs due to (a) use of motor vehicle, (b) due to negligence of the driver - therefore, the claim petition is maintainable. (Para - 5, 27)

(B) Civil Law – Motor Vehicles Act, 1988 - Sections 165, 166, 168 & 173 - Appeal - against rejection of claim petition - quantum of compensation - accident took place before 9 years and record of case is available before appellate Court - no issue of any complicated questions - in the light of various Judgments of Hon'ble Apex Court - court can decide the compensation instead of relegating the parities to the tribunal - as per the law lay down by the Hon'ble Apex Court in case of AV Pdama Case, General Manager, Kerala State Road Transport Co. case, Oriental Insurance Co. Ltd. & Bajaj Allianz General Insurance Co. Pvt. Ltd **the calculation of compensation are allowed accordingly.** (Para 30, 31, 32)

Appeal - partly allowed Judgement of tribunal shall stand modified to the aforesaid extent. (E-11)

List of Cases cited: -

1. Rita Devi Vs New India Assurance Co. Ltd. (2000 ACJ 801 (SC),

2. Ambalika Singh & ors. Vs United India Insurance Co. Ltd. & ors. (2008 (1) TAC 207,

3. Challis VS London & South Western Railway Co. (1905 (2) KB 154),

4. Nisbet Vs Rayne & Burn (1910 (1) KB 689,

5. Kalim Khan Vs Fimidabee (2018 (J) SCC 687),

6. UPSTC Vs Vidya Devi (2011 ACJ 2659),

7. Bithika Mazumdar & anr. Vs Sagar Pal Y ors. (2017 Vol. 2 SCC 748),

8. FAFO No. 1999 of 2007 (Oriental Insurance Co. Ltd. Vs Smt. Ummida Begum & ors.),

9. FAFO No. 1404 of 1999 (Smt. Raginin Devi & ors. Vs United India Insruance Co. Ltd. & anr.) Decided on 17.04.2019,

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

11. Sarla Verma Vs Delhi Transport Cor.(2009 vol. 6 SCC 121),

12. National Insurance Co. Ltd. Vs Mannat Johal & ors. (2019 (2) TAC 705 (SC),

13. A V Padma Vs Venugopal (2012 (12) GLH (SC) 442,

14. The Oriental Insurance Co. Ltd. Vs Chief Commissioner of Income Tax (TDS), (R/Special Civil Application No.4800 of 2021, Decided on 05.04.2022

15. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. (FAFO No. 1818/2012 order Dt. 19.07.2016),

16. General Manager, Kerala State Road Transport Corp. Trivandrum Vs Susamma Thomas & ors. (AIR 1994 SC 1631).

(Delivered by Hon'ble Ajai Tyagi, J.)

1. Heard learned counsel for the appellants and learned counsel for the respondents. Perused the record.

2. This appeal has been preferred by appellants/claimants against the judgment and order dated 03.02.2016 passed by Motor Accident Claims Tribunal Chandauli/Additional District Judge, Court No.1, Chandauli (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.107 of 2013, Smt. Renu Devi and others v. Gufran Ahmad and others by which the claim petition of appellants was rejected by learned tribunal.

3. The incident having taken place is not in dispute. The dispute is whether said incident is covered under Sections, 165, 166 and 168 of the Motor Vehicles Act, 1988 (in short M.V. Act) or is a murder, the legal representatives of deceased whether are entitled to any compensation under M.V. Act is the crux of the litigation.

4. The brief facts as culled out from the record are that on 31.5.2013 at about 01.45 a.m. (night), deceased Ashok Kumar Yadav, who was constable in U.P Police Department, was on duty with S.H.O. and other police personnels and were in Government Jeep No.UP 66 G 0072, near Madho Singh Toll Plaza within the jurisdiction of Police Station Orai, District Sant Ravidas Nagar, a truck bearing No.UP 70 CT 7486 came on the spot and the Police enquired from the truck driver regarding the goods loaded in the truck. On making this enquiry, the truck driver started the truck and ran away from there. The Police jeep chased the aforesaid truck and after overtaking the truck, the jeep crossed the toll plaza and stopped the truck and when police personnel signalled, the truck driver to stop the truck, the truck driver deliberately broke the barrier of toll plaza by driving rashly and negligently and damaged the barrier and hit the jeep from behind. Consequently, the jeep was fleeing in air and it overturned. In this accident, Constable Ashok Singh Yadav sustained serious injuries due to which he died during treatment.

5. The Motor accident claims tribunal held that it was a case of murder and not a case of rash and negligent driving by the truck driver. The tribunal also held that the murder of deceased was caused using the truck as a weapon and if any vehicle is used as a weapon then no compensation can be granted to the claimants under M.V. Act and the claim petition preferred by appellants who were legal representatives of deceased was rejected.

6. Learned counsel for the appellants submitted that death of the deceased had taken place while he was in police jeep, hence it was death while using motor vehicle. It is also submitted that at the time of accident, the truck driver was driving the truck rashly and negligently. The truck hit the jeep at a very high speed from behind causing accident.

7. It is further submitted by learned counsel for appellants that learned Tribunal erred in holding that the death of the deceased was murder simplicitor and not accidental death. Learned counsel submitted that under the M.V. Act if an accident arises due to use of motor vehicle then claimants are entitled to compensation. Learned counsel for appellants has relied on the judgments titled ***Rita Devi v. New India Assurance Co. Ltd., 2000 ACJ*** 801 (SC), and

Ambalika Singh and others v. United India Insurance Co. Ltd. and others, 2018 (1) TAC 207.

8. Learned counsel for Insurance company vehemently submitted that the death of deceased was consequence of planned murder by the truck driver. It was not an accident, but the truck driver intentionally hit the jeep, there was mens rea on the part of the truck driver. Learned counsel also submitted that the first information report of the occurrence was lodged under Sections 307 and 302 of Indian Penal Code (I.P.C) along with other Sections and as per contents of F.I.R., the truck driver intentionally hit the police jeep. It is also submitted that the charge sheet is also filed under Section 302 of I.P.C. It is further submitted that it is proved that the act of truck driver can be termed as murder and not accident, and hence, the claimants are not entitled to compensation under M.V. Act and learned tribunal has rightly rejected the claim petition. It is argued that there is no illegality or infirmity in the impugned judgment/award which calls for any interference by this Court under Section 173 of M.V. Act.

UNDISPUTED FACTS:

9. The death of deceased police Constable Ashok Singh Yadav had taken place when he was on duty and he was in the police Jeep when it hit the truck. As per the records, the truck involved in the accident was illegally transporting cattle, when the police enquired from the truck driver, he started the truck and ran away. The police jeep while chasing the truck overtook the said vehicle and crossed the toll plaza and stopped the jeep, after stopping the jeep, the police personnel signalled the truck driver and tried to stop it but the truck driver deliberately broke the barrier and hit the jeep from behind causing the incident to occur.

FINDINGS:

10. In Rita Devi (supra), the Apex Court held that murder can be of two types *" murder simplicitor"* and *"accidental murder"*. In the case filed Rita Devi (supra) the question before the Apex Court was whether a murder can be an accident in any given case. The Apex Court held that in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing, but there are also instances where murder can be by accident in a given set of facts, which depends on the proximity of the cause of such murder.

11. It was held that if the dominant intention of the act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.

12. The claim petition in aforesaid case namely Rita Devi (supra) was filed under Section 163A of M.V. Act, 1988 in which the claimants were not required to prove the act of negligence on the part of driver and the element of negligence rather they were required to prove that the death of the deceased had taken place out of use of the motor vehicle, but in the case on hand, the claim petition was filed under Section 166 of Motor Vehicles Act, 1988. Hence, the appellants/claimants are

required to prove the negligence also on the part of the truck driver.

13. The Apex Court in Rita Devi (supra) has held that if any act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.

14. The law on this issue about murder in case of use of motor vehicle and compensatory jurisprudence is clarified by the Supreme Court in *Rita Devi (supra).* The Supreme Court drew distinction between the term "murder" which is not an accident and a "murder" which is an accident. The Supreme Court laid down the test that if the dominant intention of the felonious act is to kill any particular person, then such killing is not accidental murder but a murder simpliciter. However, if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act, then such murder is an accidental murder. Para 10 of the judgment is relevant and is reproduced hereunder:

"10. The question, therefore is, can a murder be an accident in any given case? There is no doubt that "murder", as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a "murder" which is not an accident and a "murder" which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder."

(Emphasis supplied)

15. In Rita Devi (supra), the deceased was employed to drive an auto rickshaw for ferrying passengers on hire. On the fateful day, the auto rickshaw was parked in the rickshaw stand at Dimapur when some unknown passengers engaged the deceased for a journey. As to what happened on that day is not known. It was only on the next day that the police was able to recover the body of the deceased but the auto rickshaw in question was never traced out. The owner of the auto rickshaw claimed compensation from the insurance company for the loss of auto rickshaw. The heirs of the deceased claimed compensation for the death of the driver on the ground that the death occurred on account of accident arising out of use of the motor vehicle. The Apex Court held that the murder to be an accidental murder most satisfy certain tests, the Court in Para 14 is held:-

"14. Applying the principles laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the autorickshaw, was duty bound to have accepted the demand of fare-paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the autorickshaw and in the course of achieving the said object of stealing the autorickshaw, they had to eliminate the driver of the autorickshaw then it cannot but be said that the death so caused to the

driver of the autorickshaw was an accidental murder. The stealing of the autorickshaw was the object of the felony and the murder that was caused in the said process of stealing the autorickshaw is only incidental to the act of stealing of the autorickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing theft of the autorickshaw."

(Emphasis supplied)

16. In Rita Devi (supra), the Supreme Court relied on **Challis v. London and South Western Railway Company, (1905) 2 KB 154 and Nisbet v. Rayne & Burn, (1910) 1 KB 689** would throw light so as to draw the distinction between the felonious act which accidentally results in death and a murder simpliciter. Paras 11 to 13 of the judgment are reproduced hereinbelow:

"11. In Challis v. London and South Western Rly. Co. [(1905) 2 KB 154 : 74 LJKB 569 : 93 LT 330 (CA)] the Court of Appeal held where an engine driver while driving a train under a bridge was killed by a stone wilfully dropped on the train by a boy from the bridge, that his injuries were caused by an accident. In the said case, the Court rejecting an argument that the said incident cannot be treated as an accident held:

"The accident which befell the deceased was, as it appears to me, one which was incidental to his employment as an engine driver, in other words it arose out of his employment. The argument for the respondents really involves the reading into the Act of a proviso to the effect that an accident shall not be deemed to be within the Act, if it arose from the mischievous act of a person not in the service of the employer. I see no reason to suppose that the legislature intended so to limit the operation of the Act. The result is the same to the engine driver, from whatever cause the accident happened; and it does not appear to me to be any answer to the claim for indemnification under the Act to say that the accident was caused by some person who acted mischievously."

12. In the case of Nisbet v. Rayne & Burn [(1910) 2 KB 689 : 80 LJKB 84 : 103 LT 178 (CA)] where a cashier, while travelling in a railway to a colliery with a large sum of money for the payment of his employers' workmen, was robbed and murdered. The Court of Appeal held:

"That the murder was an ,,accident" from the standpoint of the person who suffered from it and that it arose ,,out of" an employment which involved more than the ordinary risk, and consequently that the widow was entitled to compensation under the Workmen's Compensation Act, 1906. In this case the Court followed its earlier judgment in the case of Challis [(1905) 2 KB 154 : 74 LJKB 569 : 93 LT 330 (CA)] . In the case of Nisbet [(1910) 2 KB 689 : 80 LJKB 84 : 103 LT 178 (CA)] the Court also observed that ,,it is contended by the employer that this was not an "accident" within the meaning of the Act, because it was an intentional felonious act which caused the death, and that the word "accident" negatives the idea of intention". In my opinion, this contention ought not to prevail. I think it was an accident from the point of view of Nisbet, and that it makes no difference whether the pistol shot was deliberately fired at Nisbet or whether it

was intended for somebody else and not for Nisbet."

13. The judgment of the Court of Appeal in Nisbet case [(1910) 2 KB 689 : 80 LJKB 84 : 103 LT 178 (CA)] was followed by the majority judgment by the House of Lords in the case of Board of Management of Trim Joint District School v. Kelly[1914 AC 667 : 83 LJPC 220 : 111 LT 305 (HL)]."

17. The term accident has not been defined under the M.V. Act. Sections 165, 166, and 168 of the M.V. Act, 1988 read as follows:

Section 165 of M.V. Act , Claims Tribunals-

(1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this Chapter referred to as Claims Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both. Explanation.--For the removal of doubts, it is hereby declared that the expression "claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles" includes claims for compensation under section 140 1[and section 163A].

(2) A Claims Tribunal shall consist of such number of members as the State Government may think fit to appoint and where it consists of two or more members, one of them shall be appointed as the Chairman thereof.

(3) A person shall not be qualified for appointment as a member of a Claims Tribunal unless he--

(a) is, or has been, a Judge of a High Court, or

(b) is, or has been a District Judge, or

(c) is qualified for appointment as a High Court Judge 1[or as a District Judge]. 1[or as a District Judge]."

(4) Where two or more Claims Tribunals are constituted for any area, the State Government, may by general or special order, regulate the distribution of business among them.

Section 166 of M.V. Act , Application for compensation.--

(1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made--

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be: Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be

made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application. 1[(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed: Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.] 2[***] 3[(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act.]

Section 168 of M.V. Act . Award of the Claims Tribunal.--*On receipt of an application for compensation made under section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be: Provided that where such application makes a claim for compensation under section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent d*isablement shall be disposed of in accordance with the provisions of Chapter X.

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct."

18. In light of the judicial pronouncement let us consider the facts, in case on hand the original act of truck driver was to flee with the truck in order to escape from being arrested by the police because cattle were being illegally transported by him, hence, this was the felonious act of truck driver. In furtherance of this original felonious act, the truck driver hit the police vehicle from behind in which the deceased was also there at that time he was on duty. The truck driver hit the police jeep with great speed so that the jeep overturned several times and lastly, fell into the ditch. This fact itself shows that the truck driver was driving the vehicle rashly and negligently and at a very high speed that firstly it broke the toll barrier and then hit the police vehicle. It is pertinent to mention

that truck driver has not stepped into the witness box. Learned tribunal has fallen into error in holding that this matter does not fall within the purview of rash and negligent driving by the truck driver. The learned Tribunal has also fallen into error in holding that if any vehicle is used as a weapon for murder then no compensation can be awarded under M.V. Act because learned tribunal has lost sight of the fact that the death of the deceased had taken place due to the accident arising out of use of motor vehicle. The term murder has to be looked into from two angles one murder due to accident and murder where it is felonious act (a) Murder due to accident: the murder of the deceased was due to an accident arising out of the use of motor vehicle. Therefore, the Trial Court wrongly came to the conclusion that the claimants were not entitled for compensation as claimed by them. (b) Murder is felonious act: in common parlance, murder is a felonious act, where death is caused with intent and the perpetrators of the act normally had the motive against the victim for such killing; however, on the other hand, there could also be other instances where murder was not originally intended and the same was caused in furtherance of other felonious act. In our case the judgment of Ambalika Singh (supra) will have to be also discussed.

19. The aforesaid provisions of the M.V. Act would demonstrate that the term accident has not been defined in the M.V. Act and, therefore, importance of the term **"accident"** and importance of the term out of use of motor vehicle and negligence would be important.

20. The term use of motor vehicle has been explained by the Apex Court in the case of Shivaji Dayanu Patil v. Vatschala Uttam More, 1991 3 SCC 530, the term use of motor vehicle means where the term use of motor vehicle has been explained even leakage of petrol and, thereafter, where the explosion in the place and fire occurred resulting in death of certain villagers. This involved the petrol tanker and one another truck was held to be accident arising out of use of motor vehicle and, therefore, there is a casual relationship between earlier event of accident which was due to collision and later incident of explosion and fired such connection need not be direct or immediate once. If it is demonstrated that the death occurred due to use of motor vehicle, then prima facie claim petition would be maintainable. It goes without saying that it is because of use of motor vehicle that accident occured. Later on while deciding the matter finally, also the Apex Court in Judgment titled **New India Assurance Company Limited Versus Yadu Sambhaji More reported in, (2011) AIR SC 666** has taken similar view which goes to show that the tribunal had jurisdiction to entertain such petitions, that to in use or arising out of use of the motor vehicle has been consistently followed in the later judgment. The Apex Court has criticised the finding by the tribunal of rejecting the claim petitions.

21. 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.

22. 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.

23. We will have also to consider the definition of the word "Accident' : (i) The word "accident" is derived from the Latin verb "accidere" signifying "fall upon, befall, happen, chance." In an etymological sense anything that happens may be said to be an accident and in this sense, the word has been defined as befalling a change; a happening; an incident; an occurrence or event. In its most commonly accepted meaning, or in its ordinary or popular sense, the word may be defined as meaning: a fortuitous circumstance, event, or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event; chance or contingency; fortune; mishap; some sudden and unexpected event taking place without expectation, upon the instant, rather than something which continues, progresses or develops; something happening by chance; something unforeseen, unexpected, unusual, extraordinary or phenomenal, taking place not according to the usual course of things or events, out of the range of ordinary calculations; that which exists or occurs abnormally, or an uncommon occurrence; and (ii) Unavoidable accident: One which is not occasioned in any degree, either directly or remotely, by the want of such care and prudence as the law holds every man bound to exercise and the term unavoidable accident does not find any mention in the Act.

24. The facts in this case are that the precedents are in favour of the appellants, the incident occurred due to use of motor vehicle. The facts cumulative prove show that incident occurred due to (A) use of motor vehicle (B) due to negligence of the driver. The death occurred due to use of motor vehicle being driven rashly and negligently. There is casual connection between the first and the second incident and therefore the claim petition under the M.V. Act was maintainable. The tribunal has not taken a holistic view of the matter.

25. Reference to the recent decisions in case of **Kalim Khan v. Fimidabee, 2018 (J) SCC 687** and the recent decision

of this Court in **Ambalika Singh v. United India Insurance Co. Ltd., 2017 (0) AIJ-UP 381149**, deciding similar dispute and the petition could not have been dismissed.

26. In our case, the facts reveal that it was an avoidable accident and the driver has driven the vehicle rashly and dashed the vehicle of the police department from behind. It was his duty to take proper care, but as he was committing an illegal act and was scared of getting arrested, he committed this act maximum. The res ipsa loquior would also play of major role, the reason being that the accident speaks for itself the reason being the incident would not have occurred namely checking of the truck and, thereafter, chasing the truck. This act of the driver would not have been possible and, therefore, it cannot be said that there is no casual connection between the first incident and the second incident. The learned tribunal with utmost respect has not taken holistic view in the matter while holding that the truck was used as a weapon, the accident is by the use of vehicle and it has to be turmed to be an accident. The term "negligence' would assume significance the term negligence in common parlance would go to show that the driver drove the vehicle negligently as narrated herein-below.

27. Just because the charge sheet is laid under Section 302 will not take the case from the purview of using the vehicle negligently. The evidence of all the witnesses go to show that the driver of the vehicle drove the vehicle rashly and negligently and came from behind and dashed with the jeep deliberately may be he had not caused murder that is not the subject matter of our concerned but the death occurred due to the ante mortem injuries caused due to use of truck in which the truck which dashed with the police vehicle in which the deceased was seated.

28. The judgment of this High Court in **UPSRTC v. Vidya Devi, 2011 ACJ 2659** will also enure for the benefit of the claimants-appellants, the dismissal of the claim petition is bad in eye of law.

29. On the basis of above discussions, we come to the conclusion that the death of the deceased was result of the rash and negligent driving by truck driver and the accident had taken place while using the motor vehicle by the deceased. Hence, we upturn the finding of learned tribunal given on issue nos. 1 and 4 and set aside the order, rejecting the claim petition. The findings given on issue Nos. 2 and 3 because at the time of accident, the truck in question was duly insured by Insurance Company/respondent no.3 and the truck driver was having valid and effecting driving licence and we confirm the said findings as nothing is demonstrated by the insurance company to take a different view in the matter.

30. Now we come to the part of the compensation. The accident in question had taken place before 9 years and the record is before us. There are no complicated questions as the deceased was a salaried person the documents are there and, therefore, the next issue which arises is that the matter has remained pending for long, the record and proceedings are before this Court should the matter be remanded to the Tribunal so that compensation is decided or decide this court can the same? The answer is in the affirmative as per the judgments of the Apex Court in **Bithika Mazumdar and another Vs. Sagar Pal and others, (2017) 2 SCC 748 and of this Court in F.A.F.O. No. 1999 of 2007 (Oriental Insurance Company Limited vs.**

Smt. Ummida Begum and others) and in F.A.F.O. No. 1404 of 1999 (Smt. Ragini Devi and others Vs. United India Insurance Company Limited and another) decided on 17.4.2019 where in it has been held that if the record is with the appellate Court, it can decide compensation instead of relegating the parties to the Tribunal. The provisions of section 173 read with section 168 will permit this Court to decide the matter.

31. Here the calculation is to on settled principles for grant of compensation where deceased was a salaried person. Hence, we take up the issue with regard to the quantum of compensation payable to the appellants/claimants.

32. Admittedly, the deceased was a police Constable and he was 28 years of age at the time of accident. The pay slip of the deceased, pertaining to the relevant month of April, 2013, is on record which is exhibited as paper No.39C. According to the pay slip, the basic pay of deceased was Rs.10,130/- per month and Dearness Allowance was Rs.7,294/- per month. The net income of the deceased is shown Rs.18,263/- per month. The deceased was paid Rs.150/- per month as allowance and Rs.750/- per month as diet allowance, these two amounts are being deducted from the total salary. Hence the computable salary comes to Rs.17,363/- per month. The deceased was Government servant and below 40 years of age. Hence, as per **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050,** 50% will have to be added towards future loss of income. The deceased was survived by his widow and three minor children along with his parents, the age of father of the deceased was 55 years, it is not shown that the father was dependent or not on the deceased and for two minor children shall be taken as one unit, hence 1/3 will be deducted towards personal expenses of the deceased. As per decision titled **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** multiplier of 17 would be applied. As per decision of Pranay Sethi (supra), the claimants/appellants would be entitled to Rs.15,000/- for lost of assets and Rs.15,000/- for funeral expenses. The wife of the deceased would be entitled to get Rs.40,000/- for loss of consortium with addition of 10% every three years. Hence, we fix total compensation Rs.1,00,000/- under the head of non pecuniary damages plus Rs.50,000/- each to three minor children who have lost their father at a tender age.

33. In this backdrop we evaluate the income in view of the judgment of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050 and Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** and, the calculation of compensation would be as follows:

i. Income Rs.17,363/- p.m.

ii. Percentage towards future prospects : 50% namely Rs.8681/-

iii. Total income : Rs. 17,363 + Rs. 8,681= Rs.26044/-

iv. Income after deduction of 1/3: Rs.17,363/-

v. Annual income : Rs.17,363 x 12 = 2,08,356

v. Multiplier applicable : 17 (as the deceased was in the age bracket of 26-30 years)

vi. Loss of dependency: Rs.2,08,356 x 17 = Rs.35,42,052/-

viii. Under the head of non pecuniary damages = Rs.1,00,000 + Rs.50,000/-

ix. Total compensation : Rs.36,92,000/- (round figure).

34. 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 7 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."

35. 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*** for disbursement.

36. 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 (supra), the order of investment is not passed because applicants /claimants are neither illiterate nor rustic villagers.

37. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunal 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 judgment of **A.V. Padma (supra),** the same is to be applied looking to the facts of each case.

38. In view of the above, the appeal is **partly allowed.** Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount of Rs.36,92,000/- 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.

39. Out of the total amount of compensation, father and mother of the deceased would receive Rs.3,00,000/- each. The three minor children of the deceased would get Rs.5,00,000/- each plus Rs.50,000/- each, which shall be kept in fix deposit in nationalized Bank with regard to the children who are still minor till attaining the age of majority. The rest of the amount shall be paid to wife of the deceased.

40. Record be transmitted to tribunal.

41. Recently the Gujarat High Court in case titled the ***Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS), R/Special Civil Application***

No.4800 of 2021 decided on 05.04.2022, it is held that interest awarded by the **tribunal** or appellate court under Section 171 of Motor Vehicles Act **is not taxable** under the Income Tax Act, 1961

42. The Tribunal shall follow the guidelines issued by the Apex Court in ***Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others*** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As 8 years have elapsed since occurrence of accident, the amount be deposited in the Saving Account of claimants in Nationalized Bank. The amount shall be credited in the said account with without investment as the case may be.

43. We are thankful to learned counsel for the parties for ably assisting this court in getting this old appeal disposed of.

(2022)07ILR A590
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 991 of 2017

Chanda Srivastava & Ors. ...Appellants
Versus
Shadab Ahmad & Ors. ...Respondents

Counsel for the Appellants:
Sri Ankur Mehrotra

Counsel for the Respondents:
Sri Vishesh Kumar Gupta

Civil Law- Motor Vehicles Act, 1988 - Section-166 - Appeal - Death Claim - Rejection of claim petition by the tribunal - on the ground of technical inspection report & disbelieved the evidence adduced by the appellants - under the MV Act, burden of proof is not as strict in Civil or Criminal matters - compensatory jurisprudence discussed - Tribunal fails to five any co-gent reason to disbelieving the evidences specially of co-passenger - driver of car held negligent - hence, court remitted back the matter to the MACT to decide the issue of compensation along with other issues in the light of judgment of Apex Court & High Court within three months - Appeal disposed of accordingly.

Appeal - disposed of. (E-11)

List of Cases cited: -

1. Anita Sharma & ors. Vs The New India Assurance Co. Ltd. & anr., (2021) 1 SCC 171

2. Parmeshwari Vs Amir Chand, (2011) 11 SCC 635

3. Reliance General Insurance Co. Ltd. Vs Subbulakshmi & ors., C.M.A. No. 1482 of 2017 [C.M.P. No. 7919 of 2017. (CMA Sr. No. 76893 of 2016)]

4. Puspabai Purshottam Udeshi Vs Ranjit Ginning and Pressing Co., 1977 ACJ 343 (SC)

5. Bimla Devi & ors. Vs Himachal RTC, 2009 (13) SCC 530

6. Archit Saini & anr. Vs Oriental Insurance Co. Ltd., AIR 2018 SC 1143

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred by the appellants against the judgement and order dated 22.07.2015 passed by Motor Accident Claim Tribunal/Special Judge (Anti-Corruption Act) Court No.1, Varanasi passed in MACP No.83 of 2014 (Smt. Chanda Srivastava and others Vs.

Shadab Ahmad and others), by way of which, the claim petition of the appellants/claimants was dismissed.

2. Brief facts of the case are that a claim petition was filed by the appellants before the learned Tribunal for seeking compensation of death of Kripa Shankar Lal, employee of Income Tax Department, who died in a road accident. As per the averments made in the claim petition on 10.10.2013 at about 8:00 pm, the deceased was travelling in car bearing No. UP 65 CT 3842 with Income Tax Officer Shri Himanshu Kumar from Varanasi to Lucknow in connection with official work. The driver of the car was driving the vehicle rashly and negligently. When they reached at village Asroga, Police Station-Kudwar, District Sultanpur, the driver of the car lost the balance and control due to high speed seeing a truck, coming from the opposite direction and the car overturned beside the road. In this accident Kripa Shankar Lal and Himanshu Kumar sustained serious injuries. They were taken to the government hospital, Sultanpur, where Kripa Shankar Lal died. The accident took place due to negligence of car driver.

3. Heard learned counsel for the appellants and learned counsel for the respondent.

4. Learned counsel for the appellants submitted that the learned Tribunal misinterpreted the evidence on record as it did not consider the oral and documentary evidence of claimants in the right perspective. Learned counsel further submitted that the principles of compensation in Motor Vehicle Act, 1988 envisage a beneficial legislation and strict rules to prove the petition are not required. Trial before the Tribunal is summary in nature. Learned counsel submitted that it was night at the time of accident and an unknown truck came from opposite direction and the eyes of car driver were dazzled in the headlights of the truck and since the car driver was moving at a high speed, he could not control the vehicle and it overturned after getting disbalanced. It is next submitted that PW2 Himanshu Kumar is the eye-witness of the accident because he himself was travelling in the car. He has deposed before the learned Tribunal and in his testimony he has specifically deposed that the driver of the car became uncomfortable because his eyes were dazzled in the light of the truck, coming from opposite direction and due to high speed of the car, the driver lost control and car was overturned. Learned counsel submitted that the Tribunal has not believed this part of the evidence, which could not be disbelieved because there is no dispute that PW2 was travelling in the car and he was the best witness to narrate the manner of accident. It is further submitted that the car driver has also appeared before the learned Tribunal as DW2, namely, Salman Ali. He has deposed that an unknown truck hit the car from behind. Learned Tribunal rejected the claim petition on the basis of the statement made by car driver DW2 without considering the fact that no driver would admit his negligence. Hence, claim petition was wrongly rejected.

5. Learned counsel for the insurance company submitted that first information report of the accident was lodged at police station against unknown vehicle and during investigation no such vehicle could be traced and investigating officer submitted final report. Hence, the learned Tribunal rightly concluded that the technical

inspection report of the car goes to show that all the damages in the car are on the rear side which shows that the car was hit by a vehicle from behind and due to that reason it was overturned on the right side of the road. Hence, the Tribunal has rightly disbelieved the evidence adduced by the appellants and the claim petition was rejected.

6. The compensatory jurisprudence under the Motor Vehicle Act, 1988 is a beneficial piece of legislation. The burden of proof in claim petitions is not as strict as it is in civil or criminal matters. While deciding the claim petition, the learned Tribunal had not kept in mind the principles of standard of proof in motor accident claim petition.

7. In ***Anita Sharma and Others Vs. The New India Assurance Co. Ltd. and Another, (2021) 1 SCC 171***, the Full Bench of Hon'ble Apex Court narrated the view taken in ***Parmeshwari Vs. Amir Chand, (2011) 11 SCC 635,*** that it is very difficult to trace the witnesses and collecting information for an accident which took place many hundreds of kilometers away and further it is held by Hon'ble Apex Court in ***Anita Sharma and Others (Supra)*** that in a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability.

8. The Division Bench of Madras High Court also held in ***Reliance General Insurance Co. Ltd. Vs. Subbulakshmi and Others***, passed in C.MA. No. 1482 of 2017 [C.M.P. No. 7919 of 2017. (CMA Sr. No. 76893 of 2016)] has referred the case of ***Puspabai Purshottam Udeshi Vs. Ranjit Ginning and Pressing Co., 1977ACJ 343 (SC)***, in which it is observed that the normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of ***res ipsa loquitur.*** The general purport of the words ***res ipsa loquitur*** is that the accident 'speaks for itself or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care.

9. In ***Bimla Devi and Others VS. Himachal RTC reported in 2009 (13) SCC 530,*** the Hon'ble Supreme Court held that it was necessary to be borne in mind that strict proof of an accident caused by a particular vehicle in a particular manner may not be possible to be done by the claimants. The claimants were merely to

establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied.

10. In the case on hand, the appellants have brought the case that at the time of accident the eyes of car driver were dazzled in the headlight of a truck which was coming from opposite direction and since the car was being driven at a very high speed, the driver of the car could not maintain the balance and lost control and car was overturned beside the road. Hence, it does not make any difference if that unknown truck could not be traced by the investigating officer and final report was submitted because it is not a case that unknown truck hit the car. Learned Tribunal has relied on technical inspection report of the car and held that it was having damage on the rear side. Hence, the manner of the accident, as contemplated by the appellants, was not believed. It is also held that the driver of the car stepped into the witness-box and deposed that he was driving at a moderate speed. Had it been so, the car could not overturn. The technical report cannot be the sole basis on which the Tribunal could rely heavily as held in the judgement of the Apex Court in **Archit Saini and Antother Vs. Oriental Insurance Company Limited, AIR 2018 SC 1143**. The issue of negligence is also required in this matter. It is also pertinent to mention that the informant of First Information Report was also examined on behalf of the appellants as PW3. Although, he has written an FIR that when he reached at the spot of the accident, people told him that some unknown vehicle had hit the car but in his own deposition as PW3 before the learned Tribunal he has also stated that the accident had taken place because eyes of the car driver were dazzled in the headlight of the truck coming from the opposite direction. Morever, in this case PW2 Himanshu Kumar who is Income Tax Officer, is the best eye-witness who could bring the fact before the learned Tribunal as to how the accident had taken place because he himself was travelling in the car alongwith the deceased. He has specifically deposed that the accident had taken place due to negligence of the driver of the car because he was driving at a very high speed and his eyes were dazzled when the headlights of the truck, coming from opposite direction, met with his eyes, due to high speed he could not control the car and lost control over it. Learned Tribunal has not given any justification or cogent reason to disbelieve evidence. Hence, the learned Tribunal has erred in disbelieving the evidence of co-passenger. Hence, there is sufficient evidence on record which convinces us that the accident had taken place because the car driver was driving at a very high speed as a result of which he could not control the car and it was overturned after being disbalanced. Hence, the finding of the learned Tribunal is upturned and we hold the driver of the car negligent.

11. The deceased was a salaried person. As the matter is pending since the year 2014, we remit back the matter to the learned Tribunal to decide the issue of compensation alongwith other issues except the issue Nos.1 and 5 on the basis of judgements of the Apex Court and this High Court as the deceased was a salaried person. Matter be decided within three months from the date when certified copy of this judgement is placed before the Tribunal and the record is received by the Tribunal.

12. Record be sent back to the Tribunal forthwith.

(2022)07ILR A594
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.06.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 1005 of 2013

Ajay Kumar ...Appellant
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Appellant:
Sri Jaspreet Singh, Sri Amit Kumar, Sri P.K. Singh

Counsel for the Respondents:
Sri Manendra Nath Rai, Sri Nandita Bharti, Sri Pratul Kumar Srivastava

(A) Civil Law – Railway Act, 1989 - Sections 8, 123(C)(2) & 124-A, Railway Claims Tribunal Act,1987 Section - 23, Evidence Act, 1872 Section - 102: – Claimant's Appeal – rejection of Claim - Untoward incident - *Appreciation of evidence* - tribunal disbelieved untoward incident on account of a contradiction in the testimonies of claimant and eye-witness - which could be the result of an aberration in perception that the claimant suffered from in the throes of his agony post accident - finding of tribunal erroneous. (Para -10)

(B) Civil Law – Railway Act, 1989 - Section 8, 123(C)(2), 124-A, Railway Claims Tribunal Act,1987 Section - 23, Evidence Act, 1872 Section - 102 – Claimant's Appeal – rejection of Claim - Untoward incident - *Bona fide passenger* - Admittedly, railway ticket recovered from claimant but it was not placed on record - as such evidential burden not discharged by the Railways - merely absence of a railway ticket with victim of a railway accident would not show that he was not a *bona fide* passenger - as well as overshooting destination would also not deprive him of his status as 'bona fide' passenger - finding of tribunal - perverse. (Para - 12, 13)

(C) Civil Law– Railway Act, 1989 - Sections 8, 123(C)(2) & 124-A - Railway Claims Tribunal Act,1987 - Section – 23 - Evidence Act, 1872 - Section - 102 – Claimant's Appeal – Untoward incident - *Quantum of compensation* - appellant suffered a fall from the train - sustained injuries which can be visualized by the very natural description of incident - adverse inference drawn against the Railways for failure to produce recovered Railway ticket - no means can be regarded that appellant was not a bona fide passenger - finding returned by the tribunal - cannot be sustained - the compensation computed at Rs. 4 lacs with 9% rate of interest if not paid within 90 days - appeal allowed with costs.(Para - 17, 19)

Appeal - allowed. (E-11)

List of Cases cited: -

1. Vaishali Vs U.O.I.(2011 ACJ 106),

2. U.O.I.Vs Rina Devi (2019 (3) SCC 572),

(Delivered by Hon'ble J.J. Munir, J.)

This is a claimant's appeal, arising out of a judgment and order dated 16.09.2013, passed by the Railway Claims Tribunal, Lucknow Bench, Lucknow rejecting the claim for compensation on account of injuries sustained in an untoward incident.

2. Ajay Kumar, the sole appellant here, who preferred the application for compensation before the Tribunal, said in his application, raising the claim, that he was travelling on a second class general ticket on board the Farakka Express on March 18, 2007 from Delhi to Kanpur.

When the train was passing through the Govindpuri Railway Station, there was a sudden "jerk and jolt' in its movement, that led the appellant to be thrown off board. In consequence, the appellant was grievously injured. He was admitted to the care of the Lala Lajpat Rai Hospital, Kanpur, where he underwent surgery of amputation closure. In consequence of the accident, the appellant lost his journey ticket. Along with the claim application, the appellant has submitted photostat copies of documents that include the discharge slip from the G.S.V.M. Medical College, Kanpur, Lala Lajpat Rai and Associated Hospital, Kanpur, a copy of his ration card and a copy of the permanent disability certificate issued by the Chief Medical Officer, Kanpur Dehat, besides some papers relating to the treatment received by the applicant as an out-patient at the G.S.V.M. Medical College, Lala Lajpat Rai and Associated Hospital. The claimant prayed that he may be granted compensation in the sum of Rs. 4 lacs with pendente lite and future interest at the rate of 18% per annum from the date of incident.

3. The respondent-Union of India through the General Manager, Northern Railways, filed a written statement, refuting the appellant's claim. The written statement was filed on 27.11.2007. The respondent took a stand that the appellant was neither a passenger on board the Farakka Express nor did he suffer a fall from the train on 13.03.2007 near Govindpuri Railway Station. There are some additional pleas set out in the written statement and this Court must remark that the written statement is so carelessly drafted that in paragraph no. 8 thereof, it is said that "the deceased was not the passenger of the Farakka Express train on 13.03.2007". Admittedly, this is a case where, in consequence of the untoward incident, the appellant has survived the fall and it is he who is claiming compensation. It is further pleaded in the written statement that the untoward incident never took place and the story has been fabricated. It is also averred that the claim application does not disclose an untoward incident within the meaning of Section 123(c)(2) read with Section 8 of the Railways Act, 19891.

4. On the pleadings of parties, the following issues were framed :

1. Whether the injured was a bona fide passenger of the train in question?

2. Whether the incident of sustaining injuries by the injured falls under the ambit of Section 124-A of the Railways Act, 1989?

3. What are the injuries sustained by the injured applicant?

4. To what relief?

5. In support of the claim, the appellant, Ajay Kumar, examined himself as AW1. His examination-in-chief was put in, in the form of an affidavit along with photostat copies of documents viz. the discharge slip from the hospital, the handicap certificate from the Chief Medical Officer, Kanpur Dehat and medical prescriptions. Another witness who testified on behalf of the appellant was Smt. Maya, AW2, an eye-witness of the incident. She too put in an affidavit, carrying her evidence by way of examination-in-chief. Both the witnesses for the appellant were cross-examined on behalf of the respondents.

6. The respondent filed documentary evidence, which is an inquiry report of the

Inspector, RPF/GMC, Kanpur, a police G.D. entry and a report of the Station In-charge, NCR, Govindpuri. This Court notices that no witness was examined on behalf of the respondents. The Tribunal, after hearing parties, decided Issue Nos. 1 and 2 together, by the judgment impugned. It is remarked by the Tribunal that according to the evidence of the appellant, he fell off the Farakka Express while it was passing through the Govindpuri Railway Station on 18.03.2007 and got injured. He was hospitalised in the Lala Lajpat Rai Hospital, Kanpur by Smt. Maya Devi. It is remarked that during his cross-examination, the appellant has said that after the untoward incident, the Police had visited the site and returned without extending any help. The Police made no efforts to convey him to the hospital. It is said that it was Smt. Maya Devi who took him to the hospital. The Tribunal notes that Smt. Maya Devi has also submitted an affdiavit and has been cross-examined by the learned Counsel for the respondent. Smt. Maya Devi, in her cross-examination, said that she picked up the injured appellant from the site and took him to the Police and Railway Authorities. The Police arranged a tempo to convey the appellant to the hospital. This difference in the version of the appellant and his witness, Maya Devi, has been regarded as a contradiction by the Tribunal, fundamental enough to shake the veracity of the appellant's case.

7. The Tribunal has then considered the documentary evidence offered by the respondents. It is remarked that the inquiry conducted by the Inspector, RPF/GMC, Kanpur and the Police G.D. show that a certain porter, Chhote Lal from the West Cabin, at 07:00 hours, handed over a memo regarding a man who had sustained injuries by train. When the police officials reached at the site, they found the appellant and his nephew, Deepu alias Pradeep Kumar there. The Tribunal records the fact that the inquiry report of the Inspector says that the second class general ticket, on which the appellant was travelling, was from Delhi to Jhinjhak. It was recovered from the person of the injured by the Police and he was dispatched to the Lala Lajpat Rai Hospital by the police officials. Again, at this stage, the assertion in the cross-examination of the appellant that the Police, after reaching the site, went away without assisting him, has been found, on a comparison with the report of the Inspector, RPF/GMC, Kanpur to be a material contradiction. Apart from the contradiction, the Tribunal has concluded that the appellant had a ticket up to Jhinjhak and therefore, at Govindpuri, he was not a bona fide passenger. It has been held by the Tribunal that initially, burden lies upon the appellant to prove his case of being a victim of an untoward incident by adducing documentary evidence, and the respondents need not disprove the case of the appellant, which on its own strength, is not proved by cogent evidence. The Tribunal has remarked that no evidence was produced on behalf of the appellant, leading to a failure on the appellant's part to discharge his evidential burden under Section 102 of the Indian Evidence Act, 1872. The Tribunal has held that it is not proved that the appellant was a bona fide passenger on board the train in question, or that he sustained injuries in an untoward incident while travelling on board the said train. In this view of the matter, the Tribunal has dismissed the claim *vide* judgment and order dated 26.09.2013.

8. Aggrieved, the appellant has come up through this appeal under Section 23 of the Railway Claims Tribunal Act, 1987.

9. Heard Ms. Amrita Singh, learned Counsel for the appellant and Mr. Manendra Nath Rai, learned Counsel appearing on behalf of the respondents. The records have been carefully perused.

10. The way the Tribunal has looked at the evidence of the appellant AW1 and his witness Smt. Maya Devi, AW2 is patently fallacious. It has disbelieved the untoward incident on account of a contradiction in the testimonies of the appellant and Smt. Maya Devi that could logically be there, given that the appellant had sustained a grievous injury in the untoward incident, leading to amputation of one of his limbs. The contradiction in the evidence of the two, about which the Tribunal has made much ado, is that whereas the appellant says that the Police came to the site and went away without assisting him and that it was Smt. Maya Devi who conveyed him to the hospital, Smt. Maya Devi says that she picked up the appellant on seeing him fall off the train and suffer injuries and took him to the Police and the Railway Authorities. According to Smt. Maya Devi, AW2 it was the Police who arranged a tempo to convey the appellant to the hospital. This has been discerned as a vital contradiction in the cross-examination of the appellant and his witness Smt. Maya Devi. The evidence of parties is not to be understood or appreciated as if it were by the rules of grammar. It is to be appreciated to understand facts relevant to the issue or the fact in issue itself, as it unfurled on the ground. The Tribunal lost sight of the fact that the appellant was a man who had suffered a grievous injury as a result of the fall from the train that led to the traumatic amputation of one of his lower limbs. In the quick sequence of events after the untoward incident, it is very logical that the appellant misunderstood that the Police did not help, but Smt. Maya Devi conveyed him to the hospital. The fact that Smt. Maya Devi took the help of the Railway Authorities and the Police in conveying the appellant to the hospital may be presenting a full picture of which the traumatized appellant reported the half, that he perceived. Both the appellant and Smt. Maya Devi are ad idem on the point that it was she who picked up the appellant and got him conveyed to the hospital. Whether she did this of her own, without any assistance from the Police or with their assistance, is not at all material. As already remarked, this could be the result of an aberration in perception that the appellant suffered from in the throes of his agony post accident. The Tribunal has, therefore, gone utterly wrong in inferring a contradiction on this count between the testimonies of AW1 and AW2.

11. The other count on which the Tribunal has held against the appellant is that he could not establish himself to be a bona fide passenger on Board the Farakka Express, when he claims to have met the accident. In reaching this conclusion, the Tribunal has heavily relied on the inquiry report conducted by the Inspector, RPF/GMC Kanpur, enclosing with it a copy of the Police G.D. No. 4. The Tribunal has remarked that a perusal of the inquiry report and the Police G.D. shows that at 07:00 hours, a porter, Chhote Lal from the West Cabin, handed over a memo regarding a person who had sustained injuries by train. The report has further been noticed to show that when the Police officials reached the site, they found the appellant and his nephew Deepu alias Pradeep Kumar there. The general ticket from Delhi to Jhinjhak was recovered from the appellant and he was dispatched to the

Lala Lajpat Rai Hospital by the Police for treatment. It is remarked that what the appellant has said in his cross-examination is not acceptable, in view of the entry in the G.D. The Tribunal has inferred that the appellant had a journey ticket from Delhi to Jhinjhak, and not Kanpur. Since Govindpuri is beyond Jhinjhak, he was not a bona fide passenger on board the Farakka Express, when he suffered the injury, as a result of the untoward incident. The Tribunal has also remarked that the appellant has been trying to mislead the Tribunal and for the purpose, has planted a false witness Smt. Maya Devi. It has also been stated by the Tribunal that the appellant has not come with clean hands.

12. On a reading of the inquiry report submitted by the Inspector, RPF/GMC, Kanpur, the Police G.D. and the cross-examination of Smt. Maya Devi, it is evident the finding of the Tribunal on this score is not only wrong, but also perverse. Perverse this Court says because once the Inspector, RPF/GMC, Kanpur had acknowledged in his inquiry report supported by the G.D. that a railway ticket had been recovered from the appellant, entitling him to travel from Delhi to Jhinjhak, the failure of the respondent in producing the recovered ticket would result in failure to discharge evidential burden on the respondents' part. The inference would be that the appellant was travelling on a valid ticket up to Kanpur and the respondents, after admittedly recovering the railway ticket, have not produced it in evidence, because if produced, it would go against their stand. There is no explanation given why the recovered ticket mentioned in the report of the Inspector, RPF/GMC, Kanpur has not been put in evidence by the respondents. Therefore, it has to be held that the appellant was travelling on a valid railway ticket from Delhi to Kanpur. If one were to assume on the admitted state of evidence, that is established by the report of the Inspector, RPF/GMC, Kanpur, that the appellant had a ticket valid up to Jhinjhak alone and had overshot his destination, suffering the accident at Govindpuri, that too would not deprive him of his status as a bona fide passenger. If a passenger overshoots his destination vis-à-vis the railway ticket held by him, the legal position is beyond cavil. All that the Railways can do is to charge him for the extra distance travelled, but cannot dub him as a passenger not bona fide travelling on board train. In this connection, reference may be made to the decision of the Bombay High Court in **Vaishali v. Union of India2,** where it has been held :

10. ....Merely because he had over-travelled beyond his authorised distance of Bhusawal, it would not be enough to label him a mala fide or fraudulent passenger. Looking to the rulings cited and provisions of the Act, Railway Manual, at the most, the Railways could have recovered excess fare or charge from him beyond the travelling destination; furthermore, he could also be allowed to return to the station of his destination in view of the Rules. .....

13. Also, it is well-settled that the mere absence of a railway ticket with the victim of a railway accident would not show that he was not a bona fide passenger. The claimant would discharge his initial burden or evidential burden by asserting on affidavit that he was a *bona fide* passenger, whereupon the burden would shift to the Railways and the issue has then to be decided, after both the sides lead evidence, according to the facts of each case and the circumstances. In this regard, reference

may be made to the decision of the Supreme Court in Union of India v. Rina Devi3, where it was held :

29. We thus hold that mere presence of a body on the railway premises will not be conclusive to hold that injured or deceased was a bona fide passenger for which claim for compensation could be maintained. However, mere absence of ticket with such injured or deceased will not negative the claim that he was a bona fide passenger. Initial burden will be on the claimant which can be discharged by filing an affidavit of the relevant facts and **burden will then shift on the Railways and the issue can be decided on the facts shown or the attending circumstances. This will have to be dealt with from case to case on the basis of facts found. The legal position in this regard will stand explained accordingly.**

(Emphasis by Court)

14. Here, the facts place the appellant, as already said, on a much better footing, because possession of railway ticket by him is admitted to the Inspector, RPF/GMC, Kanpur Nagar and a mention of it is to be found in the Police G.D. The reference to the ticket specifically shows that it was taken away by the police officials, when the appellant was sent to the hospital.

15. Before parting with the matter, the fact that the appellant sustained injuries in an untoward incident while travelling on board the train in question, can be best visualised by the very natural description of the incident in the cross-examination of AW2 Smt. Maya Devi, who is, in no way, related to the appellant. She has, in her cross-examination, described the incident thus :

घटना 18-3-2007 की है। घटना 5 बजे के लगभग की है। घायल अजय मेरे सामने गिरा था। उस समय गाड़ी चल रही थी। पहले मैने घायल को उठाया और अपना काम मैं उस समय भूल गयी। मैं घायल को नहीं जानती थी। घटनास्थल से घायल को उठाकरके, लोग स्टेशन ले गए वहाँ पुलिस और रेलवे - वालों को बताया। फिर पुलिस ने टेम्पों कराकर, उसमें घायल को, अस्पताल ले गए। पुलिस वालों ने कोई लिखा-पढ़ी नहीं की। पुलिस मेरे साथ गयी थी। मैं अजय के कहने पर गवाही देने आयी हूँ। यह कहना गलत है कि मैं यहाँ पर गलत बयान दे रही हूँ।

सुनकर तस्दीक किया।

16. The aforesaid testimony of AW2 Smt. Maya Devi leaves this Court in no manner of doubt that the appellant was a bona fide passenger on board the Farakka Express, who suffered a fall from the train and became the victim of an untoward incident, while the train was moving.

17. In the circumstances, the Railways must be held, as already said, to have failed to discharge their evidential burden by producing the ticket, leading to an adverse inference against the Railways. By no means can the appellant be regarded as one who was not a bona fide passenger, under the circumstances, travelling up to Kanpur. The findings returned by the Tribunal, in the considered opinion of this Court, cannot at all be sustained and the judgment deserves to be reversed.

18. In the result, this appeal **succeeds** and is **allowed with costs**. The impugned judgment and order dated 16.09.2013 passed by the Railway Claims Tribunal, Lucknow Bench, Lucknow in Case No. OA0700241 is hereby **set aside** and **reversed.** The claim application stands **allowed.**

19. It is ordered that the appellant is entitled to receive in compensation a sum

of Rs. 4 lacs, which shall be paid to him, within a period of 90 days from the date of receipt of a copy of this judgment, by the respondents. In the event, the compensation awarded is not paid within a period of 90 days, the compensation awarded shall carry interest at the rate of 9% per annum after expiry of the period of 90 days from the date of this judgment till realisation. Let the lower court records be sent down to the Tribunal, together with a certified copy of this judgment passed by this Court.

20. Let a copy of this order be communicated to the General Manager, Northern Railways, Baroda House, New Delhi by the Senior Registrar.

(2022)07ILR A600
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1241 of 2021

Satpal Singh ...Appellant
Versus
The Oriental Insurance Co. Ltd. & Ors. ...Respondents

Counsel for the Appellant:
Sri Sharve Singh

Counsel for the Respondents:
Sri Krishna Agarawal

Civil Law– Motor Vehicles Act, 1988 - Sections -168 & 171 : - Claimant's Appeal for enhancement - quantum of compensation - left leg of appellant was amputed from his hip - Partial permanent disability - determination of compensation u/s 168 must be reasonable, just, fair, equitable & accepted by legal standards - Assessment of income by tribunal is erroneous - Income reassessed by High Court - Since injured would be incapacitated for lifetime, 40% must be added for future loss of income - Age of appellant was 27 years at the time of accident - hence, multiplier should 17 be applied - amount granted for pain, shock and suffering enhanced - Omission to grant any amount for future medical expenses & procuring artificial limb was erroneous - therefore, compensation awarded by the tribunal, enhanced as from Rs. 3,64,160 with 9% rate of interest to Rs. 15,80,000/- with 7.5% rate of interest - Appeal is partly Allowed - judgment of tribunal shall stand modified accordingly. (Para -11, 31, 32, 33)

Appeal - partly allowed. (E-11)

List of Cases cited: -

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

2. Raj Kumar Vs Ajay Kumar & anr. (2011 (1) SC 343),

3. Anthony Vs Managing Director KSRTC (2020 ACJ 1592),

4. Sanjay Verma Vs Haryana Roadways (2014 (3) SCC 210),

5. Kajal Vs Jagdish Chand (2020 (0) AIJEL - SC 65725),

6. H. West & son Ltd. Vs Shephard 1963 (2) WLR 1359),

7. Philips Vs Western Railway Company (1874) 4 QBD 406,

8. K Suresh Vs New India Assurance Company Ltd. & ors.,

9. Sanjay Kumar Vs Ashok Kumar & anr. (2014 (5) SCC 330),

10. Syed Sadiq & ors. Vs D.M. United India Insurance Co. Ltd. (2014 (2) SCC 735),

11. Vs Mekala Vs M. Malathi & anr. (2019 (2) TAC 718 (All.),

12. Jithendran Vs New India Assurance Com. Ltd. & anr. (2021 ACJ 2736),

13. Lokkamma & ors. Vs The Reg. Manger M/s United India Insurance Co. Ltd. (AIR 2021 SC 3301),

14. A V Padma Vs Venugopal, (2012 (1) GLH 6 SC 442),

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

16. The Oriental Insurance Co. Ltd. Vs Chief Commissioner of Income Tax (TDS), (R/S Civil Application NO. 4800/2021 decided on 05.04.2022.

17. Bajaj Allianz General Insurance Company Pvt. Ltd. Vs U.O.I.& ors., vide order dated 27.01.2022

(Delivered by Hon'ble Ajai Tyagi, J.)

1. Heard learned counsel for the appellant and learned counsel for the respondents. Perused the record.

2. This appeal, at the behest of the claimant, challenges the judgment/award dated 08.07.2002 and decree dated 22.07.2002 passed by Motor Accident Claim Tribunal Agra/Additional District Judge, Court No.11, Agra (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.147 of 2000 awarding a sum of Rs.3,64,160/- with interest at the rate of 9% as compensation.

3. The brief facts as culled out from the record are that on 8.5.2000, appellant/claimant Satpal Singh was going from Delhi to Ghaziabad by Scooter No. DL 5 S 4011 with Dharamveer Singh at about 12 O'clock in the night when the scooter reached at Mohan Nagar, Sales Tax Check Post, a truck bearing UP 20 D 4827, which was being driven very rashly and negligently by its driver, came from behind and hit the aforesaid Scooterist. The wheel of the truck ran over the left leg (lower limb) of the appellant. The applicant was admitted to the nearest Hospital at Mohan Nagar, District Ghaziabad where he remained admitted from 9.3.2000 to 7.4.2000 and during his treatment his left leg (lower limb) was amputed from the hip.

4. The accident is not in dispute. The factum of negligence has attained finality. The issue regarding the driver of the truck having valid and effective driving licence has also been decided by the tribunal in favour of the appellant which is not challenged in this appeal. Hence only the issue of quantum of compensation is to be looked into by us.

5. Learned counsel for the appellant submitted that learned Tribunal has assessed the income of the appellant at Rs.1800/- per month (eighteen hundred only) which is very meagre because the appellant was aged 27 years old on date of accident. The applicant was a TV Mechanic and his income was not less then Rs.7,000/- per month in the year of accident, but learned Tribunal has equated his income with labourer. It is further submitted by learned counsel that no amount for future loss of income is awarded by the tribunal. Appellant was aged 27 years and he could have progressed in life and his income would have increased year by year, but learned tribunal did not consider this fact.

6. It is next submitted by counsel for the appellant that left leg of appellant was amputed from the hip and as per medical certificate, he has sustained permanent

disability to the tune of 90%, but in fact the appellant has become 100% disabled so his permanent disability should be considered at 100%. It is also submitted that tribunal has applied multiplier of 14 while it should have been 17 keeping in view age being 27 years. It is next submitted that tribunal has awarded a very meagre amount of Rs.5,000/- for pain, shock and suffering, and no amount for future medicines, special diet and attendant charges, etc., have been awarded, learned Tribunal is not considered the loss of amenities.

7. Learned counsel for the Insurance Company submitted that the income of the appellant was not be proved, he was Mechanic, but he has failed to prove his monthly income to be Rs.7,000/- per month. Hence, learned Tribunal has rightly assessed his monthly income at Rs.1800/- per month. It is next submitted by learned counsel that as per medical certificate, the permanent disability of the appellant was found to the tune of 90% and learned Tribunal has also considered 90% it cannot be 100%. Learned counsel for Insurance Company very fairly submitted that the multiplier should be in accordance with judgment of **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121.** It is also submitted that there is no evidence on record that appellant suffered any future loss of income. The amount under non pecuniary heads has been fairly awarded by the tribunal. It is submitted that Tribunal has awarded compensation with 9% rate of interest which is on higher side.

8. This is the case where a 27 year old man has lost his one limb from the hip joint on account of injuries sustained in road accident but the learned tribunal has awarded total compensation of Rs.3,64,160/- which cannot be said to be just compensation.

9. This is a case of injury which is very grave in nature. The wheel of the truck ran over the left leg of the appellant and during treatment his left leg was imputed from the hip joint which made him in capacitated from pursuing in good career in life though he was a TV Mechanic at the time of accident. He is not able to walk, run or even seat properly. He has lost amenities and pleasure of life it can safely be assumed that he had bleak prospects of marriage and family life. He is not able to live the normal life, his disability which is to the tune of 90% is permanent in nature, his normalacy of life can't be restored as it was before the accident, but Court should provide "just compensation".

10. We have to keep in mind all the factors which are relevant for just and proper compensation as is the object of the Motor Vehicles Act, 1988 (for short, "the Act of 1988').

11. Section 168 of the Act, 1988, contemplates determination of 'just compensation'. 'Just' means-fair, reasonable and equitable amount accepted by legal standards. 'Just compensation' does not mean perfect or absolute compensation. 'Just compensation' principle requires examination of particular situation obtaining uniquely in individual case. When compensation is to be determined on an application under Section 166 of the Act, 1988, various heads under which damages are to be assessed, have to be looked into by Tribunal.

12. The question of determination of compensation for injured directly came up before Supreme Court in ***Raj Kumar Vs. Ajay Kumar and another, 2011(1) SCC 343*** *and* ***Anthony v. Managing Director, K.S.R.T.C. 2020 ACJ 1592*** relied by

applicant's counsel. Therein, claimant sustained fracture of both bone of left leg and fracture of left radius in a motor accident on 01.10.1991. Tribunal awarded compensation under the heads of loss of future earning, pain and sufferings, loss of earning during period of treatment, medical expenses, conveyance and special diet. He was awarded total compensation of Rs. 94,700/- and 9% interest. His appeal for enhancement was rejected by Tribunal and ultimately went in appeal to Supreme Court. It observed that scheme of Act, 1988 shows that award must be "just", which means that compensation should, to the extent possible, fully and adequately restore claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. A person is not only to be compensated for physical injury, but also for the loss which he suffered as a result of such injury. It means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. The heads under which compensation needs be awarded in "personal injury" cases are detailed in para 6 of the judgment titled Raj Kumar Vs. Ajay Kumar (supra) and it reads as under:

"6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii) (b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

13. "Disability" refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. "Permanent disability"

refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of period of treatment and recuperation, after achieving maximum bodily improvement or recovery which is likely to remain for remainder life of injured. Permanent disability can be either partial or total. "Partial permanent disability" refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. "Total permanent disability" refers to a person's inability to perform any avocation or employment related activities as a result of the accident.

14. The percentage of disability certified in medical terms has been considered and Courts have observed that percentage of disability in respect of a part of body does not mean the same percentage with respect to whole body and it may be different. Para 9 of judgment in Raj Kumar Vs. Ajay Kumar (supra) said as under:

"9. The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%."

(emphasis added)

15. Court also castigated that Tribunals wrongly assume that percentage of permanent disability is same in terms of percentage of loss of future earning capacity. The two aspects are different. Relevant observations in para 10 of the judgment in Raj Kumar Vs. Ajay Kumar (supra) are reproduced as under:

"10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award

of either too low or too high a compensation."

(emphasis added)

16. Court also held that in some cases evidence and assessment may show that percentage of loss of earning capacity as a result of permanent disability is approximately the same as percentage of permanent disability and in that case said percentage for determination of compensation may be adopted but it is not always. It is in this context Court further said that in order to determine, whether there is any permanent disability and if so the extent of such disability, a Tribunal should consider, and decide, with reference to evidence:

"(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person."

17. It was also observed that ascertainment of the effect of permanent disability on actual earning capacity involves three steps. First is to ascertain what activities claimant could carry on in spite of permanent disability and what he could not do as a result of permanent disability. The second is to ascertain claimant's avocation, profession and nature of work before accident, as also his age. The third step is to find out whether claimant is totally disabled from earning any kind of livelihood or despite permanent disability, claimant could still effectively carry on activities and functions, which he was earlier carrying on and whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

18. The role of Tribunal was elaborately discussed by observing that it is not a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular the extent of permanent disability. Tribunal does not function as a neutral umpire as in a civil suit. It is an active explorer and seeker of truth who is required to hold an enquiry into the claim for determining 'just compensation'. Tribunal should take an active role to ascertain the true and correct position so that it can assess 'just compensation'. Court also observed that when a doctor gives evidence about percentage of permanent disability, Tribunal must find out whether such percentage of disability is functional disability with reference to whole body or whether it is only with reference to a limb. In para 19 of the judgment in Raj Kumar Vs. Ajay Kumar (supra) Court summarized the principles in respect of "permanent disability" and assessment of compensation and in para 20 it gives certain illustrations in regard to assessment of loss of future earning. Same are reproduced as under:

"19. We may now summarize the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body

of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors."

19. A three Judge Bench considered the question of "just compensation" in a case of permanent disability in ***Sanjay Verma Vs. Haryana Roadways, 2014(3) SCC 210.*** Court observed that besides determination of damages under the head "loss of income" and "medical expenses", Tribunal must also award compensation under the head "future treatment" and "pain and sufferings" and where there is requirement of an attendant, cost of attendant should also be included for award of compensation.

20. In ***Kajal Vs. Jagdish Chand reported in 2020 (0) AIJEL-SC 65725***, the Apex Court has quoted pertinent observations from a very old case Philips Vs. Western Railway Company (1874) 4QBD 406 as under:

"You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. The plaintiff can never sue again for it. You have, therefore, now to give him compensation once and for all. He has done no wrong, he has suffered a wrong at the hands of the defendants and you must take care to give him full fair compensation for that which he has suffered." Besides, the Tribunals should always remember that the measures of damages in all these cases "should be such as to enable even a tortfeasor to say that he had amply atoned for his misadventure."

21. Hon'ble Apex Court has further quoted pertinent observations from H. West & Son Ltd. v. Shephard 1963 2 WLR 1359 as under:

"Money may be awarded so that something tangible may be procured to replace something else of the like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that Judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.

In the same case Lord Devlin observed that the proper approach to the problem was to adopt a test as to what contemporary society would deem to be a fair sum, such as would allow the wrongdoer to "hold up his head among his neighbours and say with their approval that he has done the fair thing", which should be kept in mind by the court in determining compensation in personal injury cases."

22. Section 168 of MV Act stipulates that there should be grant of just compensation. Thus, it becomes challenge for a Court of law to determine just compensation which should not be bonanza for the claimant/victim and at the same time it should not be too meagre. Hon'ble the Apex Court in Rajkumar Vs Ajay Kumar and others (2011) 1 SCC 343 has laid down the heads under which compensation is to be awarded for personal injuries which is as follows:

"Pecuniary damages (Special damages)

(i)Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii) (a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

23. In **K. Suresh v. New India Assurance Company Ltd. and Ors**., Hon'ble the Apex Court has held as follows :

"2...There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity the Act) stipulates that there should be grant of just compensation. Thus, it becomes a challenge for a court of law to determine just compensation which is

neither a bonanza nor a windfall, and simultaneously, should not be a pittance."

24. Hence, keeping in mind the above contours of "just compensation", we proceed to determine the quantum of compensation. It is not disputed that appellant has submitted the bills for medical expenses and treatment worth Rs.87,000/-. As far as disability of the appellant is concerned, Doctors have issued disability certificate to the tune of 90% for body as a whole and the Tribunal has also considered the same percentage. Hence, we do not disturb the percentage of permanent disability.

25. Perusal of judgment shows that despite holding that the appellant was a T.V. Mechanic, the learned Tribunal has considered his monthly income at Rs.1800/- on the ground that he could not adduce any evidence in this regard. We are even fortified in our view by 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) V. Mekala Vs. M. Malathi and another, (2014) 11 SCC 178; and

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

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

26. Learned tribunal has assessed income at Rs.1800/- per month of injured appellant on the basis of The Minimum Wages Act, the said finding is bad. Learned tribunal could not have equated the appellant with labourer because before learned tribunal the appellant led evidence and opined that he was a T.V. Mechanic meaning thereby, that he was a technical and skilled person. The accident took place in the year of 2000, hence, we hold the income of the appellant at Rs.4,000/- per month.

27. The Hon'ble Apex Court in the judgment of J***ithendran v. New India Assurance Company Ltd and another, 2021 ACJ 2736*** has held that in case of injury, 40% would be added towards future prospects, considering the fact that injured would be incapacitated for life, the same would be applicable to the facts of this Case.

28. Keeping in view the aforesaid decisions 40% would be added for future loss of income of the appellant, it is the result of his permanent disability and that too to the tune of 90%. The age of appellant was 27 years at the time of accident, hence, multiplier of 17 shall be applied, Rs.87,000/- were spent on medical expenses which are rightly granted by the tribunal. Learned tribunal has granted a meagre amount of Rs.5,000/- for pain and suffering. This is a case of amputation of one leg, hence Rs.1,00,000/- is granted for pain, shock and suffering as held by the Apex Court in ***Syed Sadiq Etc. Vs. Divisional Manager United India Insurance Company Ltd., (2014) 2 SCC 735.*** Learned tribunal has not granted any amount for future medical expenses hence, we grant Rs.40,000/- for future medicines, Rs.10,000/- (lumps sum) for special diet and Rs.5,000/- for attendant charges are also granted.

29. We can take judicial notice of the fact that in some of the cases, the injured as the case in hand requires artificial limb for betterment in movement, where leg is amputated. Purpose of social welfare legislation is to find out ways and means to help the sufferer in all possible fields. If Tribunal finds with medical advice that artificial limb can procure his self-dependency, all possible efforts should be made to get it executed and whatever necessary expenses, it requires, must be treated to be a part of compensation, which should be allowed against the persons liable to pay compensation. Hence, the appellant would be entitled to get Rs.1,00,000/- for procuring artificial limb.

30. Where the appellant has become disabled to the tune of 90% and that too by his leg, he is not able to seat properly and walk and he has lost pleasures of life because he cannot live a normal life after the accident. It is natural that he had bleak prospects of marriage and family life as he was a young man of 27 years of age only. It cannot be said that appellant lost amenities of life to the great extent which cannot be restored at all, therefore, we grant Rs.2,00,000/- for loss of amenities. On the basis of above discussion, the amount of compensation payable to the appellant is computed herein-below.

31. On the basis of above discussions, the amount of compensation payable to the appellant is computed herein-below.

i. Annual Income : Rs.4,000/- p.m.

ii. Percentage towards future prospects : 40% which would be Rs.1600/-

iii. Total income (i+ii) : Rs.5600/-

iv. Annual Income : Rs.5600 x 12 = 67,200/-

v. Multiplier applicable : 17

vi. Loss of dependency: (Rs.67,200 x 17)=Rs.11,42,400/-

vii. Permanent disability at the rate of 90% = Rs.10,28,000/- (rounded figure)

viii. Medical expenses = Rs.87,000/-

ix. For Artificial limb = Rs.1,00,000/-

x. For loss of amenities : Rs.2,00,000/-

xi. For Special diet : Rs.10,000/-

xii. For attendant charges = Rs.5,000/-

xiii. For future medicines = Rs.40,000/-

xiv. For transportation expenses = Rs.10,000/-

xv. For pain, shock and suffering : Rs.1,00,000/-

xvi. Total compensation (vii+viii+ix+x+xi+xii+xiii+xiv+xv) : **Rs.15,80,000/-** (in rounded figure)

32. The tribunal has awarded the rate of interest @ 9% but 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 7 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."

33. In view of the above, the appeal is **partly allowed**. Judgment and award 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 with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. However, for period of 22.7.2002 to 17.12.2003 no interest would be payable in view of decision of Apex Court reported in ***Lakkamma and Others Vs. The Regional Manager M/s United India Insurance Co. Ltd., AIR 2021 SC 3301***. The amount already deposited be deducted from the amount to be deposited.

34. Learned Tribunal has awarded rate of interest as 9% per annum but we are award of interest at 7.5% on the enhanced amount in the light of the above judgment of the Apex Court.

35. 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 6 (SC), 442,*** the order of investment is not passed because applicants /claimants are neither illiterate nor rustic villagers.

36. 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 judgment of A.V. Padma (supra). The same is to be applied looking to the facts of each case.

37. No other grounds were urged when the matters were heard.

38. Recently the Gujarat High Court in case titled ***the Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS), R/Special Civil Application No.4800 of 2021 decided on 05.04.2022,*** it is held that interest awarded by the tribunal under Section 171 of Motor Vehicles Act is not taxable under the Income Tax Act, 1961.

39. The Tribunal shall follow the guidelines issued by the Apex Court in ***Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others*** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As 10 years have elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

40. We are thankful to learned counsels for the parties for ably assisting

this court in getting this old appeal disposed of.

41. Record be sent back to tribunal below forthwith.

(2022)07ILR A611
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2022 & 13.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 1877 of 2008

Mushtaq Ahmad & Anr. ...Appellants
Versus
Sri Riyaz Khan & Ors. ...Respondents

Counsel for the Appellants:
Ms. Anju Shukla, Sri Nigamendra Shukla

Counsel for the Respondents:
Sri Sudhanshu Behari Lal Gour, A.K. Sinha, Sri Amitanshu Gour

(A) Civil Law - Motor Vehicles Act, 1988 - Sections 140, 163, 163-A & 166 - Appeal - for enhancement of compensation - Negligence – after evidence was led - tribunal recast the issues and decided claim petition u/s 166 not u/s 163-A - once the tribunal decided the matter u/s 166 by deciding the issue of negligence, it was under an obligation to decide the future loss of income also - hence, Court granted addition of 40% towards future loss of income. (Para - 8)

(B) Civil Law – Motor Vehicles Act, 1988 - Sections 140, 163, 163-A & 166— Appeal - quantum of compensation - Multiplier of 18 should be applied instead of 15 as deceased was in age bracket of 21 - 25 as well as per law lay down in Kurvan Ansari Alias Kurvan Ali's case Rs. 40,000/- each to the parents be granted & deduction towards personal expenses of the deceased would be ½ as deceased was bachelor. (Para 9)

(C) CIVIL LAW – Motor Vehicles Act, 1988 - Sections -140, 163, 163-A & 166— Appeal - quantum of compensation - rate of interest - in the light of Hon'ble Apex court Judgment & order rendered in *'National Insurance Co. Ltd. Vs Mannat Johal & ors.'* **Case - rate of interest should be 7.5%** (Para 10)

(D) CIVIL LAW – Motor Vehicles Act, 1988 - Section - 166: - Income Tax Act, 1961 Section - 194- A(3)(ix): - **Appeal - Tax deduction - in the light of judgment of Hon'ble Apex court in case of** *'Smt. Hansaguri P. Ladhani's case* **- insurance company is entitled to deduct the appropriate amount under the head of 'TDS' accordingly - directions are also issued to the tribunal to follow the guidelines issued in case of** *'Bajaj Allianz General Insurance Com. Pvt. Ld. Vs UOI & ors.'*. (Para 13)

Appeal - Allowed Judgement of tribunal shall stand modified to the aforesaid extent. (E-11)

List of Cases cited: -

1. Kurvan Ansari @ Kurvan Ali Vs Shyam Kishore Murmu (2021 (0) AIJEL - SC - 67995).

2. National Insruance Co. Ltd. Vs Mannat Johal & ors. (2019 (2) TAC 705 (SC),

3. A V Padma Vs Venugopal (2012 (12) GLH (SC) 442,

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

5. FAFO No. 23/2001 (Smt. Sudesna & ors. Vs Hari Sigh & anr.),

6. The Oriental Insurance Co. Ltd. Vs Chief Commissioner of Income Tax (TDS), (R/Special

Civil Application No.4800 of 2021, Decided on 05.04.2022

7. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. (FAFO No. 1818/2012 order Dt. 19.07.2016),

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

1. Heard Sri Nigamendra Shukla, learned counsel for the appellants and Sri Amitanshu Gour, learned Advocate, appearing for Sri S.B.L. Gour, learned counsel for the respondent.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 20.2.2008 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.2, Bulandshahr (hereinafter referred to as 'Tribunal') in Motor Accident Claim Case No.246 of 1999 awarding a sum of Rs.2,90,000/- as compensation with interest at the rate of 6%.

3. It is an admitted position of fact that the accident occurred on 28.5.1999. The claim petition was filed under Sections 163 A, 166 & 140 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'Act'). The evidence was led and only in the year 2007 the claimants deleted Section 166 and 140 of the Act which was much after the evidence was recorded. Only heading of section was corrected and nothing was corrected in the body of the claim petition, namely, income of the deceased was Rs. 6,000/- per month and the monetary loss claimed was Rs.20,000/- which was beyond the scope of Section 163A of the Act. After the pleadings were over, the evidence was closed and the matter was fixed for arguments, the Tribunal recast the issues and framed five issues. One of them was regarding negligence. Had the Tribunal considered the matter only under Section 163A, there was no question of deciding the issue of negligence. The Tribunal has considered the matter as if it was a matter under Section 166 of the Act and, therefore, once the Tribunal decides the matter under Section 166 and not under Section 163 A of the Act by deciding issue of negligence, it was under an obligation to decide the future loss of income.

4. The accident took place on 28.5.1999. The deceased-Isttyak was 25 years of age at the time of accident. The Tribunal considered his income to be Rs.2400/- per month, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 15 on the basis of age of parents and has granted Rs.2,000/- under non pecuniary damages.

5. It is submitted by learned counsel for the appellants that the deceased was earning Rs.3300/- per month and the Tribunal has erred in not considering the same. It is further submitted that the Tribunal has not granted any amount under the head of future loss of income. It is further submitted that the Tribunal has granted multiplier of 15 considering the age of the parents of the deceased which is bad and it should be 18 as the deceased was in the age bracket of 21 to 25.

6. It is lastly submitted by learned counsel for the appellants that the amount awarded under non-pecuniary heads and interest, awarded by the Tribunal or on the lower side and are required to be enhanced.

7. As against this, learned counsel for the respondent has contended that the income which has been considered by the Tribunal is just and proper as there was no

income proof. It is further submitted by learned counsel for the respondent that non grant of future loss of income and multiplier of 15 granted by the Tribunal are just and proper. is just and proper. It is also contended by learned counsel for the respondent that the deceased being bachelor, the deduction towards personal expenses of the deceased would be 1/2.

8. Having heard learned counsel for the parties, income of the deceased, even in the year of accident can be considered to be at least Rs.3000/- per month looking the fact that he was mason by profession. As the petition was under Section 163 A of Motor Vehicles Act, 1988, future prospects cannot be given was the submission of learned counsel for respondent but, in this case, the Tribunal has considered the claim petition as one under Section 166 of Motor Vehicles Act as originally filed. This is clear from the order passed in 2008 when after evidence was led the Tribunal recast the issues and decided the issue of negligence which it could not do so if it had considered the claim under Section 163A of M.V. Act as negligence cannot be decided or considered in a claim under Section 163 A. Therefore, once the Tribunal has decided the matter under Section 166 by deciding issue of negligence, it was under an obligation to decide the future loss of income which has not done. Hence, we grant addition of 40% towards future loss of income of the deceased. The deduction towards personal expenses of the deceased would be 1/2 as the deceased was bachelor. Multiplier of 18 should be granted as the deceased was in the age bracket of 21-25. Further, Rs.40,000/- each to the parents be granted in view of the decision in **Kurvan Ansari Alias Kurvan Ali Vs. Shyam Kishore Murmu, 2021 (0) AIJEL-SC 67995.**

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

i. Income: Rs.3,000/-per month (Rs.36,000 per year)

ii. Percentage towards future prospects : 40% namely 14,400/-

iii. Total income : Rs.36,000 + Rs.14,400 = 50,400/-

iv. Income after deduction of 1/2 towards personal expenses : Rs.25,200/-

v. Multiplier applicable : 18

vi. Loss of dependency: Rs.25,200 x 18 = Rs.4,53,600/-

vii. Amount under non pecuniary heads : Rs.40,000 + Rs.40,000/- = Rs.80,000/-

viii. Total compensation : Rs.5,33,600/-

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. 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 as directed above. The amount already deposited be deducted from the amount to be deposited. Record and proceedings be sent back to the Tribunal forthwith.

12. 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 rustic villagers.

13. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case **of Smt. Hansaguri 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. The said decision has also been reiterated by High Court Gujarat in R/Special Civil Application No.4800 of 2021 (**The Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS)** decided on 5.4.2022.

14. 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 judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

15. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India** and others vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long period has elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

16. This Court is thankful to both the counsels for getting this matter decided.

In Ref: Civil Misc. Correction Application No.5 of 2022

This is basically a review filed in the grab of correction.

We uphold the order of the learned trial Judge and grant the recovery rights to the insurance company subject to the amount be deposited as the claimants are the third party.

It is stated that the order could be uploaded only in the month of June, 2022, we extended the time by four more weeks.

This review is partly allowed.

We thank Shri Nigamendra Shukla for ably assisting this Court.

(2022)07ILR A615
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.06.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

First Appeal From Order No. 3841 of 2018

Ashish & Ors. ...Appellants
Versus
Murti Shri Ramchandra Virajman & Ors. ...Respondents

Counsel for the Appellants:
Sri Kartikeya Saran, Sri Ujjawal Satsangi

Counsel for the Respondents:
Sri Kuldeep Singh, Sri Santosh Kumar Mishra, Sri Vipin Vinod

(A) Civil Law – Civil Procedure Code, 1908 - Section 92 - Order 1, Rule 8, Order 7, Rule 11, Order 32, Rules 1: - **Defendants' Appeal** - **against remand order of Civil Appellate Court for fresh decision before Trial court** - **Maintainability of - Suit filed by a representative - under Order 1 rule 8 - seeking permanent injunction for restraining the defendants-appellants from management & selling of the property in question as well as for transferring the entire management work including right of maintenance of the deity from appellants to the Administration - objection taken under Order 7 rules 11 - trial court rejected - the Plaint on the ground of 'non-disclosure of cause of action' & 'suit barred by law' - court held that - 'no cause of action' is different from a Plea that 'Plaint does not disclosure a cause of action' - words 'Cause of Action' means 'any cause of action' - hence suit is maintainable - and admittedly, it is defendant's own case that neither public or private Trust was created nor any deity was installed - thus, section 92 not attracted - hence, rejection of plaint by trial court is not proper - order of lower appellate court needs no interference - appeal dismissed.(**Para – 18, 20, 21, 22, 30, 32, 33)

Appeal - Dismissed. (E-11)

List of Cases cited: -

1. Rajendra Bajoria & ors. Vs Hemant Kumar Jalan & ors., Civil Appeal Nos.5819-5822 of 2021

2. Bhupati Nath Smrititirtha Vs Ram Lal Maitra 1909 Law Suit (Cal) 89

3. Chairman Madappa Vs M.N. Mahanthadevaru & ors. AIR 1966 SC 878

4. Ranchhoddas Kalidas & ors. Vs Goswami Shree Mahalaxmi Vahuji & ors. AIR 1953 Bom. 153

5. Kumaravelu Chettiar & ors. Vs T.P. Ramaswami Ayyar & ors. AIR 1933 PC 183

6. St. of Orissa Vs Klockner & Co. (1996) 8 SCC 377

7. Raptakos Brett and Co. Ltd. Vs Ganesh Property 1998 (7) SCC 184

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Kartikeya Saran, learned counsel for the defendants-appellants and Sri Santosh Kumar Mishra, learned counsel for the plaintiffs-respondents No.2 to 7.

2. This appeal under Order 43 Rule 1(u) of Code of Civil Procedure, 1908 *(hereafter referred to as "CPC")* arises out of judgment and decree dated 18.7.2018 passed by Additional District Judge, Court No.6, Mirzapur in Civil Appeal No.42 of 2016 setting aside the judgment and order dated 11.12.2017 passed by Additional Civil Judge (Senior Division) Mirzapur in Original Suit No.265 of 2015 and remanding back the matter to the Trial Court.

3 . A brief sketch of facts is necessary for the better appreciation of the case which are as under :

4. The dispute relates to the property being Arazi No.548, 549/1, 549/2, 546, 547, 554, 569, 570, 571, 575, 577 and 572 measuring 5 Bigha and 18 Biswa situated in Village-Tarkapur, Tappa - 84, Pargana - Kantit, Tehsil and District Mirzapur. On 13.03.1947, one Kedar Nath Mishra was given a lease of aforesaid land in perpetuity. He executed an agreement for largesse (bakshishnama) (Endowment Deed) dated 17.08.1949, dedicating the entire property to "Lord Ram Chandraji" and His idol was to be installed over the said property and thereafter necessary religious worship was to be performed under the control and guidance of one Kailash Nath Agrawal, after him, his successors.

5. Kailash Nath Agrawal did not get the idol of Lord Ram Chandraji installed over the property dedicated, thus a suit under Order 1 Rule 8 C.P.C. was filed by the plaintiffs-respondents being Original Suit No.265 of 2014 against the present appellants claiming relief of permanent injunction restraining the appellants from managerial capacity of the property in question, as well as restraining the appellants from selling off the property in dispute and also for transferring the entire managerial work and rights for maintaining and taking care of the deity to the district administration. The said suit was contested by the defendants-appellants who filed their written statement denying the plaint allegation.

6. An application under Order 7 Rule 11 CPC was filed by the defendants-appellants on 18.3.2015, on the ground that the suit filed by the plaintiffs was not maintainable in view of Order 7 Rule 11 (a) and (d) CPC, as it did not disclose any cause of action and from the statement in the plaint, the suit appears to be barred by law. The Trial Court vide order dated 11.12.2017 allowed the application 75Ga filed by defendants-appellants and rejected the objection 78Ga filed by plaintiffs-respondents and dismissed the suit. Against the said judgment and order, Civil Appeal No.42 of 2017 was preferred in which the lower Appellate Court framed following point of determination :

"क्या प्रस्तुत वाद आदेश 7 नियम 11 जा. दी. के प्राविधानों से बाधित है?"

7. The lower Appellate Court vide judgment and order dated 18.7.2018 allowed the appeal and set aside the order dated 11.12.2017 and remanded the matter back and directed the Trial Court to frame issues on the basis of pleading of the parties and decide the suit on merits. Hence this appeal.

8. Sri Kartikeya Saran, learned counsel appearing for the appellants

submitted that the suit filed under Order 1 Rule 8 C.P.C. on behalf of plaintiffs was not maintainable as no deity has been installed in the property in question and thus no person can file a suit as a next friend. He next contended that the person, who was a party to the agreement dated 17.8.1949 or his legal heirs could file civil suit for the breach of the clauses mentioned in the said agreement and no third party can maintain a suit against the appellants. He next contended that suit at the instance of the plaintiffs-respondents was not maintainable under Order 1 Rule 8 CPC and at best could have been filed under Section 92 read with Order 32 Rule 1 CPC as the matter relates to public charity and the issue raised by the plaintiffs is for installation of a deity and claiming to be the next friend of the deity. He also contended that from perusal of the document of 1949 and the event, which had followed since then, no trust either private or public was created and in other words, condition mentioned therein had become redundant in the present time.

9. According to appellants' counsel, installation of an idol accessible to public at large is sine qua non for creation of a public trust. In the instant case, neither idol has been installed till date nor any trust has been created, thus institution of a suit as a next friend of a deity cannot be maintained. He then tried to impress upon the Court that application under Order 7 Rule 11 CPC was maintainable before the Trial Court as the plaintiffs have failed to disclose any cause of action. Moreover, from the reading of the plaint it is clear that no suit under Order 1 Rule 8 CPC is maintainable.

10. Reliance has been placed upon decision of Apex Court in the case of **Rajendra Bajoria and others vs. Hemant Kumar Jalan and others, Civil Appeal Nos.5819-5822 of 2021** decided on 21.9.2021.

11. Sri Santosh Kumar Mishra, learned counsel for the respondents submitted that endowment once made cannot be revoked. According to him, endowment was created by dedication of property to the deity "Shri Ram Chandraji" and the property became debutter property. He then contended that registered deed dated 17.8.1949 by Kedar Nath Mishra was not a deed of agreement. It was in fact a deed of dedication in favour of deity "Shri Ram Chandraji", and Kailash Nath Agrawal was appointed only as a manager. According to him, once the dedication was made to the deity, which is a juristic person, the legal personality of deity can exist and endowment made is competent and efficacious independently, even if the idol does not exist. According to him, it is pious obligation of Kailash Nath Agrawal and his legal heirs to have carried out the pious purpose for which Kedar Nath Mishra had executed the deed in the year 1949. He then contended that Section 92 is not attracted in the present case as it relates to "public charity' and if there is any alleged breach of trust created for public purpose then a suit under Section 92 CPC is maintainable, while the plaintiffs had filed the present suit under Order 1 Rule 8 CPC as a representative suit so as to give effect to deed of 1949.

12. He has relied upon a Full Bench decision of Calcutta High Court in case of **Bhupati Nath Smrititirtha vs. Ram Lal Maitra 1909 Law Suit (Cal) 89**, wherein the question which was referred to the Full bench was; "Does the principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it, apply

to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void?" The Calcutta High Court held that Hindu Law recognizes dedications for the establishment of the image of a deity and for the maintenance and worship thereof.

13. I have heard the respective counsels and perused the material before this Court.

14. Before adverting to decide the issue as to whether the application under Order 7 Rule 11 CPC was maintainable or not, and whether the lower Appellate Court had rightly remanded the matter to the Trial Court, to be decided on merit after framing of issues or not, glance of provisions of Section 92, Order 1 Rule 8, Order 7 Rule 11 and Order 32 Rule 1 of CPC are necessary for better appreciation of the case which are extracted hereasunder :

*"**92. Public charities.** - (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the 2 [leave of the Court], may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree:*

(a) removing any trustee;

(b) appointing a new trustee;

(bb) for delivery of possession of any trust property against a person who has ceased to be trustee or has been removed.

(c) vesting any property in a trustee;

(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;

d) directing accounts and inquiries;

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863 (XX of 1863), or by any corresponding law in force in the territories which, immediately before the 1st November, 1956, were comprised in Part B States, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

(3) The Court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied cypres in one or more of the following circumstances, namely :

(a) where the original purposes of the trust, in whole or in part,

(i) have been, as far as may be, fulfilled; or

(ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust; or

(b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or

(c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes; or

(d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes; or

(e) where the original purposes, in whole or in part, have, since they were laid down,

(i) been adequately provided for by other means, or

(ii) ceased, as being useless or harmful to the community, of

(iii) ceased to be, in law, charitable, or

(iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust."

"8 - One person may sue or defend on behalf of all in same interest- *(1) Where there are numerous persons having the same interest in one suit,-*

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted or

defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation *- For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the person on whom behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be."*

"11. Rejection of plaint. *- The plaint shall be rejected in the following cases-*

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law:

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of Rule 9;

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature form correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

"1. Minor to sue by next friend.- Every suit by a minor shall be instituted in his name by a person who in such shall be called the next friend of the minor.

Explanation-In this Order, "minor" means a person who has not attained his majority within the meaning of

section 3 of the Indian Majority Act, 1875 (9 of 1875) where the suit relates to any of the matters mentioned in clauses (a) and (b) of section 2 of that Act or to any other matter."

15. From the reading of Section 92 CPC, it is clear that a suit in a representative capacity is fundamentally maintainable on behalf of the entire body of persons who are interested in the trust. It is for the vindication of public rights. The principal object behind the provision is to afford protection to public trust and to prevent vexatious proceedings from being initiated by irresponsible person against the trust, as held by the Hon'ble Supreme Court in the case of **Chairman Madappa vs. M.N. Mahanthadevaru and Ors. AIR 1966 SC 878.**

16. For the application of this Section, three conditions must be satisfied, (i) the Suit must relate to public, religious or charitable trust; (ii) there must be allegation of breach of trust or the direction of the Court must be required for administration of a trust and; (iii) the reliefs claimed must be mentioned in the Section.

17. In **Ranchhoddas Kalidas & Ors. vs. Goswami Shree Mahalaxmi Vahuji & Ors. AIR 1953 Bom. 153**, Bombay High Court had explained the conditions, which must be satisfied so as to maintain a suit under Section 92 CPC.

18. For leave to file suit in representative capacity under Section 92 CPC, existence of trust is necessary. While the object of Order 1 Rule 8 CPC is that all persons interested in a suit, either as a plaintiff or as a defendant, must be joined as parties so that the Court may finally adjudicate upon the rights of all parties and the orders of the Court may be safely executed by those, who are compelled to obey them and future litigation may be avoided. This rule is an enabling provision which entitles one party to represent many, who have a common cause of action.

19. In **Kumaravelu Chettiar and Ors. vs. T.P. Ramaswami Ayyar and Ors. AIR 1933 PC 183,** Privy Council held that Order 1 Rule 8 CPC has been framed in order to save time and expenses, to ensure a single comprehensive trial of questions in which large body of persons are interested and to avoid harassment to parties by multiplicity of suits. It is thus a rule of convenience.

20. The distinction between the suit under Section 92 and Order 1 Rule 8 CPC is that in a suit to be instituted under Section 92, prior permission of the Court is mandatory, while in a suit under Order 1 Rule 8, the leave can be granted post institution of the suit.

21. Thus, from the reading of Section 92 and Order 1 Rule 8 CPC, it is clear that a suit under Section 92 can only be maintained where it relates to public charitable and religious trust, and there is an allegation of breach of trust and direction of the Court is required for the administration of trust, while there is no such requirement for filing a suit under Order 1 Rule 8 CPC, which though is a representative suit but on other footing.

22. Now coming to order 7 Rule 11 (a) and (d) it is clear that a plaint can be rejected if it does not disclose a cause of action or where from the statement made in the plaint, the suit appears to barred by any law. The Rule is mere procedure. The Court has to give a meaningful reading to

the plaint and if it is manifestly vexatious or meritless in the sense of not disclosing a clear right to sue, the Court may exercise its power under this rule.

23. A plea that there was no cause of action for the suit is different from the plea that plaint does not disclose a cause of action. In the latter case, it is the duty of the Court to decide the question before issuing summons, and reject the plaint without issuing summons. In S**tate of Orissa vs. Klockner & Co. (1996) 8 SCC 377 and in Raptakos Brett and Co. Ltd. vs. Ganesh Property 1998 (7) SCC 184** the Apex Court had clarified the said position.

24. The words "cause of action" means "any cause of action". If the plaint discloses a cause of action even in part it cannot be rejected. Recently, the Supreme Court in **Rajendra Bajoria and others (supra)** while dealing with matter under Order 7 Rule 11 held that reading of the averments made in the plaint should not only be formal but also meaningful. Relevant paras 15, 17 and 20 are extracted hereas under :

"15. It could thus be seen that this Court has held that reading of the averments made in the plaint should not only be formal but also meaningful. It has been held that if clever drafting has created the illusion of a cause of action, and a meaningful reading thereof would show that the pleadings are manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, then the court should exercise its power Under Order VII Rule 11 of Code of Civil Procedure. It has been held that such a suit has to be nipped in the bud at the first hearing itself.

...

17. It could thus be seen that the court has to find out as to whether in the background of the facts, the relief, as claimed in the plaint, can be granted to the Plaintiff. It has been held that if the court finds that none of the reliefs sought in the plaint can be granted to the Plaintiff under the law, the question then arises is as to whether such a suit is to be allowed to continue and go for trial. This Court answered the said question by holding that such a suit should be thrown out at the threshold. This Court, therefore, upheld the order passed by the trial court of rejecting the suit and that of the appellate court, thereby affirming the decision of the trial court. This Court set aside the order passed by the High Court, wherein the High Court had set aside the concurrent orders of the trial court and the appellate court and had restored and remanded the suit for trial to the trial court.

...

20. It could thus be seen that this Court has held that the power conferred on the court to terminate a civil action is a drastic one, and the conditions enumerated Under Order VII Rule 11 of Code of Civil Procedure are required to be strictly adhered to. However, Under Order VII Rule 11 of Code of Civil Procedure, the duty is cast upon the court to determine whether the plaint discloses a cause of action, by scrutinizing the averments in the plaint, read in conjunction with the documents relied upon, or whether the suit is barred by any law. This Court has held that the underlying object of Order VII Rule 11 of Code of Civil Procedure is that when a plaint does not disclose a cause of action, the court would not permit the Plaintiff to unnecessarily protract the proceedings. It has been held that in such a

case, it will be necessary to put an end to the sham litigation so that further judicial time is not wasted."

25 . In the instant case, the endowment deed executed by Kedar Nath Mishra on 17.8.1949 clearly states that the property mentioned was dedicated to "Lord Ram Chandraji" and the deed further took note of the fact that the possession was also transferred to the deity and the doner did not keep any right with him. He had appointed Kailash Nath Agrawal to manage the affairs and look after worship of the deity after it was installed, which was in times to come, to be looked after by his legal heirs. Relevant extract of the endowment deed is as under :

"पट्टा मजकूर का कुल नजराना बाबू कैलाशनाथ अग्रवाल वल्द देवी प्रसाद अग्रवाल निवासी मोहल्ला बसनई बाजार मिरजापुर ने अदा किया है और बवख्त हासिल करने पट्टा मजकूर यह बात तै हो गई थी नियत जायदाद श्रीराम चंद्र जी को जो उसी इमारत में स्थापित होगें समर्पित कर दी जावेगी और चढाई जावेगी चुनांच तय मुकिर इस बात तै शुदा के मुताबिक वदुरूस्ती होश हवास व खुशी वो रजामंदी विलाकिसी जब्रो इकरात जायदाद मुझ हिस्सा जैल श्री रामचंद्र जी को जो उसी इमारत में स्थापित होगें समर्पित कर देते हैं अब जायदाद मजकूर से कोई वास्ता हम मुकिर को बाकी नहीं है और हम मुकिर ने कब्जा भी अपना ...कर दिया है और श्रीरामचंद्र जी को कब्जा दे दिया है और श्री रामचंद्र जी जायदाद मुफस्सला जैल के यहां ...इस्तम्दवादी बजरिये वसतावेजताजा हो गये और आइन्दा हमेशा रहेगें जायदाद मजकूर का इंतजाम मिनजानिब श्री रामचंद्र जी व० कैलाशनाथ वल्द बाबू देबी प्रसाद अग्रवाल मजकूर व बाद वफात उनके वरसान सिलसिले वार करते रहे और जायदाद ...की आमदनी श्रीरामचंद्र जी के सेवा व पूजा व राजभोग इत्यादि में खर्च करते रहेगें और उनको या उनके वरसान किसी और शख्स को जायदाद मजकूर की आमदनी की किसी और मद में खर्च करने का अख्तियार न होगा और उनको यह उनके वरसान और किसी शख्स को जायदाद मजकूर को किसी और तौर पर मुन्तब्दिल करने का अख्तयार हासिल न होगा।"

26. The Hindu Law has been recognizing the religious and charitable gifts from ancient time and the Hindu concepts of religious and charitable gifts is as old as the Rigveda, wherein the term used is "Istha' and "Purtta". The compound word Istha-Purtta has been retained in the writings of all Brahminical sages and commentators down to modern days. By "Istha" mean Vedic sacrifices and rites and gifts in connection with the same; "Purtta", on the other hand, means and signifies other pious and charitable acts which are unconnected with any Srauta or Vedic sacrifice.

27. In every act of dedication, there are two essential parts, one of which is called Sankalpa or the formula of resolve, and the other Utsarga or renunciation. Sankalp state what object the founder has in making the gift, while Utsarga, on the other hand, completes a gift by renouncing ownership of the thing given.

28. In all types of endowment, the purpose of founder is clearly expressed in the Sankalpa while Utsarga or renunciation divests the founder of his rights in the property dedicated.

29. Thus, once a property is dedicated to a deity, after Sankalp and Utsarg, as in the present case for establishment of idol of "Shri Ram Chandraji" the endowment was complete at the hands of doner Kedar Nath Mishra, and it vested in the juristic person Shri Ram Chandraji though the idol was not installed. The Full Bench of Calcutta High Court in **Bhupati Nath Smrititirtha (supra)** held as under :

"66. To sum up

(i) The view that no valid dedication of property can be made by a will to a deity, the image of which is not in existence at the time of the death of the

testator, is based upon a double fiction, namely fist that a Hindu deity is for all purposes a juridical person and secondly that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of these propositions is too broadly stated and the second is in-consistent with the first principles of Hindu jurisprudence.

(ii) The Hindu Law recognises dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed extra commercial and is entitled to special protection at the hands of the sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments Manohar Ganesh Tambekar v. Lakhmiram Govindram (1887) I.L.R. 12 Bom. 247 affirmed, on appeal, by the Judicial Committee in Chotelal Lakhmiram v. Monohar Ganesh Tambekar (1899) I.L.R. 24 Bom. 50 L.R. 26 I.A. 199. It is immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in the course of the year."

30. The suit filed by the plaintiff seeking relief of permanent injunction restricting defendants-appellants from the managerial capacity of the property and also restraining them from selling the property in question as well as for transferring the entire managerial work and right for maintaining and taking care of the deity from the appellants to the administration, was thus maintainable under Order 1 Rule 8 CPC.

31. The endowment made in 1949 by Kedar Nath Mishra divesting himself from the property, and vesting the same in Lord Shri Ram Chandraji, and giving only the managerial work to be performed by Kailash Nath Agrawal and his successors in form of worship and rituals of the deity.

32. The argument as to non maintainability of suit under Order 1 Rule 8 CPC holds no ground. It is the own case of the defendants-appellants that neither public or private trust was created, nor any deity was installed. Once the stand is to the extent that no public trust was created after 1949, Section 92 is not attracted and the suit under Order 1 Rule 8 CPC was thus maintainable.

33. Now coming to the question as to whether any cause of action arose for filing the suit, the statement made in the plaint clearly reflect that Kedar Nath Mishra endowed the property to Lord Shri Ram Chandraji on 17.8.1949 giving managerial right to Kailash Nath Agrawal and his successors. The argument that endowment deed was never brought to its existence as no idol was installed would not attract Order 7 Rule 11 CPC in the present case. From reading of the application filed by the defendants-appellants for rejection of plaint, no case is made out either under Order 7 Rule 11 (a) or (d) CPC. The Trial Court committed gross error in allowing the application under Order 7 Rule 11(a) and (d) and dismissing the suit. The lower Appellate Court had rightly set aside the order of the Trial Court and remanded back the matter to be decided after framing the issues on the basis of the pleading of the parties and directing to decide the suit on merit.

34. This Court finds that once the property was endowed in 1949 to Lord Shri Ram Chandraji, the rights of doner came to an end and the property vested in the deity

whether it was installed or not. Lord Shri Ram Chandraji is a juristic person and the property vested in Him once the endowment was complete following the Sankalp and Utsarg.

35. Considering the facts and circumstances of the case, I find that the judgment and order of lower Appellate Court needs no interference by this Court.

36. The appeal fails and is hereby dismissed.

(2022)07ILR A625
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.05.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C. J.
THE HON'BLE J.J. MUNIR, J.

Special Appeal No.165 of 2022

Kamal Kishore ...Appellant
Versus
Debts Recovery Appellate Tribunal, Allahabad & Ors. ...Respondents

Counsel for the Appellant:
Sri Deepak Kumar Jaiswal, Sri Sanjay Kumar Gupta

Counsel for the Respondents:
Sri Gyan Prakash Shrivastava, Sri S.K. Srivastava, Sri Padmaker Pandey

A. Banking Law – Mortgage – Transfer - Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Sections 29 & 30 - Second Schedule to the 1961 Act: Rules 54, 56, 57, 60 and 61; Section 222, 276; Transfer of Property Act, 1882: Section 48, 60.

A.(a) Right to appeal u/s 30, RDDBFI Act - The learned Single Judge was not right in holding that since the petitioner-appellant had not followed the procedure prescribed u/Rule 60 of the Second Schedule to the 1961 Act, he could not ask the auction sale, not yet confirmed, to be set aside through an appeal u/s 30 of the RDDBFI Act. (Para 23)

An appeal u/s 30 of the RDDBFI Act can be preferred by a person aggrieved by the Recovery Officer's orders, notwithstanding the fact that he has not invoked the provisions of Rule 60 or 61 of the Second Schedule to the 1961 Act. This is so because S.30 of the RDDBFI Act opens with a non-obstante clause that gives an overriding effect to the provisions of S.30 of the said Act. It is S.29 of the RDDBFI Act, extracted hereinabove, that makes provisions of Second Schedule of the 1961 Act applicable to proceedings for recovery under the RDDBFI Act. **The application of the Rules, including Rules 60 and 61 of the Rules under the Second Schedule of the 1961 Act to a recovery under the RDDBFI Act cannot, therefore, be construed in a manner so as to derogate from the plenary right of a person aggrieved by the Recovery Officer's order of any kind to appeal to the Tribunal.** (Para 18)

A.(b) Harmonious constructions of the provisions of Sections 29 & 30 of the RDDBFI Act - The right of a person aggrieved by an order of the Recovery Officer under the aforesaid Act cannot be confined in the manner that he must of necessity invoke Rule 60 of 61 by making an application before the Recovery Officer in the first instance and against the order of the Recovery Officer, come up in appeal u/s 30. If that were done, it would whittle down the scope of the appellate powers of the Tribunal against all orders of the Recovery Officer, that include an order of attachment, auction and sale prior to its confirmation. If the challenge is laid on grounds completely different from those envisaged u/Rule 60 of the Rules framed under the Second Schedule of the 1961 Act, there may not be any requirement of deposit at all. The challenge may be on grounds like those envisaged u/Rule 61 of the Rules aforesaid or on any other ground. (Para 22)

B. Transfer of Property Act, 1882 - Section 48 - 'Property once mortgaged is always mortgaged'. This principle is applicable to preserve and keep intact the mortgagee's estate. It does not militate against the mortgagor's right to redeem or transfer his interest in favour of a third party, who would then acquire as part of the mortgagor's estate the equity of redemption. (Para 24)

B.(a) The learned Single Judge was not right because S. 48 of the TP Act gives priority to an earlier right or clogs a later created right, if the two sets of rights cannot exist together or be exercised to their full extent together. The sale of the mortgagor's right, which could be no more than the right to redeem after paying off the mortgage debt, is in no way one that cannot coexist with the mortgagee's interest or charge on the property held by the mortgagor's transferee. The sale by the mortgagor would not in any way impair the mortgagee's right or militate against his security unless it could be shown that the transfer in fact would impair it. This could be the case, if the mortgagor were to transfer the right to a person or entity, who under the law would take it free from all encumbrance. The sale deed executed in favour of the petitioner-appellant does not in any manner rid the property of the bank's encumbrance, traceable to the mortgage by deposit of title deeds. It is only a change of hand or name or identity of the mortgagor with no impairment of the security. (Para 27)

All that S.48 of the TP Act postulates is that the purchaser of the mortgagor's interest would take it as much subject to the mortgage as the original owner. (Para 28)

The prior transfer that is a mortgage in favour of the bank can certainly coexist with a transfer of mortgagor's estate or interest in favour of the petitioner-appellant by the judgment-debtor. It is just that the petitioner-appellant will hold it subject to the mortgagee's interest to secure repayment of his debt. That has been ensured in the present case by the petitioner-appellant under orders of the Tribunal since set at naught by the Appellate Tribunal and the learned Single Judge. **The Tribunal was right in saying that it is always open to the mortgagor or a purchaser of the charged property, to redeem the property by paying off the creditor. The Tribunal has rightly remarked that the right of redemption of mortgage is a statutory right, which can only be extinguished in one of the ways mentioned in para 2 of S.60 of the TP Act.** (Para 30)

B.(b) The learned Single Judge considered the transfer to the petitioner-appellant during the subsistence of the bank's mortgage a second charge without discharging the first charge and therefore thought that S.48 of the TP Act would hinder creation of any right in favour of the petitioner-appellant. **What was transferred to the petitioner-appellant was not at all any kind of a mortgagee's interest or created a further charge on the property already mortgaged with the Bank. It was, in fact, transfer of the larger estate of the mortgagor, which cannot be called a charge on the property.** (Para 31)

Appeal allowed. Impugned order passed by the learned Single Judge is set aside. Writ petition allowed. Order dated 19.09.2013 passed by the Appellate Tribunal is quashed. Order dated 08.03.2013 passed by the Tribunal setting aside the auction sale dated 13.10.2009 is restored with modification. (Para 33) (E-4)

Precedent followed:

1. C.N. Paramasivam & anr. Vs Sunrise Plaza through Partner & ors., (2013) 9 SCC 460 (Para 16)

2. Sarang Avinash Kamtaker Vs Alpha Organic & ors., MANU/MH/1202/2022 (Para 19)

3. Hill Properties Ltd. Vs U.O.I. & ors., 2016 SCC OnLine Bom 10362 (Para 20)

4. Nazims Continental & ors. Vs The Indian Overseas Bank, Triplicate Branch, Madras & ors., 2009 SCC OnLine Mad 862 (Para 21)

5. Sh. Ishar Dass Malhotra Vs Sh. Dhanwant Singh & ors., 1983 SCC OnLine Del 284 (Para 28)

6. Nagalinga Nadar Vs K. Mehrunisa Begum, 1979 SCC OnLine Mad 146 (Para 29)

(Delivered by Hon'ble J.J. Munir, J.)

1. This Special Appeal is directed against the judgment and order of a learned Single Judge of this Court in Writ - C No. 57359 of 2013 dated January 17, 2022 dismissing the petitioner-appellant's writ petition and affirming an order of the Debts Recovery Appellate Tribunal at Allahabad in Appeal No. 8114 of 2013. The Debts Recovery Appellate Tribunal, by the order under challenge before the learned Single Judge, has reversed an appellate order of the Debts Recovery Tribunal at Allahabad in Appeal No. 23 of 2009 under Section 30 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (*for short "RDDBFI Act*") and restored the auction sale dated October 13, 2009 in DRC No. 213 of 2002 by the Recovery Officer attached to the Tribunal in favour of Respondent No. 4 to this appeal, Ramu Jaiswal.

2. The facts giving rise to this appeal are that the petitioner-appellant purchased through a registered sale deed dated July 28, 1995 land comprising Arazi No. 286, situate at Village Kukradeo, District Kanpur Dehat from Harish Kumar son of Bhagwandas. Harish Kumar shall hereinafter be referred to as 'the judgment-debtor'. Upon the land being purchased by the petitioner, he established a small-scale industry. The property above described and purchased by the petitioner shall hereinafter be called 'the property in dispute'. Prior to execution of the sale deed in the petitioner-appellant's favour by the judgment-debtor, the latter had mortgaged his one-fourth share in the property in dispute in favour of Central Bank of India, Branch Sisamau, Kanpur Nagar in order to secure a loan that he had availed. The judgment-debtor had defaulted in the repayment of loan that he owed the Bank. The Bank filed Application No. 580 of 2000 for recovery of its outstandings amounting to ₹ 10,68,844/- which was decided against the judgment-debtor by the Debts Recovery Tribunal. DRC No. 215 of 2002 was issued against the judgment-debtor in proceedings for enforcement of the certificate.

3. On April 2, 2009 the Recovery Officer fixed a date for holding the auction, scheduling it on June 10, 2009 at 11:00 a.m. On the said date, the auction could not be held. The Recovery Officer thereupon got a sale proclamation published in Amar Ujala Hindi Daily issue dated October 11, 2009 scheduling the auction for October 13, 2009 at 11:00 a.m. The order to do so was passed by the Recovery Officer on August 19, 2009. On October 13, 2009 the auction was held, with only one bidder, that is to say, Ramu Jaiswal/ Respondent No. 4, who purchased the property in dispute for a sum of ₹ 93,500/-. The petitioner-appellant challenged the aforesaid auction sale dated October 13, 2008 by preferring Misc. Appeal No. 23 of 2009 under Section 30 of the RDDBFI Act before the Debts Recovery Tribunal, Allahabad (for short 'the Tribunal'). The confirmation in the auction sale was stayed by an interim order passed by the Tribunal on November 12, 2009 subject to deposit of ₹ 92,200/- which the petitioner made good. The respondent No. 4, Ramu Jaiswal made an application for impleadment in the aforesaid appeal, but it appears that the application was dismissed for non-prosecution. The order of the Tribunal dated April 8, 2013 to which allusion would be made a little later, however, shows that the fourth respondent, who shall

hereinafter be called 'the auction purchaser' appears to have been heard by the Tribunal and his case was considered in Appeal No. 23 of 2009, which was allowed by the Tribunal vide order dated April 8, 2013 on the ground that the right of redemption, that the petitioner had purchased from the judgment-debtor, would continue up to confirmation of the sale and the sale was not binding, so long as it was not confirmed. It was also held that the petitioner had already deposited the amount, for which the property in dispute was sold in favour of the fourth respondent. There was a further direction to refund the sale price to the auction purchaser, together with simple interest @ 10% per annum from the date of sale till full payment was made by the petitioner-appellant.

4. Upon an appeal carried to the Debts Recovery Appellate Tribunal, Allahabad (for short 'the Appellate Tribunal') from the order of the Tribunal dated April 8, 2013, the Appellate Tribunal vide its order dated September 12, 2013 allowed the fourth respondent's appeal and set aside the order made by the Tribunal, reviving the order of the Recovery Officer, affirming the sale in favour of the auction purchaser. It was this order of the Appellate Tribunal that the petitioner-appellant had questioned before this Court in Writ - C No. 57359 of 2013 that came up before the learned Single Judge. The learned Single Judge has upheld the determination of the Appellate Tribunal, restoring the auction sale in favour of the fourth respondent.

5. Aggrieved, the petitioner has preferred the instant appeal under Chapter VIII Rule 5 of the Rules of Court.

6. Heard Mr. Deepak Kumar Jaiswal, learned counsel for the petitioner-appellant, Mr. Gyan Prakash Shrivastava, learned counsel appearing for Respondent No. 3 and Mr. S.K. Srivastava, Advocate holding brief of Mr. Padmaker Pandey, learned counsel for Respondent No. 4.

7. The records have been carefully perused, including the affidavits that were exchanged before the learned Single Judge, together with the annexed documents.

8. The learned Counsel for the petitioner-appellant has assailed the impugned order primarily on the ground that his right to challenge the auction sale held by the Recovery Officer under Section 30 of the RDDBFI Act is in no way restricted by the provisions of Rules 60 and 61 of the Second Schedule to the Income Tax Act, 1961 (for short "the 1961 Act"). He submits that the provisions of Section 29 of the RDDBFI Act that make the provisions of the Second and Third Schedules to the 1961 Act applicable with necessary modifications to recovery of debt due under the former Act, adjudged by the Tribunal have to be harmoniously construed with the provisions of Section 30 of the RDDBFI Act.

9. It is emphasized that the provisions of Section 30 of the RDDBFI Act make every order of the Recovery Officer appealable and that right cannot be curtailed for a judgment-debtor or other person aggrieved by order of the Recovery Officer, or even a person whose interest are affected by a sale held by the Recovery Officer, by subjecting the rights of any of the person(s) above named to the rigors of Rule 60 or 61 framed under the Second Schedule to the Transfer of Property Act. It is not that in every case where a sale is held and a person's right adversely affected by it, according to the learned Counsel for the petitioner-appellant that an application

under Rule 60 or 61 of the Rules framed under the Second Schedule has to be made in the first instance to the Recovery Officer and failing there, an appeal would lie to the Tribunal under Section 30 of the RDDBFI Act.

10. The learned Counsel for the petitioner-appellant submits that if such a construction were placed on the provisions of Sections 29 and 30 of the RDDBFI Act, it would be whittle down the scope of the remedy under Section 30, which is available to any person aggrieved by an order of the Recovery Officer and is cast in the widest possible terms.

11. It is also submitted by the learned Counsel for the petitioner-appellant that the learned Single Judge has completely misapplied the provisions of Section 48 of the Transfer of Property Act, which are not at all attracted to the facts of the present case. It is also submitted that the learned Single Judge has misconstrued a sale of the mortgagor's interest in favour of the petitioner-appellant by the judgment-debtor as creation of a second charge which the sale is not. He submits that the sale in favour of the petitioner-appellant can co-exist with the bank's charge based on the equitable mortgage.

12. The learned counsel for respondent No.4 has supported the impugned order passed by the learned Single Judge on both counts of its reasoning. The learned Single Judge has expressed opinion that a sale by the Recovery Officer in execution of a recovery certificate issued under RDDBFI Act has to be done in accordance with Rules 54 to 61 of the Second Schedule to the 1961 Act. It is submitted that the said rules are applicable by virtue of provision of Section 29 of the RDDBFI Act. It is pointed out that the provisions of the Second and Third Schedule to the 1961 Act being applicable as far as possible, with necessary modifications for recovery of a debt due under the RDDBFI Act, those provisions have to be strictly complied with. The crux of the submissions that the learned Counsel for respondent No.4 has come up with and which has been the reasoning of the Appellate Tribunal also, in one part, is that the petitioner-appellant having not preferred any objection(s) before the Recovery Officer, either under Section 60 or 61 of the Rules framed under the 1961 Act, his appeal from the order of the Recovery Officer holding the auction sale was not competent.

13. In order to appreciate the contention of learned Counsel for parties, it would be necessary to refer to the provisions of Sections 29 and 30 of the RDDBFI Act, that read:

"29. Application of certain provisions of Income-tax Act.--The provisions of the Second and Third Schedules to the Income-tax Act, 1961 (43 of 1961) and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax: Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act.

30. Appeal against the order of Recovery Officer.--(1) Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may,

within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

(2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under sections 25 to 28 (both inclusive)."

14. Again, the provisions of Rules 54, 56, 57, 60 and 61 of the Second Schedule to the 1961 Act, that provide the mechanism for the recovery of tax envisaged under Section 222 and 276 of the 1961 Act, are extracted hereinbelow :

"54. Mode of making proclamation.--(1) Every proclamation for the sale of immovable property shall be made at some place on or near such property by beat of drum or other customary mode, and a copy of the proclamation shall be affixed on a conspicuous part of the property and also upon a conspicuous part of the office of the Tax Recovery Officer.

(2) Where the Tax Recovery Officer so directs, such proclamation shall also be published in the Official Gazette or in a local newspaper, or in both; and the cost of such publication shall be deemed to be costs of the sale.

(3) Where the property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Tax Recovery Officer, otherwise be given.

55. Time of sale.--No sale of immovable property under this Schedule shall, without the consent in writing of the defaulter, take place until after the expiration of at least thirty days calculated from the date on which a copy of the proclamation of sale has been affixed on the property or in the office of the Tax Recovery Officer, whichever is later.

56. Sale to be by auction.--The sale shall be by public auction to the highest bidder and shall be subject to confirmation by the Tax Recovery Officer:

Provided that no sale under this rule shall be made if the amount bid by the highest bidder is less than the reserve price, if any, specified under clause (cc) of rule 53.

57. Deposit by purchaser and resale in default.--(1) On every sale of immovable property, the person declared to be the purchaser shall pay, immediately after such declaration, a deposit of twenty-five per cent on the amount of his purchase money, to the officer conducting the sale; and, in default of such deposit, the property shall forthwith be resold.

(2) The full amount of purchase money payable shall be paid by the purchaser to the Tax Recovery Officer on or before the fifteenth day from the date of the sale of the property.

58. Procedure in default of payment.--In default of payment within the period mentioned in the preceding rule, the deposit may, if the Tax Recovery Officer thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be resold, and the defaulting purchaser shall forfeit all claims

to the property or to any part of the sum for which it may subsequently be sold.

59. Authority to bid.--(1) Where the sale of a property, for which a reserve price has been specified under clause (cc) of rule 53, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for an Assessing Officer, if so authorised by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner in this behalf, to bid for the property on behalf of the Central Government at any subsequent sale.

(2) All persons bidding at the sale shall be required to declare, if they are bidding on their own behalf or on behalf of their principals. In the latter case, they shall be required to deposit their authority, and in default their bids shall be rejected.

(3) Where the Assessing Officer referred to in sub-rule (1) is declared to be the purchaser of the property at any subsequent sale, nothing contained in rule 57 shall apply to the case and the amount of the purchase price shall be adjusted towards the amount specified in the certificate.

60. Application to set aside sale of immovable property on deposit.--(1) Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing--

(a) the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of one and one-fourth per cent for every month or part of a month], calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) for payment to the purchaser, as penalty, a sum equal to five per cent of the purchase money, but not less than one rupee.

(2) Where a person makes an application under rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws that application, be entitled to make or prosecute an application under this rule.

61. Application to set aside sale of immovable property on ground of non-service of notice or irregularity.--Where immovable property has been sold in execution of a certificate, such Income-tax Officer as may be authorised by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner in this behalf, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale of the immovable property on the ground that notice was not served on the defaulter to pay the arrears as required by this Schedule or on the ground of a material irregularity in publishing or conducting the sale:

Provided that--(a) no sale shall be set aside on any such ground unless the Tax Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the non-service or irregularity; and

(b) an application made by a defaulter under this rule shall be disallowed

unless the applicant deposits the amount recoverable from him in the execution of the certificate."

15. The learned Counsel for respondent No.4 has emphasized that there was no application by the petitioner-appellant before the Recovery Officer to whom the provisions of Rules 54 to 61 framed under the 1961 Act are applicable, seeking to exercise his right as a person whose interests were affected by the sale under Rule 60, or under Rule 61 on the ground that notice was not served on the defaulter to pay the arrears, as required by the Schedule or that there was a material irregularity in publishing or conducting the sale. The petitioner, from the order of auction sale dated October 13, 2009 had straightway appealed to the Tribunal under Section 30 of the RDDBFI Act, which was, therefore, not maintainable.

16. In addition, it has also been argued that upon initiation of recovery proceedings by the Recovery Officer attached to the Tribunal, the petitioner-appellant had filed objections that were rejected by the Recovery Officer vide order dated October 28, 2006, which remain unchallenged. The learned Single Judge has accepted the petitioner-appellant's contention on this score, firstly on the reasoning that after the auction proceedings were held ending in favour of the fourth respondent on October 13, 2009, the petitioner did not take any steps to repay the outstanding loan. Rather, the earlier challenge that he had laid to the proceedings before the Recovery Officer on October 18, 2010 remained unfruitful. Now, so far as the order dated October 28, 2006 rejecting the petitioner-appellant's objections to the recovery proceedings on the ground of his independent rights as the mortgagor's transferee are concerned, the same does not impair the petitioner-appellant's right to challenge after the auction sale was held, as that is the statutory right of the petitioner-appellant under Rules 60 and 61 of the Rules framed under the Second Schedule to the 1961 Act. That right accrues only after the auction sale is held and not earlier. Therefore, the finality attached to the order dated October 28, 2006, so far as the present cause of action is concerned, post auction is not at all relevant. The learned Single Judge has particularly emphasized the point that the proclamation for sale is governed by Rules 54, 55, 60 and 61 of the Second Schedule to the 1961 Act and relied on the decision of the Supreme Court in **C.N. Paramasivam and another v. Sunrise Plaza through Partner and others, (2013) 9 SCC 460** to remark that the rules are mandatory in character and their breach would render the auction non-est in the eyes of law. But, relying on **C.N. Paramasivam** (supra) the learned Single Judge has further held that the Rules being mandatory in nature, the petitioner-appellant would get a right to ask the sale to be set aside under Rule 60, provided he made an application to set aside the same within 30 days of the auction sale upon depositing the amount specified in the sale proclamation together with interest at the rate of 6% per annum. The learned Single Judge has held that here the petitioner-appellant never moved an application under the said Rule and challenged the auction sale by filing an appeal, where an interim order was passed, directing him to deposit an amount equal to that for which the auction sale was made. It was remarked that the petitioner-appellant's case is based on an advantage that he seeks to derive out of the said interim order, or so, the petitioner-appellant's argument proceeds.

The learned Single Judge has then held that it would be relevant to note that the petitioner-appellant has never taken any steps or deposited any amount towards the outstanding loan to show his bona fides before the interim order was passed. It has been held that the petitioner-appellant has not exercised his right, if any, as provided under the Second Schedule to the 1961 Act and therefore, the submission that there was no adherence to those Rules by the Recovery Officer, is not available to the petitioner-appellant.

17. On the above count, it appears that the learned Single Judge was of opinion that the right of appeal under Section 30 could not be exercised by the petitioner-appellant, unless as a person whose interest was affected by the sale, he had made an application to the Recovery Officer within 30 days of the auction sale, asking the sale to be set aside by making the necessary deposits under Section 60, or made an application in terms of Rule 61. He could not have simply appealed under Section 30 of the RDDBFI Act without making either an application under Rule 60 or 61 before the Recovery Officer.

18. The reasoning of the learned Single Judge on this score does not appeal to us, because it is not that the provisions of the relevant Rules for recovery under the Second Schedule to the 1961 Act are applicable in derogation of the right of a person aggrieved by any order of the Recovery Officer made under the RDDBFI Act, to prefer an appeal under Section 30 of the said Act to the Tribunal. An appeal under Section 30 of the RDDBFI Act can be preferred by a person aggrieved by the Recovery Officer's orders, notwithstanding the fact that he has not invoked the provisions of Rule 60 or 61 of the Second Schedule to the 1961 Act. This is so because Section 30 of the RDDBFI Act opens with a non-obstante clause that gives an overriding effect to the provisions of Section 30 of the said Act. It is Section 29 of the RDDBFI Act, extracted hereinabove, that makes provisions of Second Schedule of the 1961 Act applicable to proceedings for recovery under the RDDBFI Act. The application of the Rules, including Rules 60 and 61 of the Rules under the Second Schedule of the 1961 Act to a recovery under the RDDBFI Act cannot, therefore, be construed in a manner so as to derogate from the plenary right of a person aggrieved by the Recovery Officer's order of any kind to appeal to the Tribunal.

19. The aforesaid question fell for consideration very recently before a Division Bench of the Bombay High Court in Sarang **Avinash Kamtaker v. Alpha Organic and others, MANU/MH/ 1202/2022**, where considering an identical contention, the Division Bench held :

"22. So far as the contention raised by learned Counsel on behalf of Kamtekar that Alpha Organic failed to invoke the provisions of Rules 60 and 61 of the Second Schedule of the IT Act, in the absence of which, the Appeal is not tenable, we find that the DRAT for the reasons mentioned in paragraph 12 rightly came to the conclusion that the said contention on behalf of Kamtekar deserves to be rejected. Rule 60 of the Second Schedule of the IT Act provides for setting aside of the sale of the immovable property by deposit of the amount specified in the proclamation of sale and interest thereon along with penalty for payment to the purchasers within 30 days from the date of the sale. Rule 61 provides for setting aside the sale on ground of non-service of notice or

irregularity. Section 30 (1) of the RDDB & FI Act provides for an Appeal. It reads thus:-

"30(1) Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal."

23. Section 30 (1) starts with a non-obstante clause. The DRAT in support of its conclusion that Section 30 (1) overrides Section 29 of the RDDB & FI Act, took support from the observation of this Court in Hill Properties Ltd. (supra). We may usefully refer to paragraph 29 of the said decision which reads thus:-

"29. Section 30 as now substituted by Act 1 of 2000 begins with a non-obstante clause. A person aggrieved by an order of the Recovery Officer may within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal. Under Sub-section (2) of Section 30 a power is given to set aside or modify an order made under Sections 25 to 28. Section 30 co-jointly with Section 29 would mean that irrespective of the Appellate remedy provided in Part VI of IInd Schedule (Rule 86) to the I.T. Act an Appeal would lie to the Tribunal in respect of orders made under the Second Schedule to the I.T. Act. We may clarify that considering the language of Rule 11(6) an appeal would not lie under Rule 86 of the Second Schedule. Therefore, under Section 30 even if an appeal as provided under Rule 86 is not available because of Rule 11(6) making the order of the Recovery Officer conclusive, nevertheless Section 30 of the Act provides a remedy by way of Appeal against the order passed under the IInd Schedule. We may clarify here that Section 20 is a provision for Appeal from an order of the Tribunal, when Section 30 is a provision for appeal against the order of the Recovery Officer."

24. Section 30 thus provides for an appellate forum against any orders of the Recovery Officer which may not be in accordance with law. The contention of learned Counsel on behalf of Kamtekar that unless the provisions of Rules 60 and 61 are resorted to, the Appeal under Section 30 is not maintainable can only be stated to be rejected."

20. The aforesaid decision of the Bombay High Court follows an earlier decision in **Hill Properties Limited v. Union Bank of India & Ors., 2016 SCC OnLine Bom 10362.**

21. The same issue fell for consideration before the Madras High Court in **Nazims Continental and others v. The Indian Overseas Bank, Triplicane Branch, Madras and others, 2009 SCC OnLine Mad 862**, where it was held:

"20. In view of the provisions of law and finding of the Court and discussions made above, we hold that the recovery officer has also jurisdiction to entertain an application under rules 60, 61 and 62 of Part-III of 2nd Schedule to the Income Tax Act and in case any person is aggrieved against such order, may prefer appeal u/s 30 of the Act, 1993. As the defaulter or any person whose interests are affected by sale is supposed to pay the pre-deposit amount under Rule 60 and a

defaulter required to pay pre-deposit amount under Rule 61 except the person whose interests are affected due to non-service of notice on defaulter to pay the arrerars or material irregularity in publishing or conducting the sale should apply under Rule 61 or the purchaser, who may file application under Rule 62, who are not liable to pre-deposit any amount, in such case, for preferring an appeal u/s 30 of Act, 1993, against an order of recovery officer under Rules 60, 61 or 62, no pre-deposit amount required to be deposited.

21. Section 30 starts with non obstante clause, as evident from the said provision and quoted hereunder:--

"30. Appeal against the order of Recovery Officer.

(1) Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

(2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such enquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under sections 25 to 28 (both inclusive)."

In the case of *Union of India v. I.C. Lala* (AIR 1973 SC 2204), Supreme Court held that non obstante clause does not mean that the whole of the said provision of law has to be made applicable or the whole of the other law has to be made inapplicable. It is the duty of the Court to avoid the conflict and construe the provisions to that they are harmonious.

22. Mode of recovery of debt is prescribed u/s 25 of DRT Act, as quoted hereunder:--

"25. Modes of recovery of debts.- The Recovery Officer shall, on receipt of the copy of the certificate under sub-section (7) of section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:--

(a) attachment and sale of the movable or immovable property of the defendant;

(b) arrest of the defendant and his detention in prison;

(c) appointing a receiver for the management of the movable or immovable properties of the defendant."

From the aforesaid provision it will be evident that apart from attachment and sale of movable or immovable property of the defendant, the recovery officer, under the said provision, may proceed to recover the amount of debt by arresting the defendant and his detention in prison or by appointing a receiver for the management of the movable or immovable properties of the defendant. Those two provisions made under clauses (b) and (c) of Section 25 cannot be challenged before the Recovery Officer under II or III Schedule of Income Tax Act. Therefore, except by preferring an application (appeal) u/s 30 against the order of recovery officer, any aggrieved person has no other option. It cannot be said that for sale of movable or immovable property

as made under II Schedule to Income Tax. Act, including Rules 60 or 61 or 62 of Part-III of II Schedule, then by way of appeal only u/s 30 could be preferred and no such appeal could be preferred directly against the order of attachment and sale of movable or immovable property of the defendant, if recovery officer pass such order u/s 25. Therefore, we hold that against the order of attachment and sale of movable or immovable property of defendant, who are the defendants before the Tribunal, an aggrieved person, instead of moving application under Rule 60 of 61 or 62, may also prefer an application (appeal) u/s 30 of the Act, 1993. Therefore, there being a concurrent jurisdiction, DRT u/s 30 and recovery officer under Rules 60, 61 and 62 of Part-III of II Schedule of Income Tax Act in regard to movable property and jurisdiction of Tribunal under Part-II of II Schedule of Income Tax Act in regard to movable property, application of any defendant cannot be entertained by Tribunal u/s 30 without pre-deposit of the amount in terms with Rules 60 or 61 bypassing the jurisdiction of the recovery officer under the aforesaid provisions of II Schedule of Income Tax Act. Further, the auction purchaser being not a defendant in the original application u/s 19, cannot file an appeal u/s 30 against the order of recovery officer, if it intends to prefer an application, if under the provision of Rule 62 of Part-III of II Schedule to Income Tax Act."

(emphasis by Court)

22. The aforesaid position of the law makes it pellucid that it is not imperative for a defaulter or any person whose interest is affected by the sale held by the Recovery Officer acting under the RDDBFI Act to take resort to the provisions of Section 60 or 61 of the Second Schedule to the 1961 Act. Doing a harmonious constructions of the provisions of Sections 29 and 30 of the RDDBFI Act, the right of a person aggrieved by an order of the Recovery Officer under the aforesaid Act cannot be confined in the manner that he must of necessity invoke Rule 60 of 61 by making an application before the Recovery Officer in the first instance and against the order of the Recovery Officer, come up in appeal under Section 30. If that were done, it would whittle down the scope of the appellate powers of the Tribunal against all orders of the Recovery Officer, that include an order of attachment, auction and sale prior to its confirmation. If the challenge is laid on grounds completely different from those envisaged under Rule 60 of the Rules framed under the Second Schedule of the 1961 Act, there may not be any requirement of deposit at all. The challenge may be on grounds like those envisaged under Rule 61 of the Rules aforesaid or on any other ground.

23. Mindful of the fact that the petitioner-appellant was claiming to redeem the mortgagor's interest, akin to an objection under Rule 60, the Tribunal directed the petitioner-appellant to deposit the amount specified in the proclamation of sale as the one for which the recovery was ordered. The petitioner-appellant, accordingly, deposited a sum of ₹ 92,200/- on 13.11.2009. The Tribunal, therefore, permitted the petitioner-appellant, who had stepped into the shoes of the judgment debtor-mortgagor through a registered sale deed of the mortgagor's estate, to exercise the equity of redemption and set aside the sale, subject to the condition that the petitioner-appellant would have to bear all expenses of the sale, pay poundage fees and further pay 10% simple interest to the

auction purchaser till payment was made. In our opinion, therefore, the learned Single Judge was not right in holding that since the petitioner-appellant had not followed the procedure prescribed under Rule 60 of the Second Schedule to the 1961 Act, he could not ask the auction sale, not yet confirmed, to be set aside through an appeal under Section 30 of the RDDBFI Act.

24. The other principle on which the learned Single Judge has held against the petitioner-appellant is that 'property once mortgaged is always mortgaged'. That principle is applicable to preserve and keep intact the mortgagee's estate. It does not militate against the mortgagor's right to redeem or transfer his interest in favour of a third party, who would then acquire as part of the mortgagor's estate the equity of redemption.

25. The learned Single Judge has proceeded to conclude against the petitioner-appellant on another facet of the right that the petitioner-appellant acquired from the judgment-debtor through the registered sale deed of July 28, 1995. The learned Single Judge held as follows:

"14. There is another issue which would also be relevant for adjudication of present case that Section 48 of TP Act, 1882 provides that no right will be created by way of second charge on the property without discharging the first charge."

26. Section 48 of the Transfer of Property Act, 1882 (for short "TP Act") reads:

"**48. Priority of rights created by transfer**.--Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."

27. In the opinion of this Court, in applying the principle of priority amongst transferees to infer that the sale deed dated July 28, 1995 could not have been executed by the judgment-debtor so long as he had not rid the property of the mortgage, subject to which he had availed the loan from the Bank, the learned Single Judge was not right because Section 48 of the TP Act gives priority to an earlier right or clogs a later created right, if the two sets of rights cannot exist together or be exercised to their full extent together. The sale of the mortgagor's right, which could be no more than the right to redeem after paying off the mortgage debt, is in no way one that cannot co-exist with the mortgagee's interest or charge on the property held by the mortgagor's transferee. The sale by the mortgagor would not in any way impair the mortgagee's right or militate against his security unless it could be shown that the transfer in fact would impair it. This could be the case, if the mortgagor were to transfer the right to a person or entity, who under the law would take it free from all encumbrance. The sale deed executed in favour of the petitioner-appellant does not in any manner rid the property of the bank's encumbrance, traceable to the mortgage by deposit of title deeds. It is only a change of hand or name or identity of the mortgagor with no impairment of the security.

28. However, all that Section 48 of the TP Act postulates is that the purchaser of the mortgagor's interest would take it as

much subject to the mortgage as the original owner. An indication of this principle in the context of Section 48 of the TP Act is discernible in the remarks of the Division Bench of the Delhi High Court in **Sh. Ishar Dass Malhotra v. Sh. Dhanwant Singh and others, 1983 SCC OnLine Del 284**, which say:

"8.

..... It will thus be seen that a mortgage by deposit of title deeds is like any other mortgage and there is a transfer of interest in the property mortgaged to the mortgagee. The question, therefore, of the subsequent purchaser having bought the property subject to a mortgage by deposit of title deeds bona fide, with or without notice, is of no relevance. The subsequent purchaser cannot avoid the mortgage by leading evidence to show that he made all reasonable inquiries to find out if the property was subject to a mortgage by deposit of title deeds or not. S.48 of the T.P. Act does not admit of any such exception. According to this section, when a person purports to create, by transfer at different times, rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created. Further, proviso to S.48 of the Registration Act enacts that a mortgage by deposit of title deeds shall take effect as against any mortgage deed subsequently executed and registered relating to the same property. Thus, a subsequent sale cannot have priority over a mortgage by deposit of title deeds created before the sale....."

(emphasis by Court)

29. The principle embodied in Section 48 of the TP Act is succinctly stated in **Nagalinga Nadar v. K. Mehrunisa Begum, 1979 SCC OnLine Mad 146,** where it was held:

"17. There is yet another objection raised by the learned counsel for the first respondent, according to whom, no question of bona fide purchase by the appellant without notice would arise at all, in view of S. 48 of the Transfer of Property Act. It is his contention that the question of bona fide purchase or other acquisition of title without notice are confined to cases, which have all been provided for under the Transfer of Property Act under Ss. 39, 41, 43, 53, 53-A and 100 and inasmuch as S. 48 is not one of them, the appellant cannot claim that he is a bona fide purchaser from the second respondent without notice. S. 48 of the Transfer of Property Act runs thus:

"Where a person purports to create by transfer at different times rights in or over the same immovable property and such rights cannot all exist or be exercised to their full extent together, each later created right shall; in the absence of a special contract or reservation binding the earlier transferees; be subject to the rights previously created:"

It is not in dispute that the mortgage had been earlier created by the second respondent in favour of the first respondent on 17th January, 1966 and the sale had later been effected by the second respondent in favour of the appellant on 10th January, 1973. It is also seen that the first respondent's rights as mortgagee over the property and the rights of the appellant as a purchaser of the property free from encumbrance cannot co-exist or be exercised to their full extent together and

there is no special contract or binding reservation. It would therefore follow that the sale in favour of the appellant is subject to the mortgage in favour of the first respondent. In this connection, the learned counsel for the first respondent invited our attention to the decision in Arunachala Asari v. Sivan Perumal Asari, AIR 1970 Mad 226. Though the question that arose therein was with reference to the question of priority with reference to S. 48 of the Transfer of Property Act and Ss. 47 and 49 of the Indian Registration Act, Ramamurthy, J. dealt with the true scope of S. 48 of the Transfer of Property Act. At page 533, the learned Judge observed thus:

"S. 48 of the Transfer of Property Act is founded upon the equally important principle that no man can convey a better title than what he has. If a person had already effected a transfer, he cannot derogate from his grant and deal with the property free from the rights created under the earlier transaction. His prior title as absolute and free owner is curtailed or diminished by rights already created under the earlier transcation. S. 48 of the Transfer of Property Act is absolute in its terms and does not contain any protection or reservation in favour of a subsequent transferee who has no knowledge of the prior transfer. Knowledge or no-knowledge, a subsequent transferee cannot claim any priority as against an earlier transferee. Whenever the Legislature desires to protect the rights of a transferee in good faith for consideration, specific provision to that effect is made--Vide for instance, S. 27 of the Specific Relief Act, 1877 and Ss. 38 to 41 of the Transfer of Property Act, In all other cases, the well settled rule that a man cannot derogate from his grant will have to be applied."

(emphasis by Court)

30. Thus, the view of the learned Single Judge that Section 48 of the TP Act would lead to the result that no right can be created in favour of the petitioner-appellant does not accord with the law. The prior transfer that is a mortgage in favour of the bank can certainly coexist with a transfer of mortgagor's estate or interest in favour of the petitioner-appellant by the judgment-debtor. It is just that the petitioner-appellant will hold it subject to the mortgagee's interest to secure repayment of his debt. That has been ensured in the present case by the petitioner-appellant under orders of the Tribunal since set at naught by the Appellate Tribunal and the learned Single Judge. The Tribunal, in our view, was right in saying that it is always open to the mortgagor or a purchaser of the charged property, to redeem the property by paying off the creditor. The Tribunal has rightly remarked that the right of redemption of mortgage is a statutory right, which can only be extinguished in one of the ways mentioned in paragraph 2 of Section 60 of the TP Act.

31. There is another reason why the learned Single Judge would have thought that Section 48 of the TP Act would hinder creation of any right in favour of the petitioner-appellant. This is because he considered the transfer to the petitioner-appellant during the subsistence of the bank's mortgage a second charge without discharging the first charge. What was transferred to the petitioner-appellant was not at all any kind of a mortgagee's interest or created a further charge on the property already mortgaged with the Bank. It was, in fact, transfer of the larger estate of the mortgagor, which cannot be called a charge on the property. Therefore also, in our

opinion, the view taken by the learned Single Judge and the Appellate Tribunal does not commend to us. In the opinion of this Court, the law entitles the petitioner-appellant to exercise his right that he has purchased from the judgment-debtor, that is the right to redeem the mortgaged property to the same extent and the manner in which the judgment-debtor could have done.

32. However, while setting aside the auction sale, the interest of the auction purchaser also have to be protected, keeping in view the spirit of Rule 60 of the Rules framed under the Second Schedule of the 1961 Act, and also, in order to adjust equities. This the Court proposes to do by awarding an appropriate rate and term of interest to the auction purchaser payable by the petitioner-appellant.

33. In the result, this appeal **succeeds** and is **allowed**. The impugned order passed by the learned Single Judge is **set aside.** The writ petition stands **allowed**. The order dated 19.09.2013 passed by the Appellate Tribunal is hereby **quashed** and the order dated 08.03.2013 passed by the Tribunal setting aside the auction sale dated 13.10.2009 is restored with the modification that the auction purchaser-respondent no.4 shall be entitled to refund of the purchase price deposited by him with the Recovery Officer from the petitioner-appellant together with compound interest at the rate of 7.5% per annum from the date it was deposited by the auction purchaser with the Recovery Officer till deposit in these terms is made by the petitioner-appellant with the Recovery Officer.

(2022)07ILR A640
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.06.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE CHANDRA KUMAR RAI, J.

Special Appeal No.466 of 2022

Shadab Ahmad ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri S.M. Iqbal Hasan, Sri Syed Badshah Husain Naqvi, Sri Shailendra (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Virendra Singh, Sri Gajendra Pratap (Senior Adv.)

A. Civil Law – Election – Maintainability of Special Appeal - U.P. Panchayat Raj Act, 1947 - Section 12-C - Special appeals arising out of writ petition filed against the order passed by a Election Tribunal u/s 12-C are barred by Chapter VIII, Rule 5 of the Rules of the Court. (Para 8)

The Sub Divisional Magistrate, while passing order dated 13.05.2022 has clearly mentioned that the order is being passed by him, acting as prescribed authority under the Act. U/s 12-C of the Act, the election petition lies before such authority as may be prescribed. It is not the case of the appellant that Sub Divisional Magistrate is not the authority prescribed to deal with a petition u/s 12-C. **The contention that the election petition was not presented in the manner prescribed could be considered, had the appeal been maintainable. As this appeal is not maintainable, we cannot arrogate to ourselves the power to dwell on the issue.** Likewise, provision relating to revision before District Judge, will not detract from the legal position that the proceedings originate from an order of Election Tribunal under U.P. Act. (Para 9)

Special appeal dismissed. (E-4)

Precedent followed:

1. Vajara Yojna Seed Farm, Kalyanpur (M/s.) & ors. Vs Presiding Officer, Labour Court II, U.P., Kanpur & anr., 2003 (1) UPLBEC 496 (Para 6)

Present special appeal assails order dated 25.05.2022, passed by learned Single Judge Hon'ble Saumitra Dayal Singh, J. in Civil Misc. Writ Petition C No.14609 of 2022.

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Chandra Kumar Rai, J.)

1. This intra-Court appeal is directed against the order dated 25.05.2022 passed by a learned Single Judge in a writ petition filed by the petitioner challenging the order dated 13.05.2022 passed by the Prescribed Authority/Sub Divisional Magistrate Baberu in a petition filed against him under Section 12-C of the U.P. Panchayat Raj Act, 1947 challenging his election as Gram Pradhan of Gram Sabha Hardauli.

2. Sri Gajendra Pratap, learned Senior Advocate assisted by Sri Virendra Singh, appearing on behalf of respondent no.5 raised a preliminary objection to the maintainability of the instant special appeal. It is submitted that the present special appeal is barred as it is directed against the order of learned Single Judge passed under Article 226 in respect of an order passed by the Election Tribunal constituted under U.P. Act. It is urged that in view of specific exclusion made under Chapter VIII, Rule 5 of the Allahabad High Court Rules, 1952, this appeal is incompetent.

3. On the other hand, Sri Shailendra, learned Senior Counsel assisted by Sri S.N. Iqbal appearing for the appellant submitted that the special appeal is perfectly maintainable, inasmuch as, the election petition itself was still-born not having been presented in the manner prescribed; that the Act itself contemplates filing of revision before District Judge which shows that the Sub Divisional Magistrate while exercising power under Section 12-C of the U.P. Act does not act as an Election Tribunal but in administrative capacity; and in any view, the Election Tribunal does not have trappings of civil court.

4. The facts necessary for disposal of the instant appeal are that respondent no.5 presented a petition under Section 12-C of U.P. Panchayat Raj Act, 1947 (hereinafter referred as 'the Act') challenging the election of the appellant on the post of Gram Pradhan. The appellant filed an application on 18.08.2021 raising various issues touching upon the maintainability of the election petition. On 13.05.2022, respondent no.3 i.e. Prescribed Authority/U.P. Zila Adhikari, Baberu, Banda while acting as Election Tribunal directed for recounting of the ballots. Aggrieved thereby, the appellant filed writ petition no.14609 of 2022 before this Court which was allowed in part and recounting of only polling booth no.103, ward no.5, Gram Panchayat-Hardauli was permitted. Being further aggrieved thereby, the instant appeal has been filed.

5. The provision relating to intra-Court appeal is governed by Chapter VIII, Rule 5 of the Allahabad High Court Rules, 1952. It reads as follows:

5. Special appeal :- *An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made bya Court subject to the superintendence of the Court and not*

being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction 66[or in the exercise ofthe jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award--(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge.

6. The above provision has come up for interpretation in reference to orders passed by Election Tribunals under Section 12-C of U.P. Panchayat Raj Act, 1947 in ***Vajara Yojna Seed Farm, Kalyanpur (M/s.) & others vs. Presiding Officer, Labour Court II, U.P., Kanpur & another, 2003 (1) UPLBEC 496.***

7. Paragraphs 59, 60, 61 & 62 of the said judgment specifically deals with the issue being raised in the instant appeal. The Division Bench held that the Election Tribunal while deciding the election petition under Section 12-C of the Act has all the trappings of Court and that a special appeal under Chapter VIII, Rule 5 of the Rules of Court would not be maintainable. The relevant paragraphs from the said judgment dealing with the above issue are extracted below:

59. The third category special appeal being Special Appeal Nos. 1118 of 2002 and 532 of 2002 arise out of writ petition in which order of Election Tribunal was challenged. The Election Tribunal while deciding the Election Petition functions as a Tribunal. Statutory rules have been framed regarding procedure to be followed while deciding the Election Petition. Certain provisions of Code of Civil Procedure as well as provisions of Evidence Act are attracted while deciding the Election Petition. The Election Tribunal decides lis between the parties. Parties are entitled to lead evidence before the Election Tribunal. Election Tribunal, has thus, all trapping of Court and Election Tribunal is a Tribunal. Special appeal against the order passed in writ petition arising out of order of Election Tribunal is not maintainable. Under Section 12-C of U.P. Panchayat Raj Act Election Petition is to be heard and decided in accordance with the statutory rules, namely, Uttar Pradesh Zila Panchayat (Settlement of Disputes Relating to Membership) Rules, 1994. Rule 11 of the aforesaid 1994 Rules are extracted below :-

"11. Procedure before the Judge.- (1) Except so far as provided by the Act or in these Rules, the procedure provided in Code of Civil Procedure, 1908 in regard to suits shall in so far as it is not inconsistent with the Act or any provisions of these Rules and it can be made applicable, be followed in the hearing of the petitions :

Provided that:

(a) any two or more petitions to the membership of the same person may be heard together;

(b) the Judge shall not be required to record the evidence in full but shall make a memorandum of the evidence

sufficient in his opinion for the purpose of deciding the case;

(c) the Judge may, at any stage of the proceedings; require the petitioner to give further cash security for the payment of the casts incurred or likely to be incurred by any respondent;

(d) for the purpose of deciding any issue, the Judge shall only be found to order production of or to receive only so much evidence, oral or documentary as he considers necessary;

(e) any person aggrieved from the decision of the Judge may apply for review to the Judge within 15 days from the date of decision and the Judge may thereupon review the decision.

(2) The provisions of the Indian Evidence Act, 1872 (Act No. 1 of 1872) shall, subject to the provision of the Act and these Rules, be deemed to apply in all respects in the proceedings for the disposal of the petition."

60. Taking into consideration the aforesaid Rules and the power which is being exercised by the Election Tribunal, it is clear that Election Tribunal functions as Tribunal and it has all trapping of Court. In Special Appeal No. 532 of 2002 the Election Tribunal is Additional District Judge, Bareilly. Two decisions cited by Sri V.S. Sinha, Advocate appearing for the appellant in Special Appeal No. 532 of 2002 need to be considered. The decision of Prakash Timbers (Summary of Cases) (supra) was with regard to order passed by Company Law Board. The aforesaid case was on its own footing. In the aforesaid case the Division Bench of this Court had no occasion to consider as to whether Election Tribunal is a Tribunal. In these special appeals since orders were passed by Election Tribunal, the appeal is barred by Chapter VIII, Rule 5 of the Rules of the Court. The Division Bench judgment of this Court in Pratappur Sugar and' Industries' case (supra) has clearly held that if writ petition was filed challenging the order of Tribunal, special appeal is not maintainable. The Division Bench in Paragraph 15 of the aforesaid judgment held as under :-

"15. For the reasons discussed above, the inescapable conclusion is that an Additional/Deputy Labour Commissioner while exercising jurisdiction under Sub-section (6) of Clause II of the Standing Orders Junctions as a Tribunal. The writ petition had been filed challenging the order of Deputy Labour Commissioner and being a Tribunal, the present special appeal under Chapter VIII, Rule 5 of the Rules of the Court is not maintainable. The special appeal is accordingly dismissed."

61. The next case relied by Counsel for the appellant is State of U.P. v. Smt. Dayavati Khanna (supra). In the aforesaid case the argument which was raised before the Division Bench was to the effect that special appeal would be competent only from an order passed in a writ petition which is required to be heard by Single Judge but not when an order is passed by Single Judge in a writ petition cognizable by Division Bench. The said argument was considered and it was held that appeal was maintainable since the judgment passed was of a Single Judge dated 29th April, 1993. The aforesaid judgment does not in any manner help the Counsel for the appellant. The Division Bench judgment of this Court reported in 1998 (32) ALR 603, Smt. Rama Devi v.

Smt. Madhnri Verma and Ors., is fully applicable in the present case. In the aforesaid judgment the Division Bench held special appeal not maintainable in a case, which arose out of writ petition, filed against the order of Election Tribunal. In the aforesaid case Prescribed Authority exercising power under Section 12-C of U.P. Panchayat Raj Act passed a recounting order, The Division Bench upheld the objection or maintainability of the special appeal. It was laid down in Paragraph 6 of the judgment:

"6. It is clear from the aforesaid Rule that no special appeal is maintainable in the cases where the controversy does not originate before the High Court. The Rule admittedly is based on a logic that the Prescribed Authority or the Revisional Authority which act as Tribunal/Court having already appreciated the matter from judicial angle and in order to get finality the decision of the Single Judge should be taken as final and no appeal should further be maintainable. This Court has taken similar view in Sita Ram Lal v. D.I.O.S., Azamgarh and Ors., wherein the main object of Chapter VIII, Rule 5 has been duly discussed."

62. In view of the foregoing discussions, it is clear that special appeal arising out of writ petition filed against the order passed by Election Tribunal are also barred by Chapter VIII, Rule 5 of the Rules of the Court. Consequently Special Appeal Nos. 1118 of 2002 and 532 of 2002 are liable to be dismissed as not maintainable.

8. It has been clearly held in paragraph 62 that special appeals arising out of writ petition filed against the order passed by a Election Tribunal under Section 12-C are barred by Chapter VIII, Rule 5 of the Rules of the Court.

9. The Sub Divisional Magistrate, while passing order dated 13.05.2022 has clearly mentioned that the order is being passed by him, acting as prescribed authority under the Act. Under Section 12-C of the Act, the election petition lies before such authority as may be prescribed. It is not the case of the appellant that Sub Divisional Magistrate is not the authority prescribed to deal with a petition under Section 12-C. The contention that the election petition was not presented in the manner prescribed could be considered, had the appeal been maintainable. As this appeal is not maintainable, we cannot arrogate to ourselves the power to dwell on the issue. Likewise, provision relating to revision before District Judge, will not detract from the legal position that the proceedings originate from an order of Election Tribunal under U.P. Act.

10. We, accordingly, uphold the preliminary objection and dismiss the special appeal as not maintainable.

(2022)07ILR A644
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ A No. 563 of 2022

Smt. Pushpa Srivastava ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:

Sri Kripa Shankar Pandey, Sri Sunil Kumar Srivastava, Sri Radha Kant Ojha (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Santosh Kumar Tripathi

A. Service Law – Termination - Grant-in-aid (Technical or Industrial Institutions) Rules, 1949 - Grant-in-aid Rules, 1947 - Rules 7 of Appendix-4 - The impugned termination order has been passed without giving any notice, providing opportunity of hearing and without proper inquiry, hence the same is arbitrary, unjust and against the principles of natural justice. (Para 21)

Perusal of the records goes to show that termination order has been passed without any show cause notice, proper inquiry and without furnishing the documents, relying on which the impugned order has been passed. The termination order has been passed relying on such documents, which have not been served upon the petitioner and also on the ex-parte inquiry report submitted by three members Committee which was constituted for some other purpose rather than to enquire on the complaint of some person w.r.t. forged appointment letter, when the petitioner had already submitted a reply dated 09.07.2021 in respect of selection of Clerk in the Institution. (Para 20)

B. Nothing has been brought on record to show that there was any reason for entertaining a complaint which was made by some unknown persons, not related to the petitioner or to the Institution, as to whether it was accompanied by any affidavit or not, and, so much so, as to what was the basis of such a complaint. This Court keeps in mind the peculiar case of petitioner who has worked from 1997 till passing of impugned order without there being any complaint against her. She has been made to suffer only when she has raised her voice against the Management. The respondents are directed to reinstate the petitioner forthwith on the post of Instructor (on which she was working prior to passing of termination order) (as writ challenging reversion order is still pending). (Para 21, 22)

Writ petition allowed. (E-4)

Present petition assails termination order dated 03.12.2021, passed by Manager, Committee of Management of Silai, Kadhai, Bunai Prkshishan Evam Utpadan Kendra.

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

1. Heard Mr. Radha Kant Ojha, learned Senior Counsel assisted by Mr. Sunil Kumar Srivastava, learned counsel for the petitioner, Mr. Santosh Kmar Tripathi, learned counsel for respondent nos. 5 & 6 and Mr. Anil Kumar Singh Baghel, learned Additional Chief Standing Counsel for the State-respondents.

2. The writ petition has been filed with the following prayer:-

"(i) Issue a writ, order or direction in the nature of certiorari quashing the order dated impugned termination order dated 03.12.2021 (Annexure no.14 to the writ petition) passed by respondent Manager, Committee of Management of Silai, Kadhai, Bunai Prkshishan Evam Utpadan Kendra.

(ii) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondents not to interfere in the peaceful functioning of petitioner as Principal in the institution and pay her arrears of salary as well as regular salary and continue the same month to month.

(iii) Issue any other suitable writ, order or direction in favour of the

petitioner as this Hon'ble Court may deem fit and proper in the present facts and circumstances of the case.

(iv) Award the cost of the petition in favour of the petitioner."

3. The Nehru Bal Mandal is a registered society which runs a number of institutions recognized by the Board of Basic Education, Uttar Pradesh, as well as Social Welfare Department. The Silai, Kadhai, Bunai Prakshikshan Evam Utpadan Kendra, Allahabad (hereinafter referred to as Institution) is run by the aforesaid Society since 1974 after being recognized by the Social Welfare Department. The aforesaid institution is governed under the provisions of grant-in-aid (Technical or Industrial Institutions) Rules, 1949 (in short Rules, 1949). As per the aforesaid rules, the Committee of Management is empowered to run the institution, appoint the staff of the institution, pay the salary of the staff of the institution. This rule is however silent about the governance of un-aided schools.

4. The petitioner was appointed as Instructor for one year probation period in the Institution on 30.06.1997, after following the proper procedure as provided under law, on account of resignation being tendered by one Instructor, namely, Usha Mishra. The petitioner joined her duty in the Institution on 01.07.1997 and continued up to 25.09.2013. She was confirmed and promoted as Senior Instructor, being Senior most Instructor, she was handed over charge of officiating Principal on 26.09.2013 as the services of the then Principal of the Institution, namely, Chanchal Sharma were terminated by the Committee of Management. The petitioner's services were regularized as Principal by the then Committee of Management of the Institution on 17.11.2016 on the basis of long and satisfactory service.

5. The Institution where the petitioner was working as Principal was not in grant-in-aid list, therefore, the respondent Committee of Management was continuously approaching the Government for extension and Government grants, ensuingly the State Government took the Institution in grant-in-aid list by order dated 29.12.2017, and sanctioned 7 post. The Director, Social Welfare, U.P., Lucknow, also agreed to proceed for providing revised salary of the employees of the Institution by order dated 12.02.2019, accordingly he asked the Management as well as District Social Welfare Officer, Prayagraj to provide the statement of working employees in the Institution. In furtherance of the above, the District Social Welfare Officer, Prayagraj asked the management to produce the approved list of employees. Subsequently, the then management provided the approved list of employees of the Institution on 14.02.2019, which was inturn approved by the District Social Welfare Officer, Prayagraj and submitted for its approval to the Director, Social Welfare Department on 20.02.2019. The name of the petitioner finds place in the list which establishes that the petitioner was working as regular Principal of the Institution and receiving salary from the Government exchequer since 29.12.2017 till date. The petitioner has worked up to best of her abilities and capability, having unblemished record, there being no complaint whatsoever against her by anyone.

6. It appears that the resignation as tendered by one Anita Mishra, Clerk of the

Institution before the Management on 27.07.2019 has not been approved by respondent no.2 and the petitioner did not have any such information in this regard. Without clarifying the real situation with respect to vacancy of clerk the Committee of Management advertised the vacancy of clerk in the aforesaid Institution on 23.09.2020 and held the interview for the same on 24.11.2020. The petitioner being head of the panel participated in the selection proceedings in which the candidates for the post of clerk were interviewed. As the Government order dated 05.12.2018 provides for three members in the Selection Committee, an objection was raised by the petitioner as the panel consisted of four members but the same was ignored by representative of the Management namely Pramod Shukla. Petitioner being employee of the Institution did not vehemently oppose the panel and proeeded accordingly, therefore, interview was held, in which one Neelam Singh was selected as Assistant Clerk. Neelam Singh joined the Institution but the State authority has not approved the appointment dated 16.02.2021 till date.

7. The entire exercise as well as the appointment letter dated 16.02.2021 was challenged by one candidate, who participated in the interview by means of filing Writ Petition No. 625321 of 2021, the Hon'ble Court was pleased to call for records of the said selection from the Management and the matter is still pending for consideration. Another Writ Petition being Writ No.16121 of 2021 was filed by one Anita Mishra which is also pending before this Hon'ble Court. In one of the petitions, the petitioner therein had taken a ground of number of irregularities in the selection so held as well as with respect to members of the Selection Committee and consideration of the videography of the interview. The respondent Committee of Management by letter dated 26.06.2021 asked the petitioner (present writ petition) to explain the situation of the interview as one Uttam Anand who had filed the petition had narrated about some videography being conducted and asked her to produce the same before them, if there was any such videography. The petitioner submitted a detailed reply on 29.06.2021 but without considering the same, the petitioner was asked to clarify the situation of the interview with respect to members of the Selection Committee. The petitioner submitted explanation dated 09.07.2021 which was repetition of the reply earlier submitted.

8. Learned counsel for the petitioner submits that the Committee of Management was annoyed by the petitioner as she was not cooperating in the illegal exercise of selection of Neelam Singh as Assistant Clerk, therefore, the petitioner was being harassed by sending number of notices. In order to harass the petitioner, an Inquiry Committee was constituted by the Manager of the Institution on 09.08.2021 and 8 employees including 2 of the Institution were asked to appear before the Inquiry Committee on 10.08.2021. The information to appear before the inquiry committee was given by means of letter dated 09.08.2021 which does not mention about forged signatures of Manager on petitioner's appointment letter. When the petitioner appeared before the Committee as informed verbally, along with the documents as required, no members of the inquiry committee was present to continue the inquiry which was initiated on 09.08.2021, and an information was given that the inquiry has been completed and an ex-parte

inquiry report was submitted by the Inquiry Officer.

9. Surprisingly, on 12.08.2021 without any notice, opportunity of hearing or the ex-parte report being given to the petitioner, relying upon the report of the three members Committee headed by Dr. Salik Ram Dwivedi. Smt. Neetu Singh, Senior Most Instructor was given the charge to perform the duties of Principal of the Institution. The letter dated 12.08.2021 did not contain the name of the petitioner but her name was later added, showing her to be instructor and the same was sent to the petitioner through registered post along with letter of attestation of signature of Smt. Neetu Singh who was given the charge of Principal of the Institution. The aforesaid order dated 12.08.2021 vide which Smt. Neetu Singh was appointed to discharge the function of Principal in the Institution as well as the order reverting the petitioner on the post of Instructor was challenged by means of filing Civil Misc. Writ Petition No.17363 of 2021 which is still pending.

10. In the aforesaid matter, notices have been issued to Smt. Neetu Singh who was given the charge of performing the work of Principal in the Institution. When the Committee of Management came to know about filing of the writ petition, the petitioner was placed under suspension by order dated 25.11.2021. The suspension order was accompanied by charge sheet, mentioning 23 charges against the petitioner without there being any evidence with regard to the allegations made against the petitioner. The entire exercise has been done being, annoyed by the petitioner, as she had opposed the procedure of appointment of clerk namely, Neelam Singh who was relative of one of the members of the Management. After being served with the suspension order along with copy of the charge sheet, the petitioner requested for the documentary evidence in order to submit a reply but surprisingly within a week termination order has been passed on 03.12.2021 without giving any notice, opportunity of hearing to the petitioner.

11. Learned counsel for the petitioner submits that the termination order has been passed in arbitrary manner as the same has been passed just after six days of passing of the suspension order wherein along with the suspension order a charge sheet was given to the petitioner, without any show cause notice or proper inquiry. Though, the termination order speaks about some reports dated 11.11.2021 as well as 24.11.2021 and a resolution of the Committee of Management dated 01.12.2021, the aforesaid documents were not served upon the petitioner prior to passing the impugned order, therefore, the same cannot be sustained in the eyes of law. The impugned termination order is in violation of Office/Government order dated 05.12.2018 which provides that termination order cannot be passed without taking permission/approval of Director of Social Welfare Department as well as in violation of provision of Rules 7 of Appendix-4 of grant-in-aid Rules 1947, therefore, the same is illegal.

12. Learned counsel for the petitioner submits that the termination order speaks about the report of handwriting expert according to which signature of Late. Keshav Dutt Mishra, the then Manager found on the appointment letter dated 30.06.1997 did not match with the signatures of Late. K.D. Mishra made on other documents. Such a procedure adopted

by the Management is not permissible in the eyes of law, therefore, the termination order is based upon the report, which cannot be relied upon. The conduct of the Committee of Management, wherein on the basis of some complaints the signatures of the then Manager placed on the appointment letter of the petitioner were sent to the Forensic Lab before the handwriting expert is not justified as the original appointment letter was missing and Mr. K.D. Mishra expired by that time, therefore, the procedure seems to be unjustified and no reliance can be placed upon such report.

13. On one hand when the petitioner who is working in the Institution since 30.06.1997 was promoted from the post of Instructor to Principal, there was no occasion of conducting any inquiry after so many years with respect to the appointment letter on the basis of false and baseless complaints and proceed to terminate the petitioner relying upon some ex-parte report vide which the signature of the then Manager on the appointment letter was verified by the handwriting expert. The impugned termination order has no legs to stand as the charge sheet as furnished to the petitioner along with the suspension order is based on no evidence and if any the same has not been furnished to the petitioner to enable her to submit its reply. Thus, the termination order is arbitrary, unjustified, illegal and in violation of principles of natural justice, hence, cannot be sustained in the eyes of law.

14. Learned Standing Counsel could not dispute the aforesaid fact that the termination order has been passed without any notice or inquiry and relying upon the ex-parte report. Mr. Santosh Kumar Tripathi, learned counsel for respondent nos.5 and 6 submits that a complaint was made by one Prabhat Ranjan with respect to appointment letter of the petitioner obtained by forging signatures of the then Manager Mr. K.D. Mishra, on which an inquiry was conducted.

15. In one part of the inquiry, the signatures of Late. K.D. Mishra as on the photo copy of the petitioner's appointment letter (as the original records were not available) was sent for verification before the handwriting expert wherein it was found that there is difference in signatures of Late. K.D. Mishra on the appointment letter as compared to that in the other documents.

16. In another set of inquiry, three members Committee was constituted, headed by Dr. Salik Ram Dwivedi and the said committee asked for appointment letter dated 30.06.1997 but the original appointment letter was not submitted by the petitioner which shows her conduct and also approves the allegations made in the complaint.

17. Learned counsel for Committee of Management has also denied the promotion of the petitioner on the post of Senior Instructor and Principal as there is no resolution in that regard. He further submits that inquiry report has been sent before the Director Social Welfare department, waiting for his directions in this regard. An FIR has also been lodged against the petitioner with respect to the forgery which has been committed by her in obtaining fake and fabricated appointment letter. He further submits that two notices dated 23.10.2021 and 27.10.2021 have been given to the petitioner to submit her reply on the aspect, but neither the original documents nor any reply has been submitted in this regard, therefore, there is

no illegality in the order impugned and no interference is required in such case where the petitioner has obtained appointment letter by committing fraud.

18. Heard learned counsel for the parties and perused the records.

19. Perusal of the records goes to show that termination order has been passed without any show cause notice, proper inquiry and without furnishing the documents, relying on which the impugned order has been passed. It would not be out of place to mention that as per the records, the letter dated 09.07.2021 goes to show that some inquiry with respect to selection for the post of Clerk in which one Neelam Singh was appointed, was being conducted and in furtherance of the same, the letter dated 09.08.2021 was also given to 8 employees including the petitioner of the present institution, were asked to appear before the Inquiry Committee with respect to some applications placed by employees of the Institutions. Nothing has been brought on record to show that there was any reason for entertaining a complaint which was made by some unknown persons, not related to the petitioner or to the Institution, as to whether it was accompanied by any affidavit or not, and, so much so, as to what was the basis of such a complaint. The inquiry with respect to the signatures of the then Manager who had issued the appointment letter way back in the year 1997 was compared with photographed/photostat disputed signatures in other documents could not be taken into consideration for believing that the petitioner had committed some forgery as the report itself mentioned that the same was subject to an inspection of original photographs of these photographed/photostat disputed signatures placed before the handwriting and finger expert. The other stand taken by the learned counsel for the Committee of Management that signature of the then Manager on petitioner's appointment letter are forged, cannot be believed, as on one hand the petitioner was promoted from time to time and it is only after the objection raised by the petitioner with respect to selection of clerk in the institution being done not in accordance with law, all the proceedings have been initiated in the year 2020 and petitioner has been reverted to post of Instructor on 12.08.2021.

20. This Court also finds that the termination order has been passed relying on such documents, which has not been served upon the petitioner and also on the ex-parte inquiry report submitted by three members Committee which was constituted for some other purpose rather than to enquire on the complaint of some person with respect to forged appointment letter, when the petitioner had already submitted a reply dated 09.07.2021 in respect of selection of Clerk in the Institution.

21. This Court while deciding the matter also keeps in mind the peculiar case of petitioner who has worked from 1997 till passing of impugned order without there being any complaint against her, who has been made to suffer only when she has raised her voice against the Management. Undoubtedly, the impugned termination order has been passed without giving any notice, providing opportunity of hearing and without proper inquiry, hence the same is arbitrary, unjust and against the principles of natural justice.

22. In view of the aforesaid, the termination order dated 03.12.2021 cannot be sustained in the eyes of law and the

same is hereby set aside. The respondents are directed to reinstate the petitioner forthwith on the post of Instructor (on which she was working prior to passing of termination order) (as writ challenging reversion order is still pending).

23. With the aforesaid observations, the writ petition is allowed.

(2022)07ILR A651
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ A No. 620 of 2022

Gagan Sharma ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Seemant Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Selection - U.P. Police Constable and Head Constable Service Rules, 2015- Appendix-3 of Rule 16(g) - Explanation IV to Section 11 and Order 2 Rule 2 C.P.C. - No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes. However, access to justice should not be misused as a licence to file misconceived and frivolous petitions. (Para 18)

Filing successive misconceived and frivolous applications for clarification, modification or for seeking a review of the order interferes with the purity of the administration of law and salutary and healthy practice. Such a litigant must be dealt with a very heavy hand. (Para 20, 21, 22)

It is an admitted position between the parties that for the same relief as made in the present writ petition, the petitioner has already fled Writ-A No. 12672 of 2020 (Gagan Sharma Vs St. of U.P. & 3 Others), which has been dismissed by a Writ Court vide judgment and order dated 03.08.2021, however, in the said writ petition, according to the learned counsel for the petitioner, the grounds taken in the same are different from those, which have been taken in the present writ petition. (Para 9)

The issue of filing successive writ petition has been considered by the Apex Court time and again, accordingly it has been held that even if the earlier writ petition has been dismissed as withdrawn, Public Policy which is reflected in the principle enshrined in Order 23 rule 1 C.P.C., mandates that successive writ petition cannot be entertained for the same relief. (Para 10)

Even if a party does not pray for the relief in the earlier writ petition, which he ought to have claimed in the earlier petition, he cannot file a successive writ petition claiming that relief, as it would be barred by the principle of constructive res judicata enshrined in Explanation IV to Section 11 and Order 2 rule 2 C.P.C. (Para 12)

It is abundantly clear that **even if the provisions of the Code of Civil Procedure are not applicable in writ jurisdiction, the principle enshrined therein can be resorted to for the reason that the principles, on which the Code of Civil Procedure is based, are founded on public policy and, therefore, require to be extended and made applicable in writ jurisdiction also in the interest of administration of justice.** Any relief not claimed in the earlier writ petition should be deemed to have been abandoned by the petitioner to the extent of the cause of action claimed in the subsequent writ petition and in order to restrain the person from abusing the process of the Court, such an order/course requires not only to be resorted to but to be enforced. (Para 17)

B. Medical fitness is a subject best left for determination by experts and should not be lightly interfered with unless it be shown to be contrary to the standards prescribed or otherwise be liable to be assailed on other judicially manageable parameters. (Para 28)

Opinion of a committee of non-experts under Rule 15(d) for physical test of a candidate cannot override the opinion of the team of experts, i.e. Medical Board under Rule 15(g) of the Rules. Any Court of law or any person cannot express any opinion about a person whether he is healthy or unwell or what disease he has. It is the Doctor, who is an expert of that field, can diagnose the disease and give opinion about the same. (Para 27, 30)

The second writ petition is not maintainable for issuing a direction upon the respondent authorities to treat the petitioner medically fit in the selection on the post of Constable Civil Police pursuant to the advertisement dated 16.11.2018, as the earlier writ petition for the same relief stood dismissed vide order dated 03.08.2021, wherein a Coordinate Bench of this Court had found no error in the opinion of the medical board as also the appellate medical board. (Para 23)

C. Second writ petition filed for the same relief cannot be entertained by this Court. The **proper remedy available to the petitioner was to file a recall application in his earlier writ petition referred to above or to file a Special Appeal against the judgment and order passed in the said writ petition.** (Para 32)

Writ petition dismissed. (E-4)

Precedent followed:

1. M/s Sarguja Transport Service Vs St. Transport Appellate Tribunal & ors., AIR 1987 SC 88 (Para 10)

2. Ashok Kumar & ors. Vs Delhi Development Authority, 1994 (6) SCC 97 (Para 10)

3. Khacher Singh Vs St. of U.P. & ors., AIR 1995 All. 338 (Para 10)

4. Commissioner of Income Tax, Bombay Vs T.P. Kumaran, 1996 (1) SCC 561 (Para 12)

5. U.O.I. & ors. Vs Punnilal & ors., 1996 (11) SCC 112 (Para 12)

6. M/s D. Cawasji & Co. & ors. Vs St. of Mysore & anr., AIR 1975 SC 813 (Para 12)

7. Avinash Nagra Vs Navodaya Vidyalaya Samiti & ors., (1997) 2 SCC 534 (Para 13)

8. Uda Ram Vs Central St. Farm & ors., AIR 1998 Raj. 186 (Para 13)

9. Rajasthan Art Emporium Vs Rajasthan St. Industrial and Investment Corp. & anr., AIR 1998 Raj. 277 (Para 13)

10. St. of U.P. & anr. Vs Labh Chand, AIR 1994 SC 754 (Para 15)

11. Burn & Co. Vs Their Employees, AIR 1957 SC 38 (Para 16)

12. Dr. Buddhi Kota Subbarao Vs K. Parasaran & ors., AIR 1996 SC 2687 (Para 18)

13. K.K. Modi Vs K.N. Modi & ors., (1998) 3 SCC 573 (Para 19)

14. Tamil Nadu Electricity Board & anr. Vs N. Raju Reddiar & anr., AIR 1997 SC 1005 (Para 20)

15. Sabia Khan & ors. Vs St. of U.P. & ors., (1999) 1 SCC 271 (Para 21)

16. Abdul Rahman Vs Prasoni Bai & anr., (2003) 1 SCC 488 (Para 22)

17. Diwakar Paswan Vs St. of U.P. & ors., 2021 (1) ADJ 454 (Para 28)

18. St. of U.P. & ors. Vs Bhanu Pratap Rajput, 2021 (2) ADJ 451 (Para 31)

Precedent distinguished:

1. Madhvi Amma Bhawani Amma Vs Kunjijutty Pillai Meenakshi Pillai, 2000 LawSuit (SC) 833 (Para 5, 25)

2. Abdul Razak Amjadulla Abusali Vs St. of Karnataka by its Secretary, Department of Home & Others, 2017 LawSuit (Kar) 709 (Para 5, 24)

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

1. Heard Mr. Seemant Singh, learned counsel for the petitioner and Mr. Ashish Singh Nagwanshi, learned Standing Counsel for the State-respondents.

2. By means of the present writ petition, the petitioner has prayed made following relief:

(a) Issue a writ, order or direction in the nature of Mandamus directing the respondents to treat the petitioner has medically fit in the selection on the post of Constable Civil Police initiated vide advertisement dated 16.11.2018 issued by the Additional Secretary (Recruitment), Uttar Pradesh Police Recruitment and Promotion Board, Lucknow in view of Appendix-3 of Rules 15 (9) of Uttar Pradesh Police Constable and Head Constable Service Rules, 2015.

(b) Issue a writ, order of direction in the nature of Mandamus directing the respondents to appoint the petitioner on the post of Constable Civil Police and also be sent for training on the post of Constable Civil Police, treating the petitioner to be not having any such physical deformity which has been notified under the Uttar Pradesh Police Constable and Head Constable Service Rules, 2015 and by the State Government, within stipulated period of time as fixed by this Hon'ble Court.

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

(d) Award the cost of writ petition to the Writ Petition. "

3. Before coming on the merits of the claim set up on behalf of the petitioner, Mr. Nagwanshi, learned Standing Counsel has raised preliminary objection to the maintainability of this writ petition by contending that the petitioner has earlier approached this Court by means of Writ-A No. 12672 of 2020 (Gagan Sharma Vs. State of U.P. & 3 Others). The said writ petition has been dismissed by a Writ Court vide judgment and order dated 3rd August, 2021. Learned counsel for the State-respondents, therefore, submits that this second writ petition nearly for the same relief cannot be entertained by this Court and the same is liable to be dismissed on this ground alone. The proper remedy available to the petitioner is to file a recall/modification application in the said writ petition or file a special appeal against the order passed therein.

4. In the present writ petition, it is the case of the petitioner that an advertisement was issued by the Additional Secretary (Recruitment), U.P. Police Recruitment and Promotion Board, Lucknow i.e. respondent no.3 dated 16th November, 2018 in respect Constable Civil Police and Constable PAC Direct Recruitment-2018. By the said advertisement, total 49568 posts were advertised, out of which, 31360 were advertised for the post of Constable Civil Police, whereas 18208 posts were advertised for the post of Constable Police Armed Constabulary. Pursuant to the aforesaid advertisement, petitioner applied under General Category. The petitioner qualified in all the stages of recruitment and ultimately, he was selected on the post of Constable Civil Police in the final select list issued by the respondent-authority vide notification dated 2nd March, 2020. Thereafter the petitioner was called for appearing in Medical Examination at

Reserve Police Line, Bulandshahr, which was conducted by the District Medical Board, Bulandshahr, wherein he was declared medically unfit due to having cubitus valgus deformity, which means excess curve in the elbows. The petitioner also appeared in re-medical examination, which was conducted at Reserve Police Line, Meerut by the Regional Medical Board, Meerut and in the said re-medical examination, the petitioner was again declared medically unfit on the same deformity. Feeling aggrieved by the same, the petitioner approached this Court earlier by means of Writ-A No. 12672 of 2020 (Gagan Sharma Vs. State of U.P. & 3 Others), which was dismissed by a Writ Court vide judgment and order dated 3rd August, 2021, wherein the Writ Court relying upon the medical report of the petitioner, according to which the petitioner was examined by the Medical Board, which was duly constituted by the Chief Medical Officer, Bulandshahr and he was found medically unfit due to having excess angle in both elbows.

5. Learned counsel for the petitioner submits that it is no doubt true that for the same relief, as has been made in the present writ petition, petitioner filed Writ-A No. 12672 of 2020 (Gagan Sharma Vs. State of U.P. & 3 Others) but grounds taken in the present writ petition and in Writ-A No. 12672 of 2020 (Gagan Sharma Vs. State of U.P. & 3 Others) are different. The petitioner has filed the present writ petition on some new grounds which he has not taken in his earlier writ petition. Therefore, the present writ petition is maintainable. In support of this plea, learned counsel for the petitioner has placed reliance upon the judgment of the Apex Court in the case of Madhvi Amma Bhawani Amma Vs. Kunjijutty Pillai Meenakshi Pillai reported in 2000 LawSuit (SC) 833 as well as the Full Bench Judgment of the High Court of Karnataka in the case of Abdul Razak Amjadulla Abusali Vs. State of Karnataka by its Secretary, Department of Home & Others reported in 2017 LawSuit (Kar) 709.

6. New grounds pressed before this Court by the learned counsel for the petitioner are that in the Appendix-3 of Rule 16 (g) of the U.P. Police Constable and Head Constable Service Rules, 2015 (hereinafter referred to as the "Rules, 2015"), which provides the deformities, for which the candidates are required to be medically tested, cubitus valgus deformity has been mentioned. Neither any notification has been issued by the State Government mentioning that the cubitus valgus is a deformity nor the respondent authorities had ever disclosed at any point of time to the petitioner about the same i.e. at the time of the medical examination conducted by the District Medical Board and re-medical examination conducted by the Regional Medical Board. So long as the cubitus valgus is not taken into as physical deformity, the claim of the petitioner cannot be rejected on account of the same. On the Cumulative strength of the aforesaid, learned counsel for the petitioner submits that in view of Rules, 2015, the claim of the petitioner is liable to be considered treating the petitioner to be medically fit in all aspects.

7. On the other-hand, learned Counsel for the State-respondents submits that there is no provision of law to dispute the medical examinations of the petitioner which were conducted by teams of Doctors only on the allegation that in Rules, 2015, the cubitus valgus deformity has not been notified nor in any notification or Government Order of the State the said

deformity has been notified. The candidature of the petitioner has rightly been rejected by the Medical Boards referred to above. Therefore, on merits also, no interference is required to be made by this Court in exercise of powers under Article 226 of the Constitution of India.

8. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present writ petition.

9. It is an admitted position between the parties that for the same relief as made in the present writ petition, the petitioner has already filed Writ-A No. 12672 of 2020 (Gagan Sharma Vs. State of U.P. & 3 Others), which has been dismissed by a Writ Court vide judgment and order dated 3rd August, 2021, however, in the said writ petition, according to the learned counsel for the petitioner, the grounds taken in the same are different from those, which have been taken in the present writ petition.

10. The issue of filing successive writ petition has been considered by the Apex Court time and again, accordingly it has been held that even if the earlier writ petition has been dismissed as withdrawn, Public Policy which is reflected in the principle enshrined in **Order 23 rule 1 C.P.C.**, mandates that successive writ petition cannot be entertained for the same relief. (**Vide M/s. Sarguja Transport Service Vs. State Transport Appellate Tribunal & Ors.**, *AIR 1987 SC 88;* **Ashok Kumar & Ors. Vs. Delhi Development Authority,** *1994 (6) SCC 97*; *and* **Khacher Singh Vs. State of U.P. & Ors**., *AIR 1995 All. 338).*

11. In **Sarguja Trasnport Service (Supra),** the Apex Court has specifically opined that in the instant case, the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition.

12. Even if a party does not pray for the relief in the earlier writ petition, which he ought to have claimed in the earlier petition, he cannot file a successive writ petition claiming that relief, as it would be barred by the principle of constructive res judicata enshrined in Explanation IV to Section 11 and Order 2 rule 2 C.P.C. as has been explained, in unambiguous and crystal clear language by the Apex Court in **Commissioner of Income Tax, Bombay Vs. T.P. Kumaran** *reported in 1996 (10) SCC 561;* **Union of India & Ors. Vs. Punnilal & Ors. reported in 1996 (11) SCC 112; and M/s. D. Cawasji & Co. & Ors. Vs. State of Mysore & Anr**. reported in *AIR 1975 SC 813.*

13. Similar view has been reiterated by the Apex Court in **Avinash Nagra Vs. Navodaya Vidyalaya Samiti & Ors.** reported in *(1997) 2 SCC 534* and by the other Court in **Uda Ram Vs. Central State Farm & ors. reported in AIR 1998 Raj. 186; and M/s. Rajasthan Art Emporium Vs. Rajasthan State Industrial and Investment Corporation & Anr.** reported in *AIR 1998 Raj. 277.*

14. In the case of **M/s. D. Cawasji & Co. etc. (Supra),** the Apex Court observed as under:-

"Be that as it may, in the earlier writ petitions, the appellants did not pray for refund of the amounts paid by way of cess for the years 1951-52 to 1965-66 and they gave no reasons before the High Court in these writ petitions why they did not

make the prayer for refund of the amounts paid during the years in question. Avoiding multiplicity of unnecessary legal proceedings should be an aim of the Courts. Therefore, the appellants could not be allowed to split up their claims for refund and file writ petitions in this piecemeal fashion. If the appellants could have, but did not, without any legal justification, claim refund of the amounts paid during the years in question, in the earlier writ petitions, we see no reason why the appellants should be allowed to claim the amounts by filing writ petitions again. In the circumstances of this case, having regard to the conduct of the appellants in not claiming these amounts in the earlier writ petitions without any justification, we do not think, we would be justified in interfering with the discretion exercised by the High Court in dismissing the writ petitions which were filed only for the purpose of obtaining the refund....in view of the above, the petition is liable to be dismissed as not maintainable and it is dismissed accordingly...."

15. Similarly, in the case of **State of U.P. & Anr. Vs. Labh Chand reported in AIR 1994 SC 754,** the Apex Court has held as under:-

"This reason is not concerned with the discretionary power of the Judge or Judges of the High Court under Article 226 of the Constitution to entertain a second writ petition whose earlier writ petition was dismissed on the ground of non-exhaustion of alternative remedy but of such a Judge or Judges having not followed the well established salutary rule of judicial practice and procedure that an order of a Single Judge Bench or a Larger Bench of the same High Court dismissing the writ petition either on the ground of latches or non-exhaustion of alternative remedy as well shall not be bye-passed by a Single Judge Bench or Judges of a Larger Bench except in exercise of review or appellate powers possessed by it..... *But as the learned Single Judge constituting a Single Judge Bench of the same Court, who has in the purported exercise of jurisdiction under Article 226 of the Constitution bye-passed the order of dismissal of the writ petition made by a Division Bench by entertaining a second writ petition filed by the respondent in respect of the subject matter which was the subject matter of the earlier writ petition, the question is, whether the well established salutary rule of judicial practice and procedure governing such matters permit the learned Single Judge to bye-pass the order of the Division Bench on the excuse that High Court has jurisdiction under Article 226 of the Constitution to entertain a second writ petition since the earlier writ petition of the same person had been dismissed on the ground of non-availing of alternative remedy and not on merits.... Second writ petition cannot be so entertained, not because the learned Single Judge had no jurisdiction to entertain the same, but because entertaining of such a second writ petition would render the order of the same Court dismissing the earlier writ petition, redundant and nugatory although not reviewed by it in exercise of its recognized power. Besides, if a learned Single Judge could entertain a second writ petition of a person respecting a matter on which his first writ petition was dismissed in limine by another Single Judge or a Division Bench of the same Court, it would encourage an unsuccessful writ petitioner to go on filing writ petitions after writ petition in the same matter, in the same High Court and for it brought up for consideration before one Judge after*

another. Such a thing, if is allowed to happen, it would result in giving full scope and encouragement to an unscrupulous litigant to abuse the process of the High Court exercising its writ jurisdiction under Article 226 of the Constitution in that any order of any Bench of such Court refusing to entertain a writ petition could be ignored by him with impunity and the relief sought in the same matter by filing a fresh writ petition. This would only lead to introduction of disorder, confusion and chaos relating to exercise of writ jurisdiction by Judges of the High Court, for there could be no finality for an order of the Court refusing to entertain a writ petition. It is why the rule of judicial practice and procedure that a second writ petition shall not be entertained by the High Court on the subject matter respecting that the writ petition of the same person was dismissed by the same Court even if the order of such dismissal was in limine, be it on the ground of latches or on the ground of non-exhaustion of alternative remedy, has come to be accepted and followed as salutary rule in exercise of writ jurisdiction of the Court."

(Emphasis added).

16. In the case of **Burn & Co. Vs. Their Employees,** reported in AIR 1957 SC 38, the Apex Court has held as under:-

"*That would be contrary to the well-recognised principle that a decision once rendered by a competent authority on a matter in issue between the parties after a full enquiry should not be permitted to be re-agitated. It is on this principle that the rule of res judicata enacted in Section 11, Civil P.C. is based. That section is, no doubt in terms in application to the present matter, but the principle underlying it, expressed in the maxim "interest rei publicae ut sit finis litium", is founded on sound public policy and is of universal application. (Vide Broom's Legal Maxims, Tenth Edition, page 218). 'The rule of res judicata is dictated' observed Sir Lawrence Jenkins C.J. in Sheoparasan Singh Vs. Ramnandan Prasad Narayan Singh, 43 Ind. App. 91: ILR 43 Cal. 694: (AIR 1916 PC 78) (C), by a wisdom which is for all time."*

17. Therefore, in view of the above referred judgments, it is abundantly clear that even if the provisions of the Code of Civil Procedure are not applicable in writ jurisdiction, the principle enshrined therein can be resorted to for the reason that the principles, on which the Code of Civil Procedure is based, are founded on public policy and, therefore, require to be extended and made applicable in writ jurisdiction also in the interest of administration of justice. Any relief not claimed in the earlier writ petition should be deemed to have been abandoned by the petitioner to the extent of the cause of action claimed in the subsequent writ petition and in order to restrain the person from abusing the process of the Court, such an order/course requires not only to be resorted to but to be enforced.

18. In the case of **Dr. Buddhi Kota Subbarao Vs. K. Parasaran & Ors., reported in AIR 1996 SC 2687**, the Apex Court has observed as under:-

"No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes. However, access to justice should not be misused as a licence to file misconceived and frivolous petitions."

19. Similar view has been reiterated by the Apex Court in the case of **K.K.**

Modi Vs. K.N. Modi & Ors., reported in *(1998) 3 SCC 573.*

20. In **Tamil Nadu Electricity Board & Anr. Vs. N. Raju Reddiar & Anr**. reported in *AIR 1997 SC 1005* the Apex Court held that filing successive misconceived and frivolous applications for clarification, modification or for seeking a review of the order interferes with the purity of the administration of law and salutary and healthy practice. Such a litigant must be dealt with a very heavy hand.

21. In **Sabia Khan & ors. Vs. State of U.P. & ors**., reported in *(1999) 1 SCC 271,* the Apex Court held that filing totally misconceived petition amounts to abuse of the process of the Court and such litigant is not required to be dealt with lightly.

22 In the case of **Abdul Rahman Vs. Prasoni Bai & Anr.,** reported in *(2003) 1 SCC 488,* the Apex Court held that wherever the Court comes to the conclusion that the process of the Court is being abused, the Court would be justified in refusing to proceed further and refuse the party from pursuing the remedy in law.

23. Thus, in view of the above, the second writ petition is not maintainable for issuing a direction upon the respondent authorities to treat the petitioner medically fit in the selection on the post of Constable Civil Police pursuant to the advertisement dated 16th November, 2018, as the earlier writ petition for the same relief stood dismissed vide order dated 3rd August, 2021, wherein a Coordinate Bench of this Court had found no error in the opinion of the medical board as also the appellate medical board.

24. The Full Bench Judgment of the High Court of Karnataka relied upon by the learned counsel for the petitioner in the case of **Abudul Razak, Amjadulla, Abusali (Supra)** is not applicable in the case of the petitioner. The Full Bench of the Karnataka High Court while deciding the point no.1 in the said case has answered that that a second writ petition based on the very same grounds which were raised in the first writ petition assailing the order of detention is not maintainable on the principles of res judicata. However, the Full Bench has also clarified that a second writ petition assailing the very same detention order passed on fresh grounds or new grounds that were not available when the first writ petition was filed, is maintainable. When as matter of fact in the present case, the new grounds taken in the present petition with respect to the fact that the relevant rule does not take the cubitus valgus as a medical deficiency, were already available to the petitioner, while filing earlier writ petition being Writ-A No. 12672 of 2020.

25. The judgment of the Apex Court in the case of Madhvi Amma Bhawani Amma (Supra) is also not applicable in the case of the petitioner because the same issue was already been decided against the petitioner by a Coordinate Bench of this Court vide order dated 3rd August, 2021 and no new issue has been pressed in this second writ petition.

26. In view of the aforesaid, this Court is of the opinion that this second writ petition is not maintainable and is liable to be dismissed on this ground alone.

27. This Court has also not found any good ground to interfere in the present writ petition on merits. Any Court of law or any

person cannot express any opinion about a person whether he is healthy or unwell or what disease he has. It is the Doctor, who is an expert of that field, can diagnose the disease and give opinion about the same.

28. A learned Single Judge of this Court in the case of **Diwakar Paswan Vs. State of U.P. & 6 Others** reported in *2021 (1) ADJ 454*, wherein the learned Single Judge has opined as follows:

"No material has been placed on record, or otherwise referred, to suggest that the opinion of the Medical Board or the Appellate Medical Board could in any manner be said to be casual, inchoate, perfunctory or vague. We are therefore of the view that the Medical Board being an expert body, its opinion is entitled to be given due weight, credence and value.

A similar view has been taken in recent judgments of this Court in Vivek Kumar v. State of U.P.1 and Md. Arshad Khan v. State of U.P.2 wherein it was held that matters relating to medical evaluation of candidates in a recruitment process involve expert determination and it may not be desirable to supplant the procedure prescribed as laid down under the relevant recruitment rules and taking any other view may have the effect of derailing the recruitment process.

Dealing with an identical challenge this Court in Prakash Singh Vs. State of U.P.3 held:

"The petitioner essentially calls upon the Court to rule on and evaluate the correctness of the reports submitted by experts in their fields. These submissions and reliefs have evidently been sought and addressed without bearing in mind the contours of the writ jurisdiction. The opinion of a Medical Board is the outcome of an evaluation by experts in the subject. Except in exceptional situations such as where a finding of unfitness is returned in violation or disregard of the standards prescribed or on grounds which may call upon this Court to consider the correctness of the opinion on a legal plain, it would be wholly inappropriate for this Court to either interfere with the same or substitute its own opinion with respect to the medical fitness of a particular candidate. Treading this path may also cause serious prejudice and jeopardise the recruitment process itself. The Court is constrained to enter this note of caution conscious of its own limitations with respect to adjudging the medical fitness or otherwise of a particular candidate. In the ultimate analysis, it would be pertinent to emphasise that such requests must be entertained with due care and circumspection."

The Delhi High Court in a recent decision handed down in the matter of Km Priyanka Vs. Union of India cautioned against interfering with the opinion formed by medical boards constituted for selection of members of the armed forces on the strength of certificates issued by private or civilian doctors in the following terms: -

"8. We have on several occasions observed that the standard of physical fitness for the Armed Forces and the Police Forces is more stringent than for civilian employment. We have in Priti Yadav Vs. Union of India 2020 SCC Online Del 951;Jonu Tiwari VS. Union of India 2020 SCC Online Del 855; Nishant Kumar Vs. Union of India SCC Online Del 808; and Shravan Kumar Rai Vs. Union of India 2020 SCC Online Del 924 held that once no mala fides are attributed and the

doctors of the Forces who are well aware of the demands of duties of the Forces in the terrain in which the recruited personnel are required to work, have formed an opinion that the candidate is not medically fit for recruitment, opinion of private or other government doctors to the contrary cannot be accepted inasmuch as the recruited personnel are required to work for the Forces and not for the private doctors or the government hospitals and which medical professionals are unaware of the demands of the duties of the Forces."

Although learned counsel for the petitioner has placed reliance upon certain interim orders passed by learned Judges of the Court and which stand appended as Annexure 7 to the writ petition, the Court notes that none of those interim orders notice or deal with the principles as elucidated by the Division Bench in Rahul or the decisions in Manish Kumar and Prakash Singh noticed above.

It becomes pertinent to note that the opinions formed by the Medical and Review Boards have not been assailed by the petitioner on the ground of mala fides. A review of those decisions is sought solely on the basis of a contrary opinion rendered by a doctor of a government hospital. Permitting a reopening of a medical examination conducted by the respondents solely on that basis would set a dangerous precedent especially when the Court by virtue of its inherent limitations would be wholly unequipped to undertake a comparative analysis or evaluation of competing medical opinions. Medical fitness is a subject best left for determination by experts and should not be lightly interfered with unless it be shown to be contrary to the standards prescribed or otherwise be liable to be assailed on other judicially manageable parameters.

Quite apart from the consistent view taken by Courts on this question regard must also be had to the fact that the medical examination in the present case was undertaken in accordance with the provisions made in the statutory rules. Those Rules confer finality upon the opinions formed by the Medical Boards subject to an appeal against the same before a Review Medical Board. Those Rules do not envisage or contemplate a challenge to those reports based upon reports and opinions privately obtained by candidates. Permitting such a course of action would not only be contrary to the Rules which apply and bind the candidate but also result in derailing the recruitment process itself"

(Emphasis added)

29. This Court, therefore, is in respectful agreement with the decision taken by the learned Single Judge in the case of **Diwkar Paswan (Supra**) and finds no good ground to entertain the present writ petition.

30. A Division Bench of this Court in the case of **State of U.P. and others Vs. Bhanu Pratap Rajput**, reported in **2021 (2) ADJ 451**, has observed as follows:

"16. The medical examination by the Medical Board consisting of medical experts under Rule 15(g) cannot be said to be inferior to the physical standard test conducted by a team of non-experts. Therefore, we find that the finding recorded by the learned Single Judge in the impugned judgment that the assessment of physical standard by the committee

constituted under Appendix-2 to the Rules, 2015 is liable to be preferred over the determination made by the Medical Board in terms of the Appendix-3, is not sustainable. ***Opinion of a committee of non-experts under Rule 15(d) for physical test of a candidate cannot override the opinion of the team of experts, i.e. Medical Board under Rule 15(g) of the Rules."***

31. This Court also agrees with the observations made by the Division Bench of this Court in the aforesaid case.

32. Lastly, this Court finds substance in the submission made by the learned Standing Counsel that this second writ petition filed for the same relief cannot be entertained by this Court. For same relief, second writ petition is not maintainable. The proper remedy available to the petitioner was to file a recall application in his earlier writ petition referred to above or to file a Special Appeal against the judgment and order passed in the said writ petition.

33. The present writ petition is devoid of merits, and, accordingly, dismissed.

34. There shall be no order as to costs.

(2022)07ILR A661
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ A No. 3146 of 2022

Anoop Kumar Singh & Anr. ...Appellants

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Abhay Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Gagan Mehta

A. Service Law – U.P. Higher Education Service Commission (Procedure for Selection of Teachers) Regulations, 2014 - Regulation 12 - The examiners as well as experts being an independent body, their decision cannot be interfered as the same is given after proper consultation and research. In case of any mistake, the benefit of change in the answer key is given to each and every candidate, after following due process. The change in the tentative answer key can be made only after the expert opinion, the Commission takes into consideration the objections as raised by the candidates and after placing the same before the experts, the answer key is uploaded. The deletion of answer can be possible only after the experts opinion and benefit of deleted question is given to each and every candidate, in such a manner that there is no discrepancy or discrimination with any candidates. (Para 12)

B. Sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheets. The law is well settled that the burden is on the candidates, not only to demonstrate that the key answer is incorrect but also to show that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the key answer is wrong. (Para 22)

Even the policy decision incorporated in the Rules/Regulations providing for rechecking/verification/re-evaluation cannot be challenged unless there are grounds to show that the policy itself is in violation of some statutory provision. (Para 20)

In the present case, the final key was published on 11.02.2022 only after taking into

consideration the experts opinion as well as the objections raised by the candidates,. (Para 15)

C. The Courts cannot judicially review the expert opinion unless and until the key answer is patently wrong. The Constitutional Courts must exercise great restrain in such matters and should be reluctant to entertain a plea challenging the correctness of the key answers. The Court should not over step its jurisdiction by giving the directions for re-evaluation which would amount to judicially reviewing the decision of the expert in the field. (Para 22, 24, 26)

Indubitably, conducting and holding of examinations in a most fitting and fair manner is peremptory and is solemn duty of examining body to provide for fair procedure, rules, regulations or bye-laws, keeping in mind that the career and fate of the students depends upon the result of the examinations. It is settled law that when a decision is taken by the Committee of Expert having high academic qualifications and long experience in the specialised field, the Courts should not normally interfere in the matters unless there are compelling circumstances for doing so. (Para 28, 30)

Writ petition dismissed. (E-4)

Precedent followed:

1. High Court of Tripura Vs Tirtha Sarathi Mukherjee & ors., 2009 II SCALE 708 (Para 16)

2. H.P. Service Commission Vs Mukesh Thakur & ors., AIR 2010 SC 2620 (Para 16)

3. Ran Vijay Singh & ors. Vs St. of U.P. & ors., AIR 2018 SC 52 (Para 16)

4. Maharashtra St. Board of Secondary and Higher Secondary Education & anr. Vs Paritosh Bhupesh Kurmarsheth & ors., AIR 1984 SC 1543 (Para 20)

5. Pramod Kumar Srivastava Vs Chairman, Bihar Public Service Commission, Patna & ors., J.T. 2004 SC 380 (Para 21)

6. Ran Vijay Singh & ors. Vs St. of U.P. & ors., AIR 2018 SC 52; (2018) 2 SCC 357 (Para 23)

7. U.P.P.S.C. & ors. Vs Rahul Singh & ors., AIR 2018 SC 2861 (Para 27)

8. University of Mysore Vs C.D. Govinda Rao & anr., AIR 1965 SC 491 (Para 29)

9. Bihar Staff Selection Commission Vs Arun Kumar, 2020) 6 SCC 362 (Para 31)

10. Jitendra Singh Vs U.O.I. & anr., Writ-C No. 53877 of 2017 (Para 32)

Present petition prays for quashing of impugned result dated 17.02.2022 by the U.P. Higher Education Service Commission.

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

1. Heard Mr. Abhay Kumar Singh, learned counsel for the petitioners, Mr. Gagan Mehta, learned counsel for respondent nos.2 & 3 and Mr. Shailendra Singh, learned Standing Counsel for the State-respondents.

2. The writ petition has been filed by the petitioners with the following prayer:-

"(i) Issue a writ order or direction in the nature of certiorari quashing the impugned result annexed as Annexure No.11 published on the 17.02.2022 by the Respondent no.2 Uttar Pradesh Higher Education Service Commission.

(ii) Issue a writ order or direction in the nature of mandamus commanding/directing the respondent no.2 to re-evaluate the answer sheet of the petitioners and declare a fresh result on the basis of re-evaluation.

(iii Issue a appropriate writ order or direction to the respondent no.2 to

consider the candidature of the petitioners for interview for post of Assistant Professor of Geography subject."

3. In the present writ petition, counter and rejoinder affidavits have been exchanged between the parties, supplementary counter affidavit has been filed on behalf of respondent nos.2 & 3 is also taken on record. Both the parties agree that this petition be disposed of at this stage, without calling for any further affidavit.

4. Brief facts of the case are that the respondent-Commission published an advertisement for filling the vacancies of Assistant Professor in various subjects. The petitioners being eligible applied for the post of Assistant Professor in Geography subject. The petitioners appeared in written examination scheduled on 30.10.2021 and attempted the questions to the best of their ability and knowledge. After the examination, the answer key inviting objections from the candidates in case of any wrong answer in the answer key was published by the respondent-Commission. The question papers were in four sets i.e. A, B, C, D and the petitioners were given "D' Series of the booklet. The petitioners found that some of the answers given in the answer key published by respondent-Commission were wrong, therefore, they raised their objections separately with respect to questions at serial no. 2, 3, 14, 29, 34, 55, 56, 65, 66 and 79. Without considering the objections as raised by the petitioners, the final result was published by only correcting question no. 14 of "D' series of the booklet, as suggested by the petitioners. Apart from the aforesaid, the Commission has also deleted one question i.e. question no.36 and corrected one question i.e. question no.43 of the "D' series of the booklet. The revised and final result of the written paper of Assistant Professor (Geography) were declared on 11.02.2022 without correcting the answers as raised in the objections by the petitioners. The answers of 10 questions as stated above were said to be incorrect relying upon certain books as placed by the petitioners but respondent-Commission neither corrected the questions which was wrongly answered by the Commission in the answer key, as objected by the petitioners nor communicated the reason behind non consideration of rest 8 questions as suggested by the petitioners.

5. The petitioners found that question no. 29 of "D' series of the booklet had two correct answers but the objection with respect to the same could not be raised prior to declaration of the result.

6. The questions which still need to be corrected as per the objections raised by the petitioners are as follows:-

`Question No.3.

Which of the following is in pre-active stage of teaching?

(A) Evaluating
(B) Diagnosis
(C) Sequencing
(D) Remediating

As per the answer key, the correct answer is (C) whereas as per the books of UPKAR Prakashan and another book of Drishti for UGC NET JRF, available with the petitioner shows that both (B) and (C) answers are correct.

Question No.29

Reflecting teaching is:

(A) Problem Centered
(B) Practice Centered

(C)Making Association
(D) Reproduction of thought

As per the answer key, the correct answer is (A) whereas as per the books of UPKAR Prakashan and another book of Drishti for UGC NET JRF, available with the petitioner shows that both (A) and (D) answers are correct.

Question No.34

Among the following scholars who first put forth the Global Strategic View Model?

(A) A.T. Mahan
(B) S.B. Cohen
(C)A.D. Seversky
(D) N.J. Spiikeman

As per the answer key, the correct answer is (A) whereas as per the relevant pages of books of Political Geography written by Dr. S. Adhikari and Dr. Ratan Kumar and another book of Political Geography written by Ramesh Dutta Dikshit as well as by R.C. Tiwari, available with the petitioner, the correct answer is (B).

Question No.55

Which of the following types of spectrum of Remote Sensing would be be

(A) Thermal Infrared
(B) Visible Spectum Band 0.4
(C)Visible Spectum Band 0.5
(D) False Colour Composite

As per the answer key, the correct answer is (D) whereas as per the relevant pages of books of Principle of Remote Sensing and Geographical Information System written by Dr. Devidutta Chounial and another book of Arihant Publication UGC NET as well as TATA McGraw-Hills written by D.R. Khullar, available to the petitioner, the correct answer is (A) .

Question No.65

Which of the following process is called by alternate wetting and drying of rocks?

(A) Slaking
(B) Sheeting
(C)Spalling
(D) Flaking

As per the answer key, the correct answer is (A) whereas as per the relevant pages of books of Bhuaakriti Vigyan ka Swaroop written by Savindra Singh, available with the petitioner, the correct answer is (D).

Question No.66

With references to Endogenetic Forces, which of the following statement is/are correct?

(1) Extreme event like earthquake and volcanic eruptions are caused by diastrophic forces

(2) Tensional Forces cause up warping and down warping

(A) Only 1 (B) Only 2

(C)Only 1 and 2 (D) Neither 1 nor 2

The question paper is in diglot and the answers in hindi language is different from english language, therefore, the question may be deleted as there is no mechanism to know in which the language the aspirant has opted. In case, the said question is not deleted it will create anomaly.

अन्तर्जात बल के सन्दर्भ में निम्नलिखित कथनों में से कौन सा सही है/हैं?

(1) भूकंप और ज्वालामुखी विस्फोट जैसी आकस्मिक घटनाएं अन्तर्जात बलों द्वारा उत्पन्न होती हैं /

(2) उत्समवलन और असंवलन तनाव बलों द्वारा उत्पन्न होते हैं /

नीचे दिए गए कूट से सही उत्तर चुनिए:

(A) केवल १ (B) केवल २

(C)१ और २ दोनों (D) न तो १ और न ही २

In support of their submission/objection, petitioners have placed reliance the relevant pages of books of Bhautik Bhoogol ka Swaroop written by Savindra Singh and another book of Arihant Publication UGC NET.

Question No.79

Which of the following is not correctly matched?

(Ocean Deposits)	(Source)
(A) Ooze -	Biotic
(B) Red Clay -	Biotic
(C) Tiktites -	Cosmogeneous
(D) Mud -	Volcanic

As per the answer key, the correct answer is (D) whereas relying upon the book of Samudra Vigyan written by Savindra Singh and another book of Bhautik Bhoogol ka Swaroop written by Savindra Singh, the correct answer is (B).

7. The petitioners are confident and self possessed that in case the answers as relied upon by the petitioners and raised in their objections, if taken into consideration, the petitioners will qualify in the written examination.

8. Learned counsel for the petitioners submits that the petitioners while raising their objections has placed reliance upon the reliable and renowned books, therefore, their objections should have been taken into consideration prior to declaration of the result. The conduct of the respondents to declare the result without considering the objections of the petitioners amounts to arbitrariness and hard-heartedness on their part, therefore, he submits that the selection of the petitioners on the post of Assistant Professor (Geography) has been denied by not taking into consideration the objections as raised byby the petitioners, which in case done, the petitioners would have succeeded.

9. Thus, the present writ petition has been filed with the prayer to direct the respondents to re-evaluate the answer sheets on the basis of the answers as given by the petitioners in the objections placed before respondents-Commission and declare the result of the petitioners accordingly.

10. On the other hand Mr. Gagan Mehta, learned counsel for respondent nos. 2 & 3 and Mr. Shailendra Singh, learned Standing Counsel for the State respondents submit that the relief as prayed on behalf of the petitioners cannot be granted by this Court while exercising its power under Article 226 of the Constitution of India. The request of the petitioners for re-evaluation of the answer sheets regarding question no.3, 29, 55, 65, 66 and 79 cannot be accepted as the correctness of the option given in the answer key is based upon experts opinion as obtained by the respondent-Commission and in the opinion of the subject experts, the answer key has been rightly uploaded. Since the answer key has been examined by the subject experts and the petitioners have not pleaded mala fide as against the respondents, as such no judicial review would lie and the writ petition is liable to be dismissed.

11. Learned counsel for respondent-Commission has specifically mentioned that panel of examiners and experts is an independent body as the same has been constituted under Regulation 12 of the U.P. High Education Service Commission (Procedure for Selection of Teachers) Regulations, 2014, which reads as follows:-

"(1) The Chairman Examination Committee shall prepare for every subject, a list of persons qualified for appointment as examiners and submit the same for approval fo the Commission, such list shall be revised at least once in every two years:

Provided that a person included in the previous list shall be eligible for inclusion in the revised list.

(2) The list referred in sub-section (1) shall contain, as far as possible, information about the persons included therein regard to their academic qualifications, teaching experience at the degree and the postgraduate levels or professional experience and, the particulars, of the earlier examinations conducted by the Commission in which they acted as examiners.

(3) The Chairman Examination Committee shall, with the prior approval of the Commission, appoint Paper Setters and Moderators from amongst the persons included in the list referred to in sub-section (1).

(4) In making such appointments every care shall be taken to ensure that no person as so appointed who was found guilty of misconduct by any university, Government or Government body, or against whom any inquiries or investigations are pending or allegations of misconduct, or whose integrity is doubtful. Any person whose work as Head Examiner, Paper Setter or Valuer is found to be unsatisfactory by the Commission shall not be reappointed for that purpose."

12. The examiners as well as experts being an independent body, their decision cannot be interfered as the same is given after proper consultation and research. They further submit that in case of any mistake, the benefit of change in the answer key is given to each and every candidate, after following due process. The change in the tentative answer key can be made only after the expert opinion, the Commission takes into consideration the objections as raised by the candidates and after placing the same before the experts, the answer key is uploaded. The deletion of answer can be possible only after the experts opinion and benefit of deleted

question is given to each and every candidate, in such a manner that there is no discrepancy or discrimination with any candidates.

13. As regards the issue regarding discrepancy between English and Hindi version, the instruction no.15 of the question booklet itself provides that the English version will be taken as final, Instruction No.15, reads as follows:-

"यदि हिंदी या अंग्रेजी विवरण में कोई विसंगति हो तो अंग्रेजी विवरण अंतिम माना जायेगा /

In case of any discrepancy between the English and Hindi version, English version will be taken as final."

14. They further submit that the objections as raised by the candidates to the answer key was taken into consideration and the duly appointed experts of the subjects submitted their opinion on the same before the Commission placing reliance upon books like fundamentals of remote sensing by George Joseph and physical Geography by Sunil Singh from which specially question no.55, 65, 66 and 79 were verified.

15. Only after taking into consideration the experts opinion, after considering the objections raised by the candidates, the final key was published on 11.02.2022.

16. Lastly, learned counsel for respondents submit that there is no provision of re-evaluation, therefore, the re-evaluation of answer sheets cannot be permitted as prayed by the petitioners. In support of their submission, they relying upon the judgement of **High Court of Tripura Vs. Tirtha Sarathi Mukherjee and Others**, reported in **2009 II SCALE 708, H.P. Service Commission Vs. Mukesh Thakur and Others, reported in AIR 2010 SC 2620 and Ran Vijay Singh and Others Vs. State of U.P. and Others, reported in AIR 2018 SC 52.**

17. Therefore, learned counsel for respondents submit that the writ petition is not maintainable and the same is liable to be dismissed.

18. I have considered the submissions made on behalf of learned counsel for the parties and have gone through the records of the present writ petition.

19. Learned counsel for the petitioners has not brought to this Court's attention any Rules, Regulations or any guidelines framed by the respondents, notification or circular issued by the respondents or any authority of law that may permit re-evaluation.

20. The issue of re-evaluation of answer book or sheet is no more res integra. This issue has been considered by the Apex Court in the case of **Maharashtra State Board of Secondary and Higher Secondary Education & Anr. Vs. Paritosh Bhupesh Kurmarsheth & Ors.**, reported in **AIR 1984 SC 1543**, wherein the Apex Court rejected the contention that in absence of provision for re-evaluation, a direction to this effect can be issued by the Court. The Apex Court further held that even the policy decision incorporated in the Rules/Regulations providing for rechecking/ verification/re-evaluation cannot be challenged unless there are grounds to show that the policy itself is in violation of some statutory provision. The Apex Court held as under:-

"In our opinion, this approach made by the High Court was not correct or proper because the question whether a particular piece of delegated legislation - whether a rule or regulation or other type of statutory instrument - is in excess of the power of subordinate legislation conferred on the delegate as to be determined with reference only to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation, etc. and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the court to substitute its own opinion for that of the legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the Statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the Statute.

In our opinion, the aforesaid approach made by the High Court is wholly incorrect and fallacious. The Court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any draw-backs in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution."

21. This view referred to above has been approved, relied upon and reiterated by the Apex Court in the case of **Pramod Kumar Srivastava Vs. Chairman, Bihar Public Service Commission, Patna & Ors**, reported in **J.T. 2004 SC 380** observing as under:

"Under the relevant rules of the Commission, there is no provision wherein a candidate may be entitled to ask for re-

evaluation of his answer-book. There is a provision for scrutiny only wherein the answer-books are seen for the purpose of checking whether all the answers given by a candidate have been examined and whether there has been any mistake in the totalling of marks of each question and nothing them correctly on the first cover page of the answer-book. There is no dispute that after scrutiny no mistake was found in the marks awarded to the appellant in the General Science paper. In the absence of any provision for re-evaluation of answer-books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for re-evaluation of his marks."

22. This Court feels that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheets. The law is well settled that the burden is on the candidates, not only to demonstrate that the key answer is incorrect but also to show that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the key answer is wrong. The Constitutional Courts must exercise great restrain in such matters and should be reluctant to entertain a plea challenging the correctness of the key answers. The Court should not over step its jurisdiction by giving the directions for re-evaluation which would amount to judicially reviewing the decision of the expert in the field.

23. The legal position in this respect has been summarised in case of **Ran Vijay Singh and Ors. Vs. State of U.P. and Ors.**, reported in **(2018) 2 SCC 357** which is follows:-

"30. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are:

30.1. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

30.3. The court should not at all re-evaluate or scrutinise the answer sheets of a candidate--it has no expertise in the matter and academic matters are best left to academics;

30.4. The court should presume the correctness of the key answers and proceed on that assumption; and

30.5. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate."

24. Undoubtedly, the Courts cannot judicially review the expert opinion unless and until the key answer is patently wrong.

25. There is no doubt that the candidates put in dreadful efforts while preparing for an examination, it must not be unremembered that even the examination authorities as well as experts put in equally great efforts to successfully conduct the examination, therefore the Court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities.

26. Therefore, the Court should restrain in interfering with the efforts put in by the candidates as well as the examination authorities unless and until the mistake is apparent on the face of record and no research has to be done in proving the same, as the same will be an unending process resulting in uncertainty and confusion.

27. Keeping in mind the aforesaid, the Court in case of **U.P.P.S.C. and Ors. Vs. Rahul Singh and Ors**. reported in **AIR 2018 SC 2861** has observed as follows:-

"Unless the candidate demonstrate that the key answers are patently wrong on the fact of it, the Courts cannot enter into the academic field, weigh the pros cons of the arguments given by both sides and then come to the conclusion as to which of the answer is better or more correct."

28. Indubitably, conducting and holding of examinations in a most fitting and fair manner is peremptory and is solemn duty of examining body to provide for fair procedure, rules, regulations or bye-laws, keeping in mind that the career and fate of the students depends upon the result of the examinations.

29. A Constitution Bench of the Apex Court in the case of **University of Mysore Vs. C.D. Govinda Rao & Anr.,** reported in **AIR 1965 SC 491**, has held that where the decision under challenge has been taken by the Committee of Expert, "normally the Courts should be slow to interfere with the opinion expressed by the experts" unless there are allegations of mala fide against any of the Members of the Expert Committee. The Court further observed as under:-

".....It would normally be wise and safe for the Courts to leave the decisions of academic matters to experts who are more familiar with the problems they face than Courts....."

30. It is settled law that when a decision is taken by the Committee of Expert having high academic qualifications and long experience in the specialised field, the Courts should not normally interfere in the matters unless there are compelling circumstances for doing so.

31. The aforesaid issue is also well settled in view of the judgement of **Apex Court in case of Bihar Staff Selection Commission Vs. Arun Kumar** ,reported in **(2020) 6 SCC 362**. There are otherwise catena of judgements of Supreme Court holding that in the competitive selection test, prayer for re-evaluation of marks cannot be accepted unless a rule for it exists.

32. Taking into consideration the settled position of law in the matters where the answer key is disputed, this Court in case of **Jitendra Singh Vs. Union of India and Another, passed in Writ C No. 53877 of 2017**, has held that the Court has to proceed on the assumption and

presumption that the answer key is correct as the same is based on experts opinion given by the persons specialised. In the event of any doubt, benefit should go to the examination authority rather than to the candidate. It is with a rider that the Court should not re-evaluate or scrutinize the answer sheets of the candidates as it has no expertise in the matter, the academic matters are best left to the academicians there being no scope of judicial review in the matter.

33. Appropriately, considering the capitulations made by learned counsel for respondent no.2 and law laid down by the Apex Court, established position of law, this Court finds no good ground to interfere in the present petition, the same is accordingly dismissed.

(2022)07ILR A671
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ A No. 6014 of 2022

Pankaj Dhar Dubey ...Appellant
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Appellant:
Sri Bashist Tiwari, Sri Rajesh Kumar

Counsel for the Respondents:
A.S.G.I., Sri Vivek Kumar Singh

A. Service Law – Promotion – Constitutional Validity - Constitution (42nd Amendment) Act, 1976 - Section 46 - Administrative Tribunals Act, 1985 - Sections 5(2), 5(4) & 27 - Central Administrative Tribunal Act, 1985 - Section 17.

Writ jurisdiction in contempt proceedings - Ordinarily the High Court, in the exercise of its powers of judicial review u/Article 226 of the Constitution of India and its power of judicial superintendence u/Article 227 of the Constitution of India, would not interfere with the order of the Tribunal, passed in the exercise of its contempt jurisdiction u/s 17 of the 1985 Act, discharging the contemnors after holding that no case of willful contempt was made out against the respondents. (Para 25)

This Court cannot enter into the merits of the matter as the same is subject to interpretation which can be done on original side as in contempt jurisdiction the Courts of law has to not only uphold the majesty and dignity of the Courts of law but also lift the veil so as to find out as to whether there was willful disobedience of the orders passed on original side and not to function as an original or appellate court for determination of the dispute inter se between the parties. (Para 33)

B. Alternative remedy - It is always open for the petitioner herein to take recourse to the provisions contained u/s 19(v) of the Administrative Tribunals Act, 1985 while filing original application before the 5th Respondent challenging the orders negating the claim of the petitioner or depriving the petitioner of his legal and genuine right to be considered for promotion. Even otherwise, from the all four corners of law this Court finds that motion so pressed in service by means of the present writ petition is not even otherwise liable to be entertained under Article 226/227 of the Constitution of India particularly when the order itself was conditional subject to existence of vacancy and suitability of the petitioner as per the Rules and once the issue w.r.t. the fact that there remains no vacancy against which the claim of the petitioner would be considered has been raised by the Railways then it was rightly not interfered by the 5th Respondent in contempt proceedings as the Contempt Court cannot go into the merit of the matter as the

remedy lies elsewhere and not in contempt jurisdiction. (Para 34)

C. Constitutional Validity - Constitution (Forty-Second Amendment) Act, 1976: Section 46 - The petitioner herein as though raised the issue of constitutional validity of the 42nd Amendment Act, 1976 in so far as it pertains to S. 46 which deals with the matter pertaining to Tribunal, however, neither the UOI nor the respective Secretary to whom the Ministry is to be represented have been made party in the present proceedings. This Court finds that the UOI through General Manager North Eastern Railway has only been arrayed as a party. Thus **in the absence of any impleadment of a proper and necessary party this Court cannot delve into the issue regarding constitutional validity so sought to be raised at the behest of the petitioner,** leaving it open to the petitioner to challenge the same in appropriate proceedings as and when it is occasioned. (Para 36, 37)

D. The petitioner wants a direction in the nature of Mandamus commanding the 5th Respondent to decide the case by constituting a Bench of two members. The writ courts would be well advised to decide the petitions on the points raised in the petition and if in a rare case keeping in view the facts and circumstances of the case any additional points are to be raised then the concerned and affected parties should be put to the notice of the additional points to satisfy the principles of natural justice. Parties cannot be taken by surprise. (Para 36)

The present writ petition challenging the order whereby contempt proceedings has been dropped and notices have been discharged is not liable to be interfered in present proceeding and thus it is liable to be dismissed. (Para 38)

Writ petition dismissed. (E-4)

Precedent followed:

1. T Sudhakar Prasad Vs Govt of A.P. & ors., (2001) 1 SCC 516 (Para 14)

2. Dr. P.V. Jaganmohan Vs U.O.I. Service Bench No. 1793 of 2013, decided on 30.05.2014 (Para 14)

3. Dr. Harish Kumar Vs S.C. Gairola & ors., Writ Petition (S/B) No. 590 of 2018, decided on 20.12.2018 (Para 14)

4. Santosh Kumar Srivastava Vs The Managing Director, U.P. Rajiya Nirman Nigam Ltd. & ors., (2001) 1 UPLBEC 642 (Para 29)

5. Kapildeo Prasad Sah & ors. Vs St. of Bihar, (1999) 7 SCC 569 (Para 30)

6. Jhareswar Prasad Paul & anr. Vs Tarak Nath Ganguly & ors., 2002 CRI. L.J. 2935 (Para 31)

7. Director of Education, Uttaranchal & ors. Vs Ved Prakash Joshi & ors., 2005 CRI. L.J. 3731 (Para 32)

8. V.K. Majotra Vs U.O.I. & ors., AIR 2003 SC 3909 (Para 36)

Precedent distinguished:

1. L. Chandra Kumar Vs U.O.I. (1997) 3 SCC 261 (Para 15, 26)

2. Delhi Judicial Service Association, Tis Hazari Court, Delhi Vs St. of Guj. & ors., (1991) 4 SCC 406 (Para 15)

3. Sujitendra Nath Singh Roy Vs St. of W.B., 2015 AIR SCW 1833 (Para 15)

Present petition assails order dated 03.12.2021, passed by Central Administrative Tribunal, Allahabad Bench, Allahabad.

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Vikas Budhwar, J.)

1. Heard Sri Bashist Tiwari, learned counsel assisted by Sri Rajesh Kumar, learned counsel for the petitioner, Sri Vivek Kumar Singh, who has accepted notice on

behalf of the respondent no.1-Union of India.

2. In view of the order which is being proposed to be passed today there is no need to issue notice to the respondent nos.2 to 5.

3. This is a petition under Article 226 of the Constitution of India instituted by the petitioner seeking following reliefs:-

"(i) To issue writ order or direction in the nature of certiorari quashing the impugned order dated 03.12.2021 passed by Central Administrative Tribunal, Allahabad Bench, Allahabad in Civil Misc. Contempt Petition No.330/00070 of 2010, Pankaj Dhar Dubey v. U.C. Dwadas Shreni and Others (Annexure No.1 to the writ petition) arising out of order dated 06.12.2006 passed by Central Administrative Tribunal, Allahabad Bench, Allahabad in Original Application No.509 of 2004, Pankaj Dhar Dubey v. Union of India and Others (Annexure No.9 to the writ petition).

(ii) To issue writ order or direction in the nature of mandamus commanding and directing the respondents to give promotion to the petitioner on the post of Lab Assistant in scale of Rs.530-610/- in pursuance of Railway Board's Letter dated 21.01.1984 (Annexure No.3 to the writ petition)

(iii) To issue writ order or direction in the nature of mandamus directing the Central Administrative Tribunal, Allahabad Bench, Allahabad/respondent No.5 to decide the case by constituting a bench of two judicial members.

(iv) To issue writ order or direction in the nature of declaration declaring Section 46 of the Constitution (Forty-second Amendment) Act, 1976 by which Article 323A has been inserted in the Constitution of India (Annexure No.15 to the writ petition) and Section 5(2) and 5(4) of the Administrative Tribunals Act, 1985 (Annexure No.16 to the writ petition) as unconstitutional and ultra vires and struck down the same being violative of Articles 50 and 368 of the Constitution of India and against the basic structure of Constitution of India."

4. On 16.05.2022 following order was passed:-

"On being confronted with the preliminary objection raised by Sri Vivek Kumar Singh, learned counsel appearing for Union of India that the present writ petition against the order dropping the contempt proceedings is not maintainable, Sri Bashist Tiwari, learned counsel for the petitioner although sought to argue on the issue of preliminary objection, however, after some argument he prays that the matter may be adjourned for today and may be listed as fresh after one week so as to enable him to further prepare the matter.

Since this is a nominated matter, therefore, put up this case as fresh on 25th May, 2022, at 2:00 P.M. for which learned counsel for the parties have agreed.

It is made clear that in case learned counsel for the parties are not present, this Court shall proceed to consider and decide the matter on merits."

5. Perusal of the reliefs as sought in the present writ petition it will reveal that the petitioner has insisted that this Court

may issue a writ, order or direction in the nature of certiorari quashing the order dated 03.12.2021, passed by Central Administrative Tribunal, Allahabad Bench, Allahabad (5th Respondent) in Civil Misc. Contempt Petition No.330/00070 of 2010 in Original Application No.330/00509 of 2004 (Pankaj Dhar Dubey vs. U.C. Dwadas Shreni and two Others) whereby the contempt petition so preferred by the petitioner herein was consigned to record and the notices were discharged on the ground that there had been no willful disobedience on the part of the alleged contemnors, who were joined as opposite parties in the above noted contempt petition. Further relief is also being sought directing the respondents herein to give promotion to the petitioner on the post of Lab Assistant in the pay scale of Rs.530-610/- in pursuance of the Railway Board's Letter dated 21.01.1984 and to further declare Section 46 of the Constitution of India (42nd Amendment) Act, 1976 by which Article 323A has been inserted in the Constitution of India and Sections 5(2) and 5(4) of the Administrative Tribunals Act, 1985 as unconstitutional, ultra vires and struck down the same being violative of Articles 50 and 368 of the Constitution of India.

6. Factual matrix of the case as worded in the present writ petition are that the petitioner claims himself to be engaged as Substitute Science Bearer in the pay scale of Rs.2550-3200/- by virtue of the order dated 25.01.2000 passed by the Assistant Personnel Officer, Headquarters, North Eastern Railway, Gorakhpur. Alleging disparity and differential treatment the petitioner filed Original Suit No.1136 of 2003, Pankaj Dhar Dubey vs. Union of India and Others, before the Central Administrative Tribunal, Allahabad Bench, Allahabad (5th respondent) seeking a direction to be promoted as Lab Assistant in the pay scale of Rs.530-610/-(pre-revised) in pursuance of the Railway Board's Letter dated 21.01.1984. The Original Application so preferred by the petitioner herein came to be decided by the 5th respondent by virtue of the order dated 23.09.2003 while granting liberty to the petitioner to file a fresh representation raising his grievances and the same was directed to be considered by the Railways. The petitioner has further come up with the case that on 17.12.2004 the petitioner was granted temporary status with effect from 23.05.2000 and by virtue of the order dated 28.02.2005 the petitioner was posted as Chaukidar in the pay scale of Rs.2500-3200/- in the Telecommunication Department of Railways.

7. The petitioner herein has further averred that he had instituted Original Application No.509 of 2004 before the 5th respondent being Pankaj Dhar Dubey vs. Union of India and Others seeking following reliefs:-

"(i) To issue an order or direction setting aside the order dated 22.12.2003 passed by C.P. Office, N.E. Railway, Gorakhpur.

(ii) To issue an order or direction commanding the respondents to give promotion to the applicant as Lab Assistant in the scale of Rs.530-610/- in pursuance of Railway Board's letter dated 21.01.1984 after regularizing the applicant in scale of Rs.2550-3200 in Boys Inter College, N.E. Railway, Gorakhpur.

(iii) To issue an order or direction commanding the respondents to give seniority, arrears of salary for

difference of pay for the post of Science Bearer and Lab Assistant after completion of one year service from the date of his appointment excluding four months' period."

8. Record reveals that the Original Application No. 509 of 2004 so instituted by the petitioner herein came to be disposed of by Central Administrative Tribunal, Allahabad Bench, Allahabad on 06.12.2006 with the following directions:-

"8. In the result, the O.A. Is finally disposed of with a direction to the respondents to consider the case of the applicant for promotion to the post of Lab Assistant in the School run by the N.E.R., if there is vacancy and if the applicant is otherwise found suitable under the relevant Rules within a period of six months from the date of certified copy of this order is produced before them. The order dated 22.12.2003 (Annexure-1) is rendered ineffective and will not come in the way of such consideration for promotion. No order as to costs."

9. The petitioner herein has further averred in paragraph 13 of the writ petition that a review application was preferred by the Railways against the order dated 06.12.2006, which was dismissed by the 5th respondent on 10.12.2007 as time barred. The records further reveal that the Railways preferred Writ Petition No.16050/2008 which was dismissed on 27.03.2008. The operative portion of the order is being quoted herein as under:-

"1. Contesting respondent, Pankaj Dhar Dubey, was appointed on casual basis by the petitioners. He filed an Original Application No. 1136 of 2003 before the Central Administrative Tribunal, Allahabad Bench, Allahabad for his regularization. This was disposed of on 23rd day of September, 2003 directing the petitioners to decide the case of contesting respondent. Petitioners rejected the case of contesting respondent for regulation by the order dated 22nd December, 2003. Contesting respondent filed another Original Application No. 509 of 2004 challenging the order dated 22nd December, 2003, wherein he prayed that he should be regularized as well as promoted to the post of Lab Assistant. During the pendency of the said application, contesting respondent was regularized on Group D post. The Central Administrative Tribunal by its order dated 6th day of December, 2006 has directed the petitioners to reconsider the promotion of contesting respondent. Hence this writ petition.

2. We have hear learned counsel for the petitioners and Sri Bashist Tiwari, learned counsel for the contesting respondent.

3. Learned Central Administrative Tribunal under the impugned judgment has sent back the matter to the petitioners for reconsider of the case of the contesting respondent for promotion. Needless to add, this consideration has to be done in accordance with law.

4. In view of the aforesaid, we see no justification to interfere in the matter.

5. This writ petition is dismissed with the aforesaid observations."

10. In the meantime, it appears that a contempt petition was also instituted by the petitioner herein in which the following order was passed:-

"1. Sri A.V. Srivastava, learned counsel for the respondents has stated at the outset that he has filed Review Application prior to filing of Review Application against the order passed in Original Application. Sri B. Tiwari, learned counsel for the applicant states that the said Review Application has been dismissed on the ground of limitation and as such the order of this Tribunal ought to have been complied by the respondents in true spirit.

2. Having heard the counsel for the parties, we are satisfied that ends of justice would be met if the respondents are directed to ensure the compliance of the order of this Tribunal passed in the O.A. within a period of three months from the date of receipt of a certified copy of this order. In case the compliance is not done within three months, it would be open to the applicant to file fresh contempt petition.

3. In view of the above, the CCP is dismissed. Notices are discharged."

11. Records further reveal that the petitioner herein also instituted an Execution Application under Section 27 of the Administrative Tribunals Act, 1985 for execution of the judgment and the order dated 06.12.2006 in which on 18.11.2009 the following order was passed :-

"1. MA (Execution) No. 12 of 2008 : Heard learned counsel for the parties.

2. Applicant filed OA No. 509 of 2004 praying for direction to set aside order dated 22.12.2003 passed by C.P. Office, N.E. Railway, Gorakhpur, to issue an order/direction commanding the respondents to give promotion to the applicant as Lab. Assistant in the scale of Rs. 530-610/- in pursuance to Railway Board's letter dated 21.1.1984 after regularizing the applicant in scale of Rs. 2550-3200/- in Boys Inter College, N.E. Railway, Gorakhpur and for direction commanding the respondents to give seniority, arrears of salary for difference of pay for the post of 'Science Bearer' and Lab Assistant etc. Tribunal vide order dated 06.12.2006, decided OA No. 509 of 2004. Para 5 and 7 of the Tribunal order dated 6.12.2006 is reproduced below :-

"5. We have considered the respective arguments in the context of the applicant's claim for promotion to the post of Lab Assistant. He appears to be correct on the point that the posts of Lab Assistant were created vide letter dated 6.9.1984 (Annexure-9) of General Manager (P) for Boys High School, Gorakhpur, run by N.E.R. There is no clear cut denial from the side of the respondents of the factum of creation of posts of Lab Assistant. The reply does not say that the said posts were subsequently abolished or surrendered or kept in abeyance. Though there is such plea in respect of the post of Science Bearer, which the applicant was holding before 20.1.2003. So to the extent the order dated 22.12.2003 (Annexure-1) says that there are no posts of Lab Assistant in the School run by N.E.R. does not appear to be correct.

7. Sri Srivastava may be correct in saying that the casual worker or worker with temporary status before regularization may not be eligible for promotion to the post of Lab Assistant. As on today, the applicant stands regularized in Group 'D' as Chowkidar, but in a different unit named Signal Communication Microwave. The question is as to whether a Group 'D'

employees of this unit will be eligible for promotion to the post of Lab Assistant in the school, run by the N.E.R. The letter dated 21.1.1984 alone does not appear to be sufficient to decide the question as it can be construed both ways. No doubt, para 2 of the letter dated 21.1.1984 does not say that such Group 'D' employees should be of Laboratory or of the School run by the N.E.R. Or of a particular unit. But then the Railways is a big organization divided into different division/units so without knowing the detailed scheme for filling up the post of Lab Assistant in the school of N.E.R., it is difficult to pronounce whether regular Group 'D' employee of a unit, different to the unit where such vacancies may exist, will or will not be eligible for such promotion. We leave it to the authorities concerned to decide the same in the light of the relevant Rules on the subject."

3. A statement is made at the bar that the respondents challenged said order by filing Writ Petition in Allahabad High Court which was dismissed; Contempt Petition against respondent has also been dismissed.

4. Present Execution Application has been filed seeking Execution of the order of Tribunal dated 6.12.2006 (referred to above). The applicant has himself filed copy of order dated 25.4.2008 titled 'Speaking Order', communicated through department letter dated 25.04.2008 (Annexure-5 to the Execution Application). The relevant extract of the said order reads :-

".....I find that at present the applicant belongs to Signal and Telecom department whereas the post of Lab Asst. which was earlier belonging to Railway School is not existing at present as such his claim is not considerable."

5. Perusal of the said order shows that observations made in para no. 7 of the Tribunal order (quoted above) have not been taken into account.

6. In view of the above said speaking order dated 25.04.2008 is set aside with direction to the concerned respondent authority to pass fresh orders (within three months of receipt of certified copy of this order) and comply with order of Tribunal dated 21.12.2003 in O.A. No. 509 of 2004.

7. Execution Application No. 12 of 2008 is disposed of subject to above observations."

12. Eventually, by virtue of the order dated 25.04.2008, the matter pertaining to the promotion of the petitioner was found not in favour of the petitioner herein and accordingly a speaking order was passed by respondent-General Manager North Eastern Railway, Gorakhpur. Thereafter the petitioner herein preferred a Contempt Application No. 70 of 2010 before the 5th Respondent on which on 09.11.2010 notices were issued requiring passing of a conditional order for framing of the charges in case the order passed in Original Application No.509 of 2004 (Pankaj Dhar Dubey vs. Union of India and Others) is not complied with. The said sequence of event occasioned the Railways to prefer Writ-A No.72926 of 2010 (Union of India vs. Pankaj Dhar Dubey and Another) before this Court, which came to be dismissed by this Court on 17.08.2017. The operative portion of the said order is being quoted as under:-

"(23) Further, as observed hereinabove, once the Tribunal itself had issued directions on 22.01.2008 for ensuring the orders for compliance in the contempt to jurisdiction and leaving it open to the respondent no. 1 to file a fresh Contempt Application in the event of non-compliance vide judgment dated 22nd January, 2008, we see no reason over and above the reasons indicated hereinabove as to why the respondent no. 1 could not have filed the Contempt Application when he alleges the order dated 24th February, 2010 to be a contemptuous order which is yet to be examined in the proceedings before the Tribunal.

(24) The Contention raised on merits as to whether the orders of the Tribunal were being capable of complied with or not, is a matter of defence but that by itself cannot be a ground to treat the proceedings initiated under Section 17 to be without jurisdiction or unfounded.

(25) Consequently, for all the aforesaid reasons and the facts in the present case that have emerged, we do not find this to be a case to invoke our extra-ordinary jurisdiction under Article 226 of the Constitution of India or our supervisory jurisdiction under Article 227 thereof so as to preempt the proceedings of contempt on the mere issuance of the notices to the officials of the petitioners."

13. Now by virtue of the order dated 03.12.2021 passed in Civil Misc. Contempt Petition No.330/00070 of 2010 in Original Application No.330/00509 of 2004 (Pankaj Dhar Dubey vs. U.C. Dwadas Shreni and two Others) the same has been consigned to record and notices so issued to the respondents herein have been discharged.

14. Sri Vivek Kumar Singh, learned counsel for the respondent no.1-Union of India, at the very outset, has raised a preliminary objection regarding maintainability of the present writ petition before this Court on the ground that the order which is being impugned in the present proceedings is an order discharging the alleged contemnors and not proceeding against them, against which no writ petition under Article 226/227 of the Constitution of India lies before this Court. In order to buttress his submission he has cited the following judgments:-

(A) T. Sudhakar Prasad vs. Government of A.P. And Others, (2001) 1 SCC 516

(B) Service Bench No.1793 of 2013 (Dr. P.V. Jaganmohan vs. Union of India), decided on 30th May, 2014.

(c) Writ Petition (S/B) No.590 of 2018 (Dr. Harish Kumar vs. Dr. S.C. Gairola and Others), decided on 20.12.2018

15. On the other hand, Sri Bashist Tiwari, learned counsel for the petitioner has cited the following judgments in order to substantiate his argument that the writ petition lies before this Court in the proceeding under Article 226/227 of the Constitution of India even against the order wherein the contemnors are discharged:-

(**A) L.Chandra Kumar vs. Union of India (1997) 3 SCC 261**

(B) T. Sudhakar Prasad (supra)

(c) Delhi Judicial Service Association, Tis Hazari Court, Delhi vs.

State of Gujarat and Others (1991) 4 SCC 406

(D) Sujitendra Nath Singh Roy vs. State of West Bengal, 2015 AIR SCW 1833

16. Sri Tiwari, learned counsel for the petitioner has sought to argue that in view of the mandate as contained in the judgment of **L. Chandra Kuma**r (supra), this Court in exercise of jurisdiction as envisaged under Article 226/227 of the Constitution of India can entertain not only the writ petition so preferred against the order passed by the Central Administrative Tribunal under Section 17 of the Central Administrative Tribunal Act, 1985 but also punish the contemnors in that regard. According to Sri Tiwari, learned counsel for the petitioner the plenary powers so attached to Article 226 of the Constitution of India nowhere puts any embargo or restricts the scope of Article 226 of the Constitution of India so as to denude itself from examining the validity of an order passed by the Central Administrative Tribunal when the Central Administrative Tribunal abstains itself from exercising the powers as conferred under Section 17 of the Administrative Tribunal Act, 1985. Sri Tiwari has further argued that the power so conferred under Article 226/227 of the Constitution of India cannot be negated or circumscribed even by a constitutional amendment as the High Court in exercise of the jurisdiction under Article 226/227 of the Constitution of India can eliminate the contingency of any injustice/illegality so sought to be committed therein and the power of judicial superintendence is always available with it.

17. Sri Tiwari, learned counsel for the petitioner has further drawn the attention of the Court towards the judgment of T. Sudhakar Prasad (supra) so as to further contend that in the matter of exercise of contempt jurisdiction, if any material irregularity is being committed by the Central Administrative Tribunal then it can be always put to naught and the same can obviously be rectified at the stage of the proceedings under Article 226/227 of the Constitution of India. In nutshell, the submission of the learned counsel for the petitioner is to the extent that the writ petition is maintainable before this Court in case of any order so passed by the Central Administrative Tribunal denuding the exercise of contempt jurisdiction.

18. Sri Vivek Kumar Singh, learned counsel for the Union of India has argued that now the issue with regard to the maintainability of the proceedings under Article 226/227 of the Constitution of India against the orders discharging the contemnors and not proceeding against them is no more res integra as in view of the judgments of the Hon'ble Apex Court in **T. Sudhakar Prasad (**supra) as well as in the case of **Dr. P.V. Jaganmohan** (supra) and **Dr. Harish Kumar** (supra), the writ petition does not lie before this Court against the order whereby notices are discharged and the contempt proceedings are dropped by the Central Administrative Tribunal.

19. We have carefully considered the submissions so made by the learned counsel for the parties and have perused the records and we find that the present case does not necessitate the occasion to seek response from the respondents and with the consent of the learned counsel for the parties the present petition is being decided accordingly.

20. The Parliament of India in exercise of powers so conferred therein in

order to provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with affairs of Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of [any corporation or society owned or controlled by the Government in pursuance of Article 323-A of the Constitution] and for matters connected therewith or incidental thereto enacted an Act by the name and nomenclature of the Administrative Tribunals Act, 1985. Section 17 which deals with the provisions pertaining to contempt which is being quoted in extenso:-

*"**17. Power to punish for contempt**.--A Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971 (70 of 1971), shall have effect subject to the modifications that--*

(a) the references therein to a High Court shall be construed as including a reference to such Tribunal;

(b) the references to the Advocate-General in section 15 of the said Act shall be construed,--

(i) in relation to the Central Administrative Tribunal, as a reference to the Attorney-General or the Solicitor-General or the Additional Solicitor-General; and

(ii) in relation to an Administrative Tribunal for a State or a Joint Administrative Tribunal for two or more States, as a reference to the Advocate-General of the State or any of the States for which such Tribunal has been established."

21. As a matter of fact the Parliament has also enacted an Act by the name and nomenclature of the Contempt of Courts Act, 1971, which also contains various provisions pertaining to initiation of contempt proceedings and culminating them to its terminus point. The issue with regard to the different facet of the Central Administrative Tribunal Act, qua its establishment, constitution and its jurisdiction was subject matter of challenge before the Hon'ble Apex Court in the case of L. Chandra Kumar (supra) wherein the Constitution Bench of the Hon'ble Apex Court in paragraph nos.90, 93, 94, 95, 96, 97, 98 and 99 has observed as under:-

"90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Article 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the

consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.

94. The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceedings, we have invoked the doctrine of prospective over-ruling so as not to disturb the procedure in relation to decisions already rendered.

95. We are also required to address the issue of the competence of those who man the Tribunals and the question of who is to exercise administrative supervision over them. It has been urged that only those who have had judicial experience should be

appointed to such Tribunals. In the case of Administrative Tribunals, it has been pointed out that the administrative members who have been appointed have little or no experience in adjudicating such disputes; the Malimath Committee has noted that at times, IPS Officers have been appointed to these Tribunals. It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting-up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass-roots experience would best serve this purpose. To hold that the Tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that administrative members are chosen from amongst those who have some background to deal with such cases.

96. It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem. We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction. If the idea is to divest the High Courts of their onerous burdens, then adding to their supervisory functions cannot, in any manner, be of assistance to them. The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by Parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set-up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire

system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds arc allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

97. The suggestions that we have made in respect of appointments to Tribunals and the supervision of their administrative function need to be considered in detail by those entrusted with the duty of formulating the policy in this respect. That body will also have to take into consideration the comments of experts bodies like the LCI and the Malimath Committee in this regard. We, therefore, recommend that the Union of India initiate action in this behalf and after consulting all concerned, place all these Tribunals under one single nodal department, preferably the Legal Department.

98. Since we have analysed the issue of the constitutional validity of Section 5(6) of the Act at length, we may no pronounce our opinion on this aspect. Though the vires of the provision was not in question in Dr. Mahabal Ram's case, we a believe that the approach adopted in that case, the relevant portion of which has been extracted in the first part of this judgment, is correct since it harmoniously resolves the manner in which Sections 5(2) and 5(6) can operate together. We wish to make it clear that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a single Member Bench of the Administrative Tribunal, the proviso toSection 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that questions involving the vires of a statutory provision or rule will never arise for adjudication before a single Member Bench or a Bench which does not consist of a Judicial Member. So construed, Section 5(6) will no longer be susceptible to charges of unconstitutionality.

99. In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules.

All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

22. Yet in the case of **T. Sudhakar Prasad** (supra) the Hon'ble Apex Court had the occasion to consider the proceedings relating to contempt jurisdiction of the Central Administrative Tribunal, wherein the Hon'ble Apex Court in paragraph nos.16 and 17 has observed as under:-

"16. The Constitution Bench invoked the doctrine of prospective overruling and made its directions to come into effect prospectively, i.e., from the date of its judgment.

17. It is thus clear that the Constitution Bench has not declared the provisions of Article 323-A (2)(b) or Article 323-B(3)(d) or Section 17 of the Act ultra vires the Constitution. The High Court has, in its judgment under appeal, noted with emphasis the Tribunal having been compared to like courts of first instance and then proceeded to hold that the status of Administrative Tribunals having been held to be equivalent to court or tribunals subordinate to High Court the jurisdiction to hear their own contempt was lost by the Administrative Tribunals and the only course available to them was either to make a reference to High Court or to file a complaint under Section 193, 219 and 228 of IPC as provided by Section 30 of the Act. The High Court has proceeded on the reasoning that the Tribunal having been held to be subordinate to the High Court for the purpose of Articles 226/227 of the Constitution and its decisions having been subjected to judicial review jurisdiction of the High Court under Articles 226/227 of the Constitution the right to file an appeal to the Supreme Court against an order passed by the Tribunal punishing for contempt under Section 17 of the Act was defeated and on these twin grounds Section 17 of the Act became unworkable and unconstitutional. We do not find any basis for such conclusion or inference being drawn from the judgments of this Court in the cases of Supreme Court Bar Association (supra) or L. Chandra Kumar (supra) or any other decision of this Court. The Constitution Bench has in so many words said that the jurisdiction conferred on the High Courts under Articles 226/227 could not be taken away by conferring the same on any court or Tribunal and jurisdiction hitherto exercised by the High Court now legislatively conferred on Tribunals to the exclusion of High Court on specified matters, did not amount to assigning tribunals a status of substitute for the High Court but such jurisdiction was capable of being conferred additionally or supplementally on any Court or Tribunal which is not a concept strange to the scheme of the Constitution more so in view of Articles 323-A and 323-B. Clause (2)(b) of Article 323-A specifically empowers the Parliament to enact a law specifying the jurisdiction and powers, including the power to punish for contempt, being

conferred on administrative tribunals constituted under Article 323-A. Section 17 of the Act derives its legislative sanctity therefrom. The power of the High Court to punish for contempt of itself under Article 215 of the Constitution remains intact but the jurisdiction power and authority to hear and decide the matters covered by sub-section (1) of Section 14 of the Act having been conferred on the administrative tribunals the jurisdiction of the High Court to that extent has been taken away and hence the same jurisdiction which vested in the High Court to punish for contempt of itself in the matters now falling within the jurisdiction of tribunals if those matters would have continued to be heard by the High court has now been conferred on the administrative tribunals under Section 17 of the Act. The jurisdiction is the same as vesting in the High Courts under Article 215 of the Constitution read with the provisions of the Contempt of Courts Act, 1971. The need for enacting Section 17 arose, firstly, to avoid doubts, and secondly, because the Tribunals are not courts of record. While holding the proceedings under Section 17 of the Act the tribunal remains a tribunal and so would be amenable to jurisdiction of High Court under Article 226/227 of the Constitution subject to the well-established rules of self- restraint governing the discretion of the High Court to interfere with the pending proceedings and upset the interim or interlocutory orders of the tribunals. However any order or decision of tribunal punishing for contempt shall be appealable only to the Supreme Court within 60 days from the date of the order appealed against in view of the specific provision contained in Section 19 of the Contempt of Courts Act, 1971 read with Section 17 of the Administrative Tribunals Act, 1985. Section 17 of Administrative Tribunals Act is a piece of legislation by reference. The provisions of Contempt of Courts Act are not as if lifted and incorporated in the text of Administrative Tribunals Act (as is in the case of legislation by incorporation); they remain there where they are yet while reading the provisions of Contempt of Courts Act in the context of Tribunals, the same will be so read as to read the word Tribunal in place of the word High Court wherever it occurs, subject to the modifications set out in Section 17 of the Administrative Tribunals Act. Section 19 of the Contempt of Courts Act, 1971 provides for appeals. In its text also by virtue of Section 17 of the Administrative Tribunals Act, 1985 the word High Court shall be read as Tribunal. Here, by way of abundant caution, we make it clear that the concept of intra-tribunal appeals i.e. appeal from an order or decision of a member of a Tribunal sitting singly to a bench of not less than two members of the Tribunal is alien to the Administrative Tribunals Act, 1985. The question of any order made under the provisions of the Contempt of Courts Act, 1971 by a member of the Tribunal sitting singly, if the rules of business framed by the Tribunal or the appropriate government permit such hearing, being subjected to an appeal before a Bench of two or more members of Tribunal therefore does not arise. Any order or decision of the Tribunal punishing for contempt is appealable under Section 19 of the Act to the Supreme Court only. The Supreme Court in the case of L. Chandra Kumar has nowhere said that orders of tribunal holding the contemnor guilty and punishing for contempt shall also be subject to judicial scrutiny of High Court under Article 226/227 of the Constitution in spite of remedy of statutory appeal provided by Section 19 of the Contempt of Courts Act being available.

The distinction between orders passed by Administrative Tribunal on matters covered by Section 14 (1) of Administrative Tribunals Act and orders punishing for contempt under section 19 of the Contempt of Courts Act read with Section 17 of Administrative Tribunals Act, is this : as against the former there is no remedy of appeal statutorily provided, but as against the later statutory remedy of appeal is provided by Section 19 of Contempt of Courts Act itself."

23. Notably a Division Bench of this Court sitting at Lucknow had the occasion to consider the issue regarding the maintainability of writ proceedings under Article 226/227 of the Constitution of India in the matters wherein challenge was laid to the orders whereby the Central Administrative Tribunal did not proceed with the contempt and discharged the contemnors despite the allegations of the applicant therein that the orders put to compliance were not complied with.

24. In the case of **Dr. P.V. Jaganmohan** (supra) the Division Bench of this Court has observed as under:-

*".....In **T. Sudhakar Prasad** case (supra), the facts were that a contempt application was moved invoking the contempt jurisdiction of Andhra Pradesh Administrative Tribunal under Section 17 of the Act seeking initiation of proceedings against the Principal Secretary, Irrigation and CAD Department, alleging therein that there was willful disobedience by the contemner of an order passed by the Tribunal in favour of the applicant. The Tribunal initiated the proceedings. The State of Andhra Pradesh and the Principal Secretary filed a writ petition (CWP No. 34841 of 1997) in the High Court of Andhra Pradesh laying challenge to the jurisdiction of the Tribunal to take cognizance of the contempt case. In another matter, an application was also moved invoking contempt jurisdiction of the High Court, without approaching the Tribunal under Section 17 of the Act, and complaining of willful disobedience of an order passed by the Andhra Pradesh Administrative Tribunal. In both the matters, question arose as to whether such proceedings were appropriately maintainable before the High Court or the Administrative Tribunal. The issue has been disposed of by a Division Bench of the Andhra Pradesh High Court holding therein that in view of the decision rendered by the Supreme Court in **L. Chandra Kumar v. Union of India [(1997) 3 SCC 261 : 1997 SCC (L&S) 577],** Section 17 of the Administrative Tribunals Act, 1985 does not survive and consequently, the Administrative Tribunals set up under the Administrative Tribunals Act, 1985 cannot exercise the contempt jurisdiction under Section 17 of the said Act, as the same had become non est under law. The contempt proceedings before the Administrative Tribunal are set aside as being devoid of jurisdiction and the applicants were at liberty to initiate contempt proceedings by following the procedure as applicable to the contempt of subordinate courts provided under the provisions of the Contempt of Courts Act, 1971 and the rules framed thereunder by the Andhra Pradesh High Court. In other contempt application, same view was taken. The said order of the High Court was put to challenge before the apex court and the apex court in Para-16 of the said judgment held as under:*

.....

In the aforesaid case, the apex court found that where the remedy of statutory appeal is provided, the appeal

shall lie before the Supreme Court only and a categorical finding has been recorded to the effect that any order or decision of the Tribunal punishing for contempt is appealable under Section 19 of the Act to the Supreme Court only. The reliance placed by the learned counsel for the petitioner upon T. Sudhakar Prasad case (supra) is only in respect of the words "while holding the proceedings under Section 17 of the Act the Tribunal remains a Tribunal and so would be amenable to the jurisdiction of the High Court under Articles 226/227 of the Constitution subject to the well-established rules of self-restraint governing the discretion of the High Court to interfere with the pending proceedings and upset the interim or interlocutory orders of the Tribunals."

The twin conditions have been taken into consideration and a particular portion of the judgment being relied upon by the counsel for the petitioner is wholly misconceived. Judgment has to be read as a whole and if the judgment is read as a whole, then the only outcome would be that, for punishing for contempt, appeal would be maintainable before the Supreme Court.

In a later case of ***R.Mohajan*** *(supra), the appellants were not fully implementing the orders, therefore, the Tribunal, vide order dated 23-3-2010, directed for issuance of Rule 8 notice to the contemnors/appellants returnable within two months and directed to list the matter for orders on 3-5-2010. On 30-3-2010, counsel for the contemnors/appellants appeared before the Tribunal and placed on record various documents to show that the orders have been complied with. Not satisfied with the report filed by the Department, the Tribunal passed the order dated 11-6-2010 directing the contemnors/appellants to present before it to receive charges of contempt and adjourned the matter for 30-7-2010. Against the said order, the contenmors preferred an appeal. The apex court taking into consideration* ***L. Chandra Kumar*** *case (supra) and T****. Sudhakar Prasad*** *case (supra), came to the conclusion that the appeal was very much maintainable before the Supreme Court and in Para-9 of the said judgment, it was held as under:*

"9. In view of the clarification by the three-Judge Bench of this Court in T. Sudhakar Prasad (supra), we reject the objection as to the maintainability of the present appeal and hold the same as maintainable."

So it is clear from the above finding that not only in respect of punishment under the Contempt of Courts Act, but also in respect of interlocutory orders, the appeal has been found to be maintainable by the apex court.

More or less similar question arose before the Supreme Court as to what will be position where a contemner has been discharged from contempt proceedings by the High Court. If the proceedings have been dropped under the Contempt of Courts Act, then whether the appeal would be maintainable before the Division Bench of the High Court as provided under Section 19 of the Contempt of Courts Act or the Special Leave Petition would be maintainable under Article 136 of the Constitution of India.

In the case of ***Mahboob S. Allibho****y (supra), the facts were that contempt notice was issued and ultimately the proceedings for contempt were dropped*

against the contemners. In connection with the said dispute, a notice was issued to the contemners as to why a complaint be not filed against them under Sections 191, 192, 209 and 210 of the Indian Penal Code. The said order was subjected to challenge before the apex court. The apex court found that no appeal would be maintainable against the order dropping proceeding for contempt or refusing to initiate the proceeding for contempt, which is apparent not only from sub-section (1) of Section 19 but also from sub-section (2) of Section 19 which provides that pending any appeal the appellate court may order that if the appellant is in confinement, he be released on bail and the appeal be heard notwithstanding that the appellant has not purged his contempt. While considering the maintainability of the appeal, it was held in the following form:

"4.....This Court in the case of Baradakanta Mishra v. Justice Gatikrushna Misra, C.J. of the Orissa H.C., AIR 1974 SC 2255 : (1975) 1 SCR 524, said: ...Where the court rejects a motion or a reference and declines to initiate a proceeding for contempt, it refuses to assume or exercise jurisdiction to punish for contempt and such a decision cannot be regarded as a decision in the exercise of its jurisdiction to punish for contempt. Such a decision would not, therefore, fall within the opening words of Section 19, sub-section (1) and no appeal would lie against it as of right under that provision.

Again in the case of D.N. Taneja v. Bhajan Lal [(1988) 3 SCC 26, it was said: "The right of appeal will be available under sub-section (1) of Section 19 only against any decision or order of a High Court passed in the exercise of its jurisdiction to punish for contempt. In this connection, it is pertinent to refer to the provision of Article 215 of the Constitution which provides that 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. Article 215 confers on the High Court the power to punish for contempt of itself. In other words, the High Court derives its jurisdiction to punish for contempt from Article 215 of the Constitution. As has been noticed earlier, an appeal will lie under Section 19(1) of the Act only when the High Court makes an order or decision in exercise of its jurisdiction to punish for contempt. It is submitted on behalf of the respondent and, in our opinion rightly, that the High Court exercises its jurisdiction or power as conferred on it by Article 215 of the Constitution when it imposes a punishment for contempt. When the High Court does not impose any punishment on the alleged contemnor, the High Court does not exercise its jurisdiction or power to punish for contempt. The jurisdiction of the High Court is to punish. When no punishment is imposed by the High Court, it is difficult to say that the High Court has exercised its jurisdiction or power as conferred on it by Article 215 of the Constitution."

No appeal is maintainable against an order dropping proceeding for contempt or refusing to initiate a proceeding for contempt is apparent not only from sub-section (1) of Section 19 but also from sub-section (2) of Section 19 which provides that pending any appeal the appellate court may order that-

(a) the execution of the punishment or the order appealed against be suspended;

(b) if the appellant is in confinement, he be released on bail; and

(c) the appeal be heard notwithstanding that the appellant has not purged his contempt.

Sub-section (2) of Section 19 indicates that the reliefs provided under clauses (a) to (c) can be claimed at the instance of the person who has been proceeded against for contempt of court.

5. But even if no appeal is maintainable on behalf of the person at whose instance a proceeding for contempt had been initiated and later dropped or whose petition for initiating contempt proceedings has been dismissed, he is not without any remedy. In appropriate cases he can invoke the jurisdiction of this Court under Article 136 of the Constitution and this Court on being satisfied that it was a fit case where proceeding for contempt should have been initiated, can set aside the order passed by the High Court. In suitable cases, this Court has to exercise its jurisdiction under Article 136 of the Constitution in the larger interest of the administration of justice."

So the question regarding the maintainability of the writ petition against the discharge of contempt proceedings as held in the above case, the apex court has ruled that the appeal would be maintainable against an order discharging the contemner from contempt proceedings.

In the case of Smt. R.S. Sujatha (supra), the Tribunal issued contempt notice and ultimately convicted the contemner upto the rising of the Court alonwith a fine of Rs.2000/-. The said order was challenged before the Division Bench of Karnataka High Court and the Division Bench of the Karnataka High Court placing reliance upon the case of T. Sudhakar Prasad (supra), came to the conclusion that the appeal would be maintainable before the Supreme Court in such circumstances. In Paragraphs-7 and 8 of the said judgment, the Court held as under:

"7. .....The first portion extracted above is relied on by the learned counsel for the petitioner and the second portion is relied on by the respondents. A careful reading of the decision of the Supreme Court makes it clear that once an order is passed by an Administrative Tribunal punishing a party for contempt, the remedy is only by way of appeal to the Supreme Court under Section 19 of Contempt of Courts Act, 1971 and not by seeking judicial review under Article 226/227 of the constitution. The observation that Tribunal would be amenable to the jurisdiction of the High Court under Article 226/227 of the constitution cannot be read in isolation. In fact similar observations are made in CHANDRA KUMAR also. The said observations should be read with the subsequent statement of law. The mere fact that the order imposing punishment for contempt is passed in violation of principles of natural justice or by not following the procedure contemplated under Section 17 of the AT Act read with the CC [CAT] Rules, would not, by itself, mean that instead of filing an appeal, the party aggrieved can challenge the order in a proceedings under Article 226/227 of the Constitution.

8. Though the order dated 19.12.2002 which is under challenge is passed in a proceedings initiated and pending under Section 19 of the AT Act, it is a final order in so far as the proceedings initiated for contempt are concerned. Therefore, it has to be held that an appeal

under Section 19 of the Contempt of Courts Act and not a writ petition under Article 226/227 of the Constitution of India is the remedy of the petitioner."

The legal position, which crystallizes from the case laws referred to hereinabove, is that against an order dropping/discharging contempt proceedings, the appeal would be maintainable before the apex court as it cannot be inferred that where no remedy of statutory appeal is provided, then jurisdiction can be created under Article 226/227 of the Constitution of India before the High Court. The conviction under Section 19 has to be considered in reference to the discharge proceedings and when the discharge order is without a remedy, then there is no provision for intra court appeal before the Tribunal or the rules framed therein.

The reasoning given in Mahboob S. Allibhoy case (supra) applies with full force in the present case, therefore, we hold that the writ petition against the discharge proceedings would not be maintainable and the appropriate remedy to the petitioner is to approach the apex court by way of appeal under Article 136 of the Constitution of India."

25. Further the High Court of Uttarakhand at Nainital in **Dr. Harish Kumar** (supra) had also the occasion to consider the maintainability of the writ petition wherein the contempt proceedings were dropped initiated from the orders passed by the Central Administrative Tribunal, wherein the Hon'ble Apex Court in paragraph nos.14, 17, 18, 19, 20, 21, 22, 23, 24 and 25 has observed as under:-

"14. In examining this question, it must be borne in mind that a contempt proceeding is not a dispute between two parties. The proceeding is, primarily, between the Court and the person who is alleged to have committed Contempt of Court. The person, who informs the court or brings to its notice that Contempt of such Court has been committed, does not stand in the position of a prosecutor. He simply assists the Court in ensuring that its dignity and majesty is maintained and upheld. It is for the Court which initiates the proceedings to decide, considering the facts and circumstances of the case, whether the person, against whom such proceeding has been initiated, should be punished or discharged [State of Maharashtra vs. Mahboob S. Allibhoy and another[5]]. As the petitioner is merely an informant, who has brought to the notice of the Court that its orders have been violated, he cannot claim to be a person aggrieved by the order passed by the Tribunal discharging the contemnors, and in refusing to punish them on the ground that no case of willful contempt has been made out.

17. A right of appeal is available under Section 19(1) only against any decision or order of a High Court passed in the exercise of its jurisdiction to punish for contempt. The High Court derives its jurisdiction to punish for contempt from Article 215 of the Constitution. Article 215 of the Constitution of India does not confer any new jurisdiction or status on the High Courts. It merely recognises that the High Courts are Courts of Record and, by virtue of being Courts of Record, have inherent jurisdiction to punish for contempt of themselves. Such inherent power to punish for contempt is summary. It is not governed or limited by any rule of procedure excepting principles of natural justice. The jurisdiction contemplated by Article 215 is

inalienable. It cannot be taken away or whittled down by any legislative enactment subordinate to the Constitution. The provisions of the Contempt of Courts Act, 1971 are in addition to and not in derogation of Article 215 of the Constitution. The provisions of the Contempt of Courts Act, 1971 cannot be used for limiting or regulating the exercise of jurisdiction contemplated by the said Article. (T. Sudhakar Prasad6). The High Court exercises its jurisdiction or power, as conferred on it by Article 215 of the Constitution, when it imposes a punishment for contempt. When it decides not to impose any punishment on the alleged contemnor, the High Court does not exercise its jurisdiction or power to punish for contempt. The jurisdiction of the High Court is to punish. When no punishment is imposed by the High Court, it is difficult to hold that the High Court has exercised its jurisdiction or power as conferred on it by Article 215 of the Constitution. [D.N. Taneja vs. Bhajan Lal[7]; Mahboob S. Allibhoy5].

18. On whether an appeal lies against the order of the Tribunal, punishing the respondents for contempt, the Supreme Court, in T. Sudhakar Prasad6, observed:

".....It is thus clear that the Constitution Bench has not declared the provisions of Article 323-A(2)(b) or Article 323-B(3)(d) or Section 17 of the Act ultra vires the Constitution. The High Court has, in its judgment under appeal, noted with emphasis the Tribunal having been compared to like 'courts of first instance' and then proceeded to hold that the status of Administrative Tribunals having been held to be equivalent to court or Tribunals sub-ordinate to High Court the jurisdiction to hear their own contempt was lost by the Administrative Tribunals and the only course available to them was either to make a reference to High Court or to file a complaint under Sections 193, 219 and 228 of IPC as provided by Section 30 of the Act. The High Court has proceeded on the reasoning that the Tribunal having been held to be subordinate to the High Court for the purpose of Articles 226/227 of the Constitution and its decisions having been subjected to judicial review jurisdiction of the High Court under Articles 226/227 of the Constitution the right to file an appeal to the Supreme Court against an order passed by the Tribunal punishing for contempt under Section 17 of the Act was defeated and on these twin grounds Section 17 of the Act became unworkable and unconstitutional. We do not find any basis for such conclusion or inference being drawn from the judgments of this Court in the cases of Supreme Court Bar Association vs. Union of India, (1998) 4 SCC 409, or L. Chandra Kumar, (1997) 3 SCC 261 or any other decision of this Court. The Constitution Bench has in so many words said that the jurisdiction conferred on the High Courts under Articles 226/227 could not be taken away by conferring the same on any court or Tribunal and jurisdiction hitherto exercised by the High Court now legislatively conferred on Tribunals to the exclusion of High Court on specified matters, did not amount to assigning Tribunals a status of substitute for the High Court but such jurisdiction was capable of being conferred additionally or supplementally on any Court or Tribunal which is not a concept strange to the scheme of the Constitution more so in view of Articles 323-A and 323-B. Clause (2)(b) of Article 323- A specifically empowers the Parliament to enact a law specifying the jurisdiction and powers, including the power to punish for

contempt, being conferred on Administrative Tribunals constituted under Article 323-A. Section 17 of the Act derives its legislative sanctity therefrom. The power of the High Court to punish for contempt of itself under Article 215 of the Constitution remains intact but the jurisdictional power and authority to hear and decide the matters covered by Sub-section (1) of Section 14 of the Act having been conferred on the Administrative Tribunals the jurisdiction of the High Court to that extent has been taken away and hence the same jurisdiction which vested in the High Court to punish for contempt of itself in the matters now falling within the jurisdiction of Tribunals if those matters would have continued to be heard by the High Court has now been conferred on the Administrative Tribunals under Section 17 of the Act. The jurisdiction is the same as vesting in the High Courts under Article 215 of the Constitution read with the provisions of the Contempt of Courts Act, 1971. The need for enacting Section 17 arose, firstly, to avoid doubts, and secondly, because the Tribunals are not "courts of record". While holding the proceedings under Section 17 of the Act the Tribunal remains a Tribunal and so would be amenable to jurisdiction of High Court under Articles 226/227 of the Constitution subject to the well- established rules of self-restraint governing the discretion of the High Court to interfere with the pending proceedings and upset the interim or interlocutory orders of the Tribunals. However any order or decision of Tribunal punishing for contempt shall be appealable only to the Supreme Court within 60 days from the date of the order appealed against in view of the specific provision contained in Section 19 of the Contempt of Courts Act, 1971 read with Section 17 of the Administrative Tribunals Act, 1985....."

19. The Supreme Court, in L. Chandra Kumar vs. Union of India & others[8], has nowhere said that orders of Tribunals holding the contemnor guilty and punishing for contempt shall also be subjected to judicial scrutiny of the High Court under Article 226/227 of the Constitution, inspite of the remedy of a statutory appeal being available. The distinction between orders passed by Administrative Tribunal on matters covered by Section 14(1) of the 1985 Act and orders punishing for contempt under Section 19 of the Contempt of Courts Act read with Section 17 of 1985 Act is this: as against the former there is no remedy of appeal statutorily provided, but as against the latter, a statutory remedy of appeal is provided by Section 19 of the Contempt of Courts Act itself. Any order or decision of the Tribunal punishing for contempt is appealable, under Section 19 of the Contempt of Courts Act , only to the Supreme Court. [T. Sudhakar Prasad6; R. Mohajan and others vs. Shefali Sengupta and others[9]]

20. That no appeal is maintainable against an order dropping proceeding for contempt, or in refusing to initiate a proceeding for contempt, is apparent from sub section (1) of Section 19 (Mahboob S. Allibhoy5). Where the Court declines to initiate proceedings for contempt, it refuses to assume or exercise jurisdiction to punish for contempt, and such a decision cannot be regarded as a decision in the exercise of its jurisdiction to punish for contempt. Such a decision would not, therefore, fall within the opening words of Section 19 (l), and no appeal would lie against it as of right under that

provision. [Baradakanta Mishra vs. Mr. Justice Gatikrushna Misra C.J. of the Orissa H.C.[10]; Mahboob S. Allibhoy5]. When the finding is that the alleged contemnor did not wilfully disobey the order, there is no order punishing the respondent for violation of the order; and, accordingly, an appeal under Section 19 would not lie. [J.S. Parihar vs. Ganpat Duggar & others[11]]. While an appeal would lie to the Supreme Court, against the order of the Tribunal exercising its jurisdiction to punish for contempt, no appeal would lie against the order of the Tribunal refusing to exercise jurisdiction to punish for contempt.

21. While it is clear that no appeal would lie against the order passed by the Administrative Tribunal refusing to punish the respondents/contemnors in the exercise of its jurisdiction under Section 17 of the 1985 Act (which confers on them the power of contempt akin to the High Court), the petitioners would contend that, since the power of judicial review exercised by this Court under Article 226 of the Constitution of India is a part of the basic structure of the Constitution, the provisions of the Contempt of Courts Act or Section 17 of the 1985 Act would not come in its way to set aside the order passed by the Administrative Tribunal refusing to punish the respondents/contemnors for contempt.

22. Subordination of Tribunals and Courts functioning within the territorial jurisdiction of a High Court can be either judicial or administrative or both. The power of superintendence exercised by the High Court under Article 227 of the Constitution is judicial superintendence and not administrative superintendence, such as the one which vests in the High Court under Article 235 of the Constitution over subordinate courts. In L. Chandra Kumar8, the Constitution Bench did not agree with the suggestion that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall, as the Constitutional scheme does not require that all adjudicatory bodies, which fall within the territorial jurisdiction of a High Court, should be subject to its supervisory jurisdiction, i.e. the supervision of the administrative functioning of the Tribunals. (T. Sudhakar Prasad6)

23. Administrative Tribunals are alternative institutional mechanisms designed to be no less effective than the High Court, but, at the same time, not to negate the judicial review jurisdiction of Constitutional Courts. The Administrative Tribunals are not assigned a status equivalent to that of the High Court and, for the purpose of judicial review or judicial superintendence, they are subordinate to the High Court. High Courts are creatures of the Constitution, and their Judges hold constitutional office having been appointed under the Constitution. The Tribunals are creatures of statute and their members are statutorily appointed and hold a statutory office. [T. Sudhakar Prasad6; State of Orissa vs. Bhagaban Sarangi[12]]. There is no anathema in the Tribunal exercising jurisdiction of the High Court and in that sense being supplemental or additional to the High Court, but at the same time not enjoying a status equivalent to the High Court, and also being subject to judicial review and judicial superintendence of the High Court. (T. Sudhakar Prasad6).

24. While the powers of the High Court under Articles 226 and 227 of the Constitution of India are, no doubt, a part

of the basic structure of the Constitution of India (L. Chandra Kumar8), and such a power cannot be negated or circumscribed even by a constitutional amendment let alone legislation - plenary or subordinate, the distinction between existence of the power and its exercise must be borne in mind. The mere existence of a power does not justify the exercise of the power. [Rattan Bai and another vs. Ram Dass and others[13]]. While the powers of judicial review conferred on the High Court under Article 226 of the Constitution of India, and the power of judicial superintendence conferred on it under Article 227 of the Constitution of India are, no doubt, extremely wide, its exercise is hedged by self imposed limitations. The High Court would not exercise its power of judicial review akin to that of an appellate Court to hear and adjudicate the writ petition on its merits. In the exercise of its powers of judicial review, the High Court would not substitute its views for that of the Administrative Tribunal to come to a different conclusion or to examine the order on its merits, and hold that the Administrative Tribunal had erred in not punishing the respondents-contemnors. In the exercise of its jurisdiction, under Article 226/227 of the Constitution of India, the High Court would also not take upon itself the task of imposing punishment itsjnelf or to direct the Tribunal to do so.

25. Ordinarily the High Court, in the exercise of its powers of judicial review under Article 226 of the Constitution of India and its power of judicial superintendence under Article 227 of the Constitution of India, would not interfere with the order of the Tribunal, passed in the exercise of its contempt jurisdiction under Section 17 of the 1985 Act, discharging the contemnors after holding that no case of willful contempt was made out against the respondents."

26. Much reliance has been placed upon by the learned counsel for the petitioner upon the judgment in the case of **L.Chandra Kumar** (supra) so as to contend that this Court can exercise the jurisdiction under Article 226/227 of the Constitution of India as there is no fetter to restrict the exercise of the powers under preliminary jurisdiction. However, this Court finds that the judgment in the case of the **L.Chandra Kumar** (supra) did not deal with the issue regarding maintainability of writ proceedings against the order passed by Central Administrative Tribunal in the contempt jurisdiction whereby the contempt proceedings were closed and the notices were discharged.

27. So far as the reliance and reference so placed upon by the learned counsel for the petitioner in the case of **Sujitendra Nath Singh** (supra) is concerned, the same is with respect to West Bangal Land Reforms and Tenancy Tribunal refusing to initiate contempt proceedings. More so, the judgment in the case of **Delhi Judicial Service Association, Tis Hazari Court, Delhi** (supra) is also not applicable as the said judgment does not deal with the provisions of the Contempt of Courts, 1971.

28. Analysis of the judgment of this Court in the case of **Dr. P.V. Jaganmohan** (supra) will reveal that this Court has mandated that writ petition challenging the order passed by Central Administrative Tribunal dropping the contempt proceedings and discharging the notice is not amenable to the jurisdiction under Article 226 of the Constitution and further in the case of **Dr. Harish Kumar** (supra) a

Division Bench of the Hon'ble High Court at Uttarakhand had opined that ordinarily High Court in exercise of the powers of judicial review under Article 226 of the Constitution of India as well as the powers so conferred under Article 227 of the Constitution of India possessing judicial superintendence would not interfere with an order passed by the Central Administrative Tribunal in exercise of its contempt jurisdiction under Section 17 of the Central Administrative Tribunals Act while discharging the contemnours after holding that no case of of willful contempt is made out, however, this Court is proceeding to make analysis of the issue with regard to the fact whether the Tribunal was justified in dropping the charges and discharging the contemnors or not.

29. This Court finds that the order passed in Original Application No.509 of 2004 by the 5th Respondent on 06.12.2006 as extracted above reveals that the original application so preferred by the petitioner herein was disposed of with the direction to the official respondents to consider the case of the petitioner for promotion to the post of Lab Assistant in the School run by N.E.R. if there is any vacancy and if the petitioner herein is found suitable under the relevant Rules, within a period of six months from the date of a certified copy is produced before them and the order so negating the claim of the petitioner dated 22.12.2003 was rendered in effective and was directed not to come in the way of consideration of the claim of the petitioner for promotion. Meaning thereby that the order itself was conditional, however, subject to two essential conditions (a) existence of vacancy (b) suitability of the petitioner under relevant Rules. The order passed by the Contempt Court on 03.12.2021 which is subject matter of challenge before this Court records a specific stand taken by the respondents on the basis of an additional affidavit dated 13.05.2019 that there is no vacancy of Lab Assistant existing with the school run by N.E.R. It has also been recited in the order under challenge that vide order dated 07.11.2017, the petitioner herein has been posted from the post of Chaukidar under Divisional Signal and Telecommunication Engineer/N.E.R./Gorakhpur to Lab Attendant, Level-1 (Grade Pay 1800) in the North Eastern Girls Inter College, Gorakhpur and an order has been passed entitling him financial up-gradation which was due on 24.05.2000 and making admissible to MACPs. The factual position so recited in the order dated 03.12.2021 under challenge has not been disputed by the petitioner and the affidavit so mentioned therein have also not been annexed with the writ petition. More so though allegation has been made in the petition with regard to the fact that there are various posts lying vacant for consideration of the claim of the petitioner for promotion to Lab Assistant while referring to Annexure-14, at page 130 which happens to be the composition of the Railway School Staff but this Court finds inability to even go to the said question particularly in absence of any specific documents as well as the affidavits so filed before the Tribunal. Nonetheless this Court in the case of ***Santosh Kumar Srivastava vs. The Managing Director, U.P. Rajiya Nirman Nigam Ltd. And others, reported in [(2001) 1 UPLBEC 642)*** has held in paragraphs 10 to 17 as under:-

"10. Inspite of my anxious consideration, I am not persuaded with the contention for the reason that the direction of this Court was two-fold, firstly to declare the result and secondly to consider their

cases for appointment in accordance with law keeping in view the vacancy position. First part of direction has been complied with by declaring the result and, therefore, now the controversy centres round to the second part only. The second part of the order is clear and admits only one interpretation, that to consider them for appointment provided there is vacancy. The order of the Division Bench is "to consider their cases for appointment in accordance with law keeping in view the vacancy position". Therefore, in the absence of vacancy, they are not required to be considered. In order words, consideration of their claim for appointment in the event of their being declared successful, is dependent on the availability of the posts. Respondents in their counter-affidavit have disclosed the existing number of sanctioned posts of Sub-Engineers and the number of Sub-Engineers who are already working in the Nigam (Corporation). It appears that due to financial constraint, the Nigam with the approval of the State Government decided to down size their strength. Consequently, they reduced the posts of Sub-Engineers from 443 to 330. Therefore, the second part of the direction being dependent on the vacancy position, in the absence of any vacancy, was not possible to be carried out and therefore, in the facts and circumstances, it cannot be held that it amounts to deliberate defiance of this Court's order. Respondents have given detailed explanation in their affidavit, which, in my opinion, is convincing and sufficient.

11. It is settled legal position that a selected candidate has no right to the post and he cannot claim appointment as a matter of right but he is only entitled to be considered. In the case in hand, in view of the fact that there was no vacancy and the Nigam has decided not to make any appointment unless the surplus employees are adjusted against the vacancies, in my opinion, it could not be held that the respondents have wilfully flouted the order of this Court. The authorities cited by the learned counsel for the petitioner are also of no help as in the case of Jatinder Kumar and others v. State of Punjab, (supra), the Apex Court has held that a selected candidate has no right to be appointed which could be enforced by mandamus. Similar view was taken in the case of State of Bihar v. Secretariat Assistant Successful Examinees Union, (supra), wherein the Apex Court has quashed that part of the order of the High Court wherein mandamus was issued to make appointment.

12. During the course of submission, Mr. Hajela, learned counsel sought to argue that there was a clear direction of the Division Bench to consider the petitioner against the existing vacancy for appointment. I am afraid such interpretation, if accepted, will amount to restore that part of the judgment of the learned single Judge which has been quashed by the Division Bench. The learned single Judge vide order dated 21.5.1992 directed the Nigam to declare the result of the petitioners within a period of two weeks from the date of filing of the certified copy of the order and in case, they have qualified, the letter of appointment may be issued in their favour within a period of one month from the date of publication of the result. The Division Bench, on appeal, by the Nigam quashed the second part of the order directing to appoint the petitioners in view of the settled legal position that such a direction could not be appropriately issued.

13. In a contempt proceeding, it is to be seen as to whether there is any wilful disobedience or not and if such wilful disobedience is found to be on account of

compelling circumstances, the contemner may not be held liable for contempt.

14. In the case of Dushyant Somal v. Sushma Somal, AIR 1981 SC 1026, the Hon'ble Supreme Court observed as under :

"Nor is a person to be punished for contempt of court for disobeying an order of Court except when the disobedience is established beyond reasonable doubt, the standard of proof being similar, even if not the same, as in a criminal proceeding. Where the person alleged to be in contempt is able to place before the Court sufficient material to conclude that it is impossible to obey the order, the Court will not be justified in punishing the alleged contemnor."

15. In the case of Niaz Mohammad and others v. State of Haryana and others, the Apex Court has observed as under:

"9. Section 2(b) of the Contempt of Courts Act, 1971 (hereinafter referred to as 'the Act') defines "civil contempt" to mean "wilful disobedience to any judgment decree, direction, order, writ or ***other*** *process of a Court...." Where the contempt consists in failure to comply with or carry out an order of a Court made in favour of a party, it is a civil contempt. The person or persons in whose favour such order or direction has been made can move the Court for initiating proceeding for contempt against the alleged contemner with a view to enforce the right flowing from the order or direction in question. But such a proceeding is not like an execution proceeding under Code of Civil Procedure. The party in whose favour an order has been passed, is entitled to the benefit of such order. The Court while considering the issue as to whether the alleged contemner should be punished for not having complied with and carried out the direction of the Court, has to take into consideration all facts and circumstances of a particular case. That is why the framers of the Act while defining civil contempt, have said that it must be wilful disobedience to any judgment, decree, direction, order, writ or* ***other*** *process of a Court. Before a contemner is punished for non-compliance of the direction of a Court, the Court must not only be satisfied about the disobedience of any judgment, decree, direction or writ but should also be satisfied that such disobedience was wilful and intentional. The civil court while executing a decree against the judgment-debtor is not concerned and bothered whether the disobedience to any judgment, or decree, was wilful. Once a decree has been passed it is the duty of the Court to execute the decree whatever may be the consequence thereof. But while examining the grievance of the person who has invoked the jurisdiction of the Court to initiate the proceeding for contempt for disobedience of its order, before any such contemner is held guilty and punished, the Court has to record a finding that such disobedience was wilful and intentional. If from the circumstances of a particular case, brought to the notice of the Court, the Court is satisfied that although there has been a disobedience but such disobedience is the result of some compelling circumstances under which it was not possible for the contemner to comply with the order, the Court may not punish the alleged contemner."*

16. Therefore, before holding guilty for the alleged defiance of the order, the Court is required to take into

consideration all facts and circumstances of a particular case and has to be satisfied that such disobedience is wilful, deliberate and intentional before punishing the contemner under the Contempt of Courts Act. If, however, it is found that there is disobedience but such disobedience is on account of some compelling circumstances under which it is impossible for the contemner to comply with the order, the contemner may not be punished. In the case in hand, as noticed earlier, there was only direction to consider the petitioner for appointment in accordance with law keeping in view the vacancy position. In the absence of any va- cancy, there is no occasion to consider the petitioner for appointment and, therefore, no part of the order of this Court can be said to have flouted by the respondent-contemner.

17. Having heard learned counsel for the parties at length and having regard to all the facts and circumstances of the case, in my opinion, there is no wilful obedience on the part of the respondents by not considering their claim for appointment in view of the fact that no vacancy exists. In such a circumstance, it cannot be held that the respondents have wilfully disobeyed the order of this Court and as such liable to be punished for committing contempt of this Court."

30. Yet the Hon'ble Apex Court in the case of **Kapildeo Prasad Sah and Others vs. State of Bihar reported in (1999) 7 SCC 56**9 had the occasioned to consider the contingency wherein the dispute has arisen with regard to the existence of vacancy, which is coming as a hurdle for granting benefit and the Hon'ble Supreme Court in paragraph 10 to 12 has observed as under:-

"10. In his famous passage, Lord Diplock in Attorney General vs. Times Newspapers Ltd. [(1973) 3 All ER 54] said that there is also

"an element of public policy in punishing civil contempt, since administration of justice would be undermined if the order of any court of law could be disregarded with impunity". Jurisdiction to punish for contempt exists to provide ultimate sanction against the person who refuses to comply with the order of the court or disregards the order continuously. Initiation of contempt proceedings is not a substitute for execution proceedings though at times that purpose may also be achieved.

11. No person can defy court's order. Wilful would exclude casual, accidental bonafide or unintentional acts or genuine inability to comply with the terms of the order. A petitioner who complains breach of court's order must allege deliberate or contumacious disobedience of the court's order.

12. Nothing has been shown that the claim of the respondents that appellants have not been appointed against any vacancy existing on January 1, 1992 is not true or that the respondents are intentionally or deliberately advancing this plea to deprive the appellants of their right to the arrears of the salary for some ulterior motive. That being so, it was not a case where proceedings for contempt could have been initiated against the respondents. High Court is right in dismissing the contempt petition. However, since there is a serious dispute whether any vacancy existed or not as on January 1, 1992 against which appellants or anyone of them could have been appointed the matter

certainly needs examination but perhaps only by way of an interlocutory application in the writ petition and not by way of contempt. Thus, though upholding the order of the High Court, we send the matter back to the High Court to go into the question if any vacancy existed as on January 1, 1992 and, if so, pass appropriate orders."

31. The Hon'ble Apex Court in **Jhareswar Prasad Paul and Another vs. Tarak Nath Ganguly and Others** reported in **2002 CRI. L.J. 2935** in para 11 has held as under:-

"The purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law. Since the respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizen and the democratic fabric of society will suffer if respect for the juidiciary is undermined. The Contempt of Courts Act, 1971 has been introduced under the statute for the purpose of securing the feeling of confidence of the people in general for true and proper administration of justice in the country. The power to punish for contempt of courts is a special power vested under the Constitution in the courts of record and also under the statute. The power is special and needs to be exercised with care and caution. It should be used sparingly by the courts on being satisfied regarding the true effect of contemptuous conduct. It is to be kept in mind that the court exercising the jurisdiction to punish for contempt does not function as an original or appellate court for determination of the disputes between the parties. The contempt jurisdiction should be confined to the question whether there has been any deliberate disobedience of the order of the court and if the conduct of the party who is alleged to have committed such disobedience is contumacious. The court exercising contempt jurisdiction is not entitled to enter into questions which have not been dealt with and decided in the judgment or order, violation of which is alleged by the applicant. The court has to consider the direction issued in the judgment or order and not to consider the question as to what the judgment or order should have contained. At the cost of repetition be it stated here that the court exercising contempt jurisdiction is primarily concerned with the question of contumacious conduct of the party, which alleged to have committed deliberate default in complying with the directions in the judgment or order. If the judgment or order does not contain any specific direction regarding a matter or if there is any ambiguity in the directions issued therein then it will be better to direct the parties to approach the court which disposed of the matter for clarification of the order instead of the court exercising contempt jurisdiction taking upon itself the power to decide the original proceeding in a manner not dealt with by the court passing the judgment or order. If this limitation is borne in mind then criticisms which are sometimes leveled against the courts exercising contempt of court jurisdiction "that it has exceeded its powers in granting substantive relief and issuing a direction regarding the same without proper adjudication of the dispute" in its entirety can be avoided. This will also avoid multiplicity of proceedings because the party which is prejudicially affected by the judgment or order passed in the contempt proceeding and granting relief and issuing fresh directions is likely to challenge that order and that may give rise to another round of litigation arising from

a proceeding which is intended to maintain the majesty and image of courts."

32. In **Director of Education, Uttaranchal and others vs. Ved Prakash Joshi and Others** reported in **2005 CRI. L.J. 3731**, it has been held that while dealing with the application for contempt the Court cannot traverse beyond the order non compliance whereof is alleged. It is held-:-

"It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional directions or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible. In that view of the matter, the order of the High Court is set aside."

33. Applying the said judgments in the facts of the case the Court finds that this Court cannot enter into the merits of the matter as the same is subject to interpretation which can be done on original side as in contempt jurisdiction the Courts of law has to not only uphold the majesty and dignity of the Courts of law but also lift the veil so as to find out as to whether there was willful disobedience of the orders passed on original side and not to function as an original or appellate court for determination of the dispute inter se between the parties.

34. Nonetheless, it is always open for the petitioner herein to take recourse to the provisions contained under Section 19(v) of the Administrative Tribunals Act, 1985 while filing original application before the 5th Respondent challenging the orders negating the claim of the petitioner or depriving the petitioner of his legal and genuine right to be considered for promotion. Even otherwise, from the all four corners of law this Court finds that motion so pressed in service by means of the present writ petition is not even otherwise liable to be entertained under Article 226/227 of the Constitution of India particularly when the order itself was conditional one subject to existence of vacancy and suitability of the petitioner as per the Rules and once the issue with regard to the fact that there remains no vacancy against which the claim of the petitioner would be considered has been raised by the Railways then it was rightly not interfered by the 5th Respondent in contempt proceedings as the Contempt Court cannot go into the merit of the matter as the remedy lies elsewhere and not in contempt jurisdiction.

35. Though this Court has discussed in detail and proceeded to observe that the present case does not warrant interference under Article 226/227 of the Constitution of India particularly when the contempt proceedings have been dropped and notices have been discharged against the alleged contemnors and this Court finds that there is no occasion even otherwise to take different view from the view so taken by the 5th Respondent, however, the Court finds that a relief has also been sought to challenge 42nd Amendment for declaring The Constitution (Forty-Second Amendment) Act, 1976 being Section 46 pertaining to Tribunals Under Part XIVA whereby Article 323-A was introduced in so far as it pertains to Section 5(2) and 5(4) of the Administrative Tribunals Act, 1985. Section 5(2) and 5(4) of the Administrative Tribunals Act, 1985 reads as under:-

5. Composition of Tribunals and Benches thereof*. (1) Each Tribunal shall consist of 1[a Chairman and such number*

of Judicial and Administrative Members] as the appropriate Government may deem fit and, subject to the other provisions of this Act, the jurisdiction, powers and authority of the Tribunal may be exercised by Benches thereof.

[(2) Subject to the other provisions of this Act, a Bench shall consist of one Judicial Member and one Administrative Member.]

(4) Notwithstanding anything contained in sub-Section(1), the Chairman--[(a) may, in addition to discharging the functions of the Judicial Member or the Administrative Member of the Bench to which he is appointed, discharge the functions of the Judicial Member or, as the case may be, the Administrative Member, of any other Bench;]

(b) may transfer [a Member] from one Bench to another Bench;

(c) may authorise [the Judicial Member] or the Administrative Member appointed to one Bench Bench to discharge also the functions of [the Judicial Member or the Administrative Member, as the case may be] of another Bench; and]

(d) may, for the purpose of securing that any case or cases which, having regard to the nature of the questions involved, requires or require, in his opinion or under the rules made by the Central Government in this behalf, to be decided by a Bench composed of more than [two members], issue such general or special orders, as he may deem fit.

[Provided that every Bench constituted in pursuance of this clause shall include at least one Judicial Member and one Administrative Member.]"

36. Essentially, while seeking above mentioned relief the petitioner wants a direction in the nature of Mandamus commanding the 5th Respondent to decide the case by constituting a Bench of two members. This Court finds that the issue pertaining to establishment and the constitution of Central Administrative Tribunal had already been decided in the case of **L. Chandra Kumar** (supra) and further in paragraph nos. 97, 98 and 99 (as extracted above) the Hon'ble Apex Court had the occasion to deal with Section 5(2) and 5(4) of the Administrative Tribunals Act, 1985. More so, the petitioner herein as though raised the issue of constitutional validity of the 42nd Amendment Act, 1976 in so far as it pertains to Section 46 which deals with the matter pertaining to Tribunal, however, neither the Union of India nor the respective Secretary to whom the Ministry is to be represented have been made party in the present proceedings. This Court finds that the Union of India through General Manager North Eastern Railway has only been arrayed as a party. Thus in the absence of any impleadment of a proper and necessary party this Court cannot delve into the issue regarding constitutional validity so sought to be raised at the behest of the petitioner. Nonetheless, the Hon'ble Supreme Court in the case of ***V.K. Majotra vs. Union of India and Others reported in AIR 2003 SC 3909*** in paragraph 8 and 9 have clearly observed as under:-

"8. We have perused the pleadings of the writ petition and the counter affidavits filed by the respondents before the High Court. Counsel for the parties are right in submitting that the point on which the writ petition has been disposed of was not raised by the parties in their pleadings. The parties were not at issue on the point decided by the High

Court. Counsel for the parties are also right in contending that the point raised in the writ petition was neither adverted to nor adjudicated upon by the High Court. It is also correct that vires of Section 6(2)(b)(bb) and (c) of the Act were not challenged in the writ petition. The effect of the direction issued by the High Court that henceforth the appointment to the post of Vice-Chairman be made only from amongst the sitting or retired High Court Judge or an advocate qualified to be appointed as a Judge of the High Court would be that Sections 6(2)(b)(bb) and (c) of the Act providing for recruitment to the post of Vice-Chairman from amongst the administrative services have been put at naught/obliterated from the statute book without striking them down as no appointment from amongst the categories mentioned in Clauses (b) (bb) and (c) could now be made. So long as Section 6(2)(b)(bb) and (c) remains on the statute book such a direction could not be issued by the High Court. With respect to the learned Judges of the High Court we would say that the learned Judges have over stepped their jurisdiction in giving a direction beyond the pleadings or the points raised by the parties during the course of the arguments. The writ courts would be well advised to decide the petitions on the points raised in the petition and if in a rare case keeping in view the facts and circumstances of the case any additional points are to be raised then the concerned and affected parties should fee put to the notice oft the additional points to satisfy the principles of natural justice. Parties cannot be taken by surprise. We leave the discussion here.

9. We are also in agreement with the submissions made by the counsel for the appellants that the High Court exceeded its jurisdiction in issuing further directions to the Secretary, Law Department, Union of India, the secretary Personnel and Appointment Department, Union of India, the Cabinet Secretary of Union of India and to the Chief Secretary of the U.P. Government as also to the Chairman of the CAT and other appropriate authorities that henceforth the appointment to the post of presiding officer of various other Tribunals such as CEGAT, Board of Revenue, Income Tax Appellate Tribunal etc., should be from amongst the judicial members alone. Such a finding could not be recorded without appropriate pleadings and notifying the concerned and affected parties."

37. Thus taking into aforesaid factual and legal aspect this Court is not delving into the issue regarding challenge to the constitutional provisions so laid in the present petition leaving it open to the petitioner to challenge the same in appropriate proceedings as and when it is occasioned.

38. Accordingly, this Court is of the firm opinion that the present writ petition so preferred by the petitioner challenging the order whereby contempt proceedings has been dropped and notices have been discharged is not liable to be interfered in present proceeding and thus it is liable to be dismissed.

39. Resultantly, it is dismissed.

40. Interim order if any stands discharged.

41. Cost made easy.

(2022)07ILR A703
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ A No. 6334 of 2022

Smt. Poonam Rani ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Chandra Jeet Yadav

Counsel for the Respondents:
C.S.C.

A. Service Law – Constitutional validity - Misconduct – Dismissal/Removal - Prevention of Corruption Act, 1988 - Sections 7 & 13(1)(d) read with Section 13(2) - Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 - Rule 3-B(iv).

Locus standi – This Court has laid down in a number of decisions that in order to have the locus standi to invoke the extraordinary jurisdiction u/Article 226, an applicant should ordinarily be one who has a personal or individual right in the subject matter of the application, though (1) the case of some of the writs like habeas corpus or quo warranto this rule is relaxed or modified. In other words, as a general rule, infringement of some legal right or prejudice to some legal interest in hearing the petitioner is necessary to give him a locus standi in the matter. (Para 12 to 15)

The present case also does not come within the parameters of Public Law Litigation and further the issue so sought to be raised by the petitioner is not of any public importance. The present case is nothing but the proceedings relating to Public Interest Litigation in service matters which as per the law laid down by the Hon'ble Apex Court is not maintainable. (Para 23, 24)

B. Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999: Rule 3-B(iv) - Constitutional Validity - It is the settled principal of law that in case any party asserts and assails the validity of a provision on the ground that it is violative of Article 309 and 311 of the Constitution of India then it is for the said party to not only make necessary pleadings but also adduce materials to show that the same is in violation of Article 309 and 311 of the Constitution of India. Even otherwise **the presumption is always that legislature understands and correctly appreciates the need of the people and in order to rebut the said presumption, the onus is upon the party who alleges it to be unconstitutional.** (Para 28)

The Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the Legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. (Para 31)

Grounds on which the constitutional validity can be challenged - The Constitutional validity of Act can be challenged only on two grounds namely (i), lack of legislative competence and (ii) violation of any of the fundamental rights guaranteed in Part-III of the Constitution. A third exception was carved out with regard to the fact that the Courts of law can even hold the statutory enactment to be ultra vires, where there is "manifest arbitrariness". (Para 35)

C. In view of the provisions contained under Article 309 and 311 of the Constitution of India, the conditions of services takes within its ambit, the cases of dismissal or removal from service. A conjoint reading of Articles 309 and 311 reveals that Article 311 is confined to the cases wherein an inquiry has been commenced against an employee and an action of penal nature is sought to be taken. Whereas, Article 309 covers the broad spectrum of conditions of service and holds a wider ground as compared to Article 311. That would also include conditions of service beyond mere dismissal, removal or reduction in rank. It holds merit to St. that this wide ground contemplated u/Article 309 also takes in its sweep the conditions regarding termination of service including compulsory retirement. The expression "conditions of service" takes within its sweep the cases of dismissal or removal from service. (Para 49, 50)

The penalties of dismissal and removal is nowhere foreign in service jurisprudence as the said penalties amongst others finds its presence in almost all the disciplinary Rules throughout the various services and there difference is widely accepted. (Para 51)

D. The distinction between 'dismissal' and 'removal' - Under the Constitution 'removal' and 'dismissal' stand on the same footing except as to future employment. In this sense removal is but a species of dismissal. Mentioning thereby that by no stretch of imagination it can be said that attachment of a disqualification of future employment can there be said to be ultra-virus, arbitrary or discriminatory. (Para 52, 54)

E. Words and Phrases – '*person aggrieved*' - The words 'person aggrieved' do not really means a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, 'a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrong fully refused him something, or wrongfully affected his title to something. (Para 12)

Writ petition dismissed. (E-4)

Precedent followed:

1. Jasbhai Motibhai Desai Vs Roshan Kumar, Haji Bashir Ahmed & ors., (1976) 1 SCC 671 (Para 12)

2. Thammanna Vs K. Veera Reddy & ors., (1980) 4 SCC 62 (Para 13)

3. Dr. Duryodhan Sahu & ors. Vs Jitendra Kumar Mishra & ors., (1998) 7 SCC 273 (Para 14)

4. Ayaaubkhan Noorkhan Pathan Vs St. of Mah. & ors., (2013) 4 SCC 465 (Para 15)

5. Dr. B. Singh Vs U.O.I. & ors., (2004) 3 SCC 363 (Para 20)

6. Dattaraj Nathuji Thaware Vs St. of Mah., (2005) 1 SCC 590 (Para 21)

7. Neetu Vs St. of Pun. & ors., (2007) 10 SCC 614 (Para 22)

8. Chiranjit Lal Chaudhary Vs U.O.I., AIR 1951 SC 41 (Para 29)

9. St. of Bihar Vs Sm. Charusila Dasi, AIR 1959 SC 1002 (Para 30)

10. St. of Bihar Vs Bihar Distillery Ltd., AIR 1997 SC 1511 (Para 31)

11. Greater Bombay Coop. Bank Ltd. Vs United Yarn Tex (P) Ltd., 2007 (6) SCC 236 (Para 32)

12. Zaheer Ahmed Latifur Rehman Sheikh Vs St. of Mah. & ors., JT 2010 (4) SCC 256 (Para 33)

13. Namit Sharma Vs U.O.I., 2013 (1) SCC 745 (Para 34)

14. Shayara Bano Vs U.O.I., 2017 (9) SCC 1 (Para 35)

15. K.S. Puttaswamy (Aadhar) Vs U.O.I., 2019 (1) SCC 1 (Para 36)

16. Noida Employees Assoc. & ors. Vs St. of U.P., 2019 (5) ADJ 602 (Para 37)

17. Nisha Priya Bhatiya Vs U.O.I., Civil Appeal No. 2365 of 2020, decided on 24.04.2020 (Para 49)

18. Shyamlal Vs St. of U.P. & anr., AIR 1954 SC 369 (Para 52)

19. Dr. Dattatraya Mahadev Nadkarni Vs Municipal Corporation of Greater Bombay, (1992) 2 SCC 547 (Para 53)

Precedent distinguished:

1. Raju Ramsingh Vasave Vs Mahesh Deorao Bhivapurkar & ors., (2008) 9 SCC 54 (Para 5 (c), 23)

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Chandra Jeet Yadav, learned counsel for the petitioner and Sri Nand Lal Mourya, learned Standing Counsel, who appears for the respondents.

FACTS

2. Factual matrix of the case as worded in the writ petition are that the petitioner Smt. Poonam Rani claims herself to be the the wife of Sri Yogesh Kumar, who was posted as Junior Engineer in Paschimanchal Vidyut Vitran Nigam Limited, Victoria Park, Meerut. Records reveal that certain allegations were levelled against his performance while discharging official duty which occasioned laying of a trap pursuant whereto, he was found indulged in corruption coupled with misconduct pursuant whereto a Criminal Case No.11 of 2018 was registered on 19.1.2018 purported to be under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (In short Act of 1988) Police Station Mainather, District Moradabad and thereafter a first information report was also lodged and proceedings for prosecution was also drawn and he was placed under suspension on 22.1.2018. Sanction was also proceeded to be obtained under Section 17 of the Act of 1988 which was accorded on 15.2.2018. Simultaneously, a charge sheet was also issued to the petitioner by the Disciplinary Authority on 6.8.2019 and thereafter one Sri Pramod Gogneya was appointed as the Enquiry Officer and regular departmental enquiry was conducted by the Enquiry Officer, who in turn tendered its enquiry report on 6.1.2021 holding the husband of the petitioner guilty of the two charges which was sought to be levelled upon it. Ultimately, on 7.7.2021 an order was passed whereby the husband of the petitioner was dismissed from services.

3. Sri Yadav, learned counsel for the petitioner has made a statement at bar that the order dated 7.7.2021 dismissing the husband of the petitioner has been further carried in a departmental appeal before the appellate authority which is stated to be pending.

4. The petitioner herein claiming herself to be the wife of Yogesh Kumar, who had been dismissed by virtue of order dated 7.2.2021 has approached this Court while filing the present petition seeking following reliefs:-

(I) Interpret the JUSTICE, Social, Economic and Political provided in the preamble of the Constitution of India, Article 309 and 311 of the Constitution of India, in the contest of the involved substantial question of law as to interpretation of this Constitution framed as follows:

(a) Does word "Dismissal" used under Article 311 of the Constitution of India includes impression or sprit or means of "Dismissal from the Service which disqualify from future employment" or penalty provided under Rule 3-B-(iv) of the

Uttar Pradesh Government Servant (Discipline and Appeal) Rule, 1999 stands repugnant/ inconsistent to the impression or sprit or means to the word "Dismissal" used under Article 311 of the Constitution of India?

(b) Does in exercise of powers conferred by the proviso to Article 309 of the Constitution of India, its permissible or within jurisdiction to amend/modify/alter/identify or clarify the word "Dismissal" used under Article 311 of the Constitution of India as "Dismissal from the service which disqualify from future employment" and "Dismissal from service which does not disqualify from employment" as designed amended/modified/altered/ identified and clarified vide Rule 3-B-(iii) and (iv) of the Uttar Pradesh Government Servant (Discipline and Appeal), Rules, future and 1999 or not?

(c) Does proviso of Article 309 of the Constitution of India creates jurisdiction/authority to design "Rules" which may regulate the future of the persons appointed to public services and posts in connection with affairs of the union or of any State, after dismissal of service or penalty provided under Rule 3-B-(iv) of the Uttar Pradesh Government Servant (Discipline and Appeal), Rules, 1999 or Rule 3-B-(iv) of the Uttar Pradesh Government Servant (Discipline and Appeal), Rules, 1999 is repugnant/ inconsistent to the earlier/basic part of Article 309 of the Constitution of India specified as "Subject to the provisions of this Constitution Acts of the appropriate legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with affairs of Union or of any State?

(d) Does Rule 3-B-(iv) framed under the Uttar Pradesh Government Servant (Discipline and Appeal), Rules, 1999 in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and in suppression of the Civil Service (Classification, Control and Appeal) Rules, 1930 and Punishment and Appeal Rules for Subordinate Service Uttar Pradesh, 1932 is in accordance with jurisdiction/authority/ limits prescribed as "Subject to the provisions of this Constitution, Acts of the appropriate legislature may regulate the condition of service of persons appointed to the public services and posts in connection with affairs of the Union or of any the State" under Article 309 of the Constitution of India?

(e) Does jurisdiction/authority of the proviso of Article 309 of the Constitution of India framed/designed "Rules" like "Dismissal from service which disqualify from the service from future employment" for the purpose of regulate the recruitment and conditions of services of persons appointed to the public services and the posts in connection with the affairs of the Union or of any State, which substantially and remotely terminates the mandatory duty/ responsibility of a Government Servant or Public Servant coupled with Section 125 of the Code of Criminal Procedure, 1973 or Rule 3-B-(iv) of the Uttar Pradesh Government Servant (Discipline and Appeal), Rules, 1999 is repugnant/inconsistent to the preamble of the Constitution (JUSTICE, Social, economic and political) read with Article 13, 14 and 21 of the Constitution of India along with Article 5, 23(i) and 25(ii) of the Universal Declaration of Human Rights read with Section 125 of the Code of Criminal Procedure, 1973 guaranteed to

the family members/dependents of a Government Servant?

(f) Does designing of penalty and empowerment of the appointing authority/ disciplinary authority with "Dismissal from the service which disqualify from the future employment" in exercise of the powers conferred by the proviso to Article 309 of the Constitution, substantially makes appointing authority/disciplinary authority as supreme controller of life and dignity of a Government servant and his family members/dependents, even after dismissal from service and consequence whereof a Government servant becomes life time slaves of appointing authority/disciplinary authority after dismissal of services?

(g) Does after making "Rules" in exercise of power conferred by the proviso to Article 309 of the Constitution, the necessity of making "Acts" of/by appropriate legislation may regulate the recruitment and conditions of service of persons appointed to the public services and posts in connection with the affairs of the Union or of any State comes to an end or continuance of such Rules is in conflict to the Article 85 to Article 111 and Article 174 to Article 200 of the Constitution of India or not?

(II) Issue an order or direction in the nature of "Public Law Litigation" to restrain appointing authorities/disciplinary PALIEKAMARRAORTAROAK authorities or other competent authorities from imposing and implementing penalty provided under 3-B-(iv) of the Uttar Pradesh Government Servant (Discipline and Appeal), Rules, 1999 upon any Government servant.

(III) Issue an order or direction in the nature of "Public Law Litigation" commanding to appointing or other competent authorities/disciplinary authorities authorities, to protect the rights guaranteed to the family members/ dependents of the Government servants through preamble of the Constitution, Article 14 and 21 of the Constitution of India, Article 5, 23(i) and 25(ii) of the Universal Declaration of Human Rights and Section 125 of the Code of Criminal Procedure, 1973 from despotism of Rule 3-B-(iv) of the Uttar Pradesh Government Servant (Discipline and Appeal), Rules, 1999.

(IV)Issue an order or direction in the nature of "Public Law terminate Litigation" to the relationship of supreme controller of life and dignity of a Government servant and slaves arising out from imposition of penalty provided under Rule 3-B-(iv) of the Uttar Pradesh Government Servant (Discipline and Appeal), Rules, 1999 by the appointing authorities/ disciplinary authorities or other competent authorities and maintain the relationship of employer and employee.

(V) Issue an appropriate order or direction to declare the penalty provided under Rule 3-B-(iv) of the Uttar Pradesh Government Servant (Discipline and Appeal), Rules, 1999 as void ab initio/ultra vires to preamble of the Constitution, Article 13, 14, 21 and 311 of the Constitution of India.

(VI) Issue any suitable order or direction which this Hon'ble Court may deem fit and proper in the fact and circumstances of the instant case.

(VII) Award cost of the petition in favour of the petitioner.

5. Sri Yadav, learned counsel for the petitioner has made manifold submissions namely:-

(a) The provisions contained under Rule 3-B-(iv) of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (In short of the Rules, 1999) in so far as it provides that in case of dismissal from service then it would disqualify from further employment is ultra-virus of Article 309 read with 311 of the Constitution of India.

(b) Article 311 of the Constitution of India nowhere envisages any differential treatment or differentiation with respect to disqualification from future employment in the case of dismissal vis-a-vis penalty of removal where there is no disqualification for future employment and thus Rule 3-B-(iv) of the Rules, 1999 is ultra-virus.

(c) The petitioner herein though is the wife of a dismissed employee (Yogesh Kumar) but in view of the doctrine so enunciated by the Hon'ble Apex Court in the case of **Raju Ramsingh Vasave Vs. Mahesh Deorao Bhivapurkar and others (2008) 9 SCC 54,** the writ petition so instituted by the petitioner herein is maintainable as the petitioner has locus standi to institute the present petition.

6. Elaborating the first submission, learned counsel for the petitioner has argued that once Article 311 of the Constitution of India itself provides for imposition of punishment of dismissal or removal or reduction in rank without containing any fetters with respect to any disqualification so attached thereto, then 1999 Rules which have been enacted under the proviso to Article 309 of the Constitution of India cannot provide for any disqualification in case an officer or employee is visited with the punishment of dismissal while putting a condition disqualifying him or her from future employment.

7. Sri Yadav, in order to buttress his submission with respect to locus standi has invited the attention of the Court towards the judgment in the case of **Raju Ramsingh Vasave (Supra)** while referring to paragraph 45 of the judgment so as to further contend that the present case falls within the domain of Public Law Litigation (PLL) as the same may not be a subject matter of public interest litigation and as an issue relatable to public importance is being raised then this Court can suo motu exercise its jurisdiction.

8. Sri Mourya, learned Standing Counsel has refuted the submissions of Sri Yadav, who appears for the petitioner while arguing that the present writ petition is nothing but a public interest litigation involving matters pertaining to service issues and further the petitioner has no legal right to maintain the present petition as even otherwise no cause of action has arisen.

9. According to Sri Mourya learned Standing Counsel once the dismissed employee being the husband of the petitioner is not before this Court and he has availed his remedy before appellate authority by filing appeal against the dismissal order as stated by the learned counsel for the petitioner then this petition need not further retain the board and the same is liable to be dismissed with heavy cost.

POINTS OF DETERMINATION

(a) Locus standi of the petitioner to institute and maintain the proceeding under Article 226 of the Constitution of India.

(b) The issue relating to constitutional validity of Rule 3-B-(iv) of the Rules, 1999.

DISCUSSION

10. We have heard learned counsel for the parties and perused the record and with the consent of the parties, the present petition is being decided without seeking any response from the respondents.

11. A question arises as to whether the petitioner qualifies the definition of an aggrieved person or not in order to not only institute but to maintain the present petition. To answer the said question, the petitioner has to show herself to be an aggrieved party so as to have some interest while putting into motion the present proceedings.

12. The words "aggrieved person" have subject matter of judicial scrutiny in empty number of judgments of Hon'ble Supreme Court. To start with reference is being made to the case of **Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and others (1976) 1 SCC 671** paragraphs 12, 13, 14, 15, 16, 30, 34 & 37 quoted hereunder:-

"12. According to most English decisions, in order to have the locus standi to invoke certiorari jurisdiction, the petitioner should be an "aggrieved person" and, in a case of defect of jurisdiction, such a petitioner will be entitled to a writ of certiorari as a matter of course, but if he does not fulfil that character, and is a "stranger", the Court will, in its discretion, deny him this extraordinary remedy, save in very special circumstances.

13. This takes us to the further question: Who is an "aggrieved per son" and what are the qualifications requisite for such a status ? The expression "aggrieved person" denotes an elastic, and, to an extent, an elusive concept. It cannot be confined within the bounds of rigid, exact and comprehensive definition. At best, its features can be described in a broad, tentative manner. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him. English Courts have sometimes put a restricted and sometimes a wide construction on the expression "aggrieved person". However, some general tests have been devised to ascertain whether an applicant is eligible for this category so as to have the necessary locus standi or 'standing' to invoke certiorari jurisdiction.

14. We will first take up that line of cases in which an "aggrieved person" has been held to be one who has a more particular or peculiar interest of his own beyond that of the general public, in seeing that the law is properly administered. The leading case in this line in Queen v. Justices of Surrey(1) decided as far back as 1870. There, on the application by the highway board the Justices made certificates that certain portions of three roads were unnecessary. As a result, it was ordered that the roads should cease to be repaired by the parishes.

15. E, an inhabitant of one of the parishes, and living in the neighbourhood of the roads, obtained a rule for a certiorari to bring up the orders and certificates for the purpose of quashing them on the ground that they were void by reason of the notices not having been

affixed at the places required by law. On the point of locus standi (following an earlier decision Hex v. Taunton St. Mary(2), the Court held that though a certiorari is not a writ of course, yet as the applicant had by reason of his local situation a peculiar grievance of his own, and was not merely applying as one of the public, he was entitled to the writ ex debito justitiae.

16. It is to be noted that in this case was living in the neighbourhood of the roads were to be abandoned as a result of the certificates issued by the Justices. He would have suffered special inconvenience by the abandonment. Thus had shown a particular grievance of his own beyond some inconvenience suffered by the general public. He had a right to object to the grant of the Certificate. Non-publication of the notice at all the places in accordance with law, had seriously prejudiced him in the exercise of that legal right.

30. Typical of the cases in which a strict construction was put on the expression "person aggrieved", is Buxton and ors. v. Minister of Housing and Local Government(4). There, an appeal by a Company against the refusal of the Local Planning Authority of permission to develop land owned by the Company by digging chalk, was allowed by the Minister. Owners of adjacent property applied to the High Court under s. 31(1) of the Town and Country Planning Act, 1959 to quash the decision of the Minister on the ground that the proposed operations by the company would injure their land, and that they were 'persons aggrieved' by the action of the Minister. It was held that the expression 'person aggrieved' in a statute meant a person who had suffered a legal grievance; anyone given the right under Section 37 of the Act of 1959 to have his representation considered by the Minister was a person aggrieved, thus Section 31 applied, if those rights were infringed; but the applicants had no right under the statute, and no legal rights had been infringed and therefore they were not entitled to challenge the Minister's decision. Salmon J. quoted with approval these observations of James T. J. in In Re Sidebothem:-

"The words 'person aggrieved' do not really means a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance,`a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrong fully refused him something, or wrongfully affected his title to something."

34. This Court has laid down in a number of decisions that in order to have the locus standi to invoke the extraordinary jurisdiction under Article 226, an applicant should ordinarily be one who has a personal or individual right in the subject matter of the application, though (1) the case of some of the writs like habeas corpus or quo warranto this rule is relaxed or modified. In other words, as a general rule, in fringement of some legal right or prejudice to some legal interest in hearing the petitioner is necessary to give him a locus standi in the matter.

37. It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (i) 'person aggrieved'; (ii) 'stranger'; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from

those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold."

13. In **Thammanna Vs. K Veera Reddy and others (1980) 4 SCC 62** paragraphs 15, 16 & 17 are quoted hereunder:-

"15. It was not obligatory for the Election-Petitioner to join the appellant as a respondent. There were no allegations or claims in the election-petition which would attract Section 82 of the Act. From that point of view, the appellant was not a necessary party to be impleaded. Of course, if the appellant had made an application within the time prescribed, in compliance with Section 86(4) of the Act, the Court would have been bound to join him as a respondent. But the question of Section 86 (4) coming into play never arose as the Election-Petitioner had already impleaded the appellant as Respondent 5 in the election- petition. Even so, Respondent 5 did not join the controversy. He neither joined issue with the contesting respondent 1, nor did he do anything tangible to show that he had made a common cause with the Election-Petitioner against Respondent 1. In fact, the only parties between whom the matters in controversy were at issue, were the Election- Petitioner and Respondent 1. The other respondents, including the appellant, did not participate or side with either contestant in that controversy.

16. Although the meaning of the expression "person aggrieved" may vary according to the context of the statute and the facts of the case, nevertheless, normally "a 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something."

17. In the face of the stark facts of the case, detailed above, it is not possible to say that the appellant was aggrieved or prejudicially affected by the decision of the High Court, dismissing the election-petition.

14. In **Dr Duryodhan Sahu and others Vs. Jitendra Kumar Mishra and others (1998) 7 SCC 273** paragraphs 16 & 17 are quoted hereunder:-

16. In Thammanna versus K. Veera Reddy and other (1980) 4 S.C.C. 62 it was held that although the meaning of the expression 'person aggrieved' may vary according to the context of the statute and the facts of the case, nevertheless normally, a person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.

17. In Jasbhai Motibhai Desai Versus Roshan Kumar Haji Bashir Ahmed

and others (1976) 1.S.C.C. 671 the Court held that the expression 'aggrieved person' donotes an elastic, and to an extent, an elusive concept. The Court observed:

"...It cannot be confined within the bounds of a rigid, exact, and comprehensive definition. At best, its features can be described in a broad tentative manner. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statue of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him'.

15. In **Ayaaubkhan Noorkhan Pathan Vs. State of Maharashtra and others (2013) 4 SCC 465** paragraphs 9, 10, 11, 12, 13, 14, 16, 17 are quoted herein under:-

"9. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court, that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a court of law. A writ petition under Article 226of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the Authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that, the relief prayed for must be one to enforce a legal right. Infact, the existence of such right, is the foundation of the exercise of the said jurisdiction by the Court. The legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same. (Vide : State of Orissa v. Madan Gopal Rungta, AIR 1952 SC 12; Saghir Ahmad & Anr. v. State of U.P., AIR 1954 SC 728; Calcutta Gas Company (Proprietary) v. State of West Bengal & others, AIR 1962 SC 1044; Rajendra Singh v. State of Madhya Pradesh, AIR 1996 SC 2736; and Tamilnad Mercantile Bank Shareholders Welfare Association (2) v. S.C. Sekar & Ors., (2009) 2 SCC 784).

10. A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must therefore, necessarily be one, whose right or interest has been adversely affected or jeopardised. (Vide: Shanti Kumar R. Chanji v. Home Insurance Co. of New York, AIR 1974 SC 1719; and State of Rajasthan & Ors. v. Union of India & Ors., AIR 1977 SC 1361).

11. In Anand Sharadchandra Oka v. University of Mumbai, AIR 2008 SC 1289, a similar view was taken by this Court, observing that, if a person claiming

relief is not eligible as per requirement, then he cannot be said to be a person aggrieved regarding the election or the selection of other persons.

12. In A. Subhash Babu v. State of A. P. , AIR 2011 SC 3031, this Court held:

"The expression "aggrieved person' denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant."

13. This Court, even as regards the filing of a habeas corpus petition, has explained that the expression, "next friend' means a person who is not a total stranger. Such a petition cannot be filed by one who is a complete stranger to the person who is in alleged illegal custody.

14. This Court has consistently cautioned the courts against entertaining public interest litigation filed by unscrupulous persons, as such meddlers do not hesitate to abuse the process of the court. The right of effective access to justice, which has emerged with the new social rights regime, must be used to serve basic human rights, which purport to guarantee legal rights and, therefore, a workable remedy within the framework of the judicial system must be provided. Whenever any public interest is invoked, the court must examine the case to ensure that there is in fact, genuine public interest involved. The court must maintain strict vigilance to ensure that there is no abuse of the process of court and that, "ordinarily meddlesome bystanders are not granted a Visa". Many societal pollutants create new problems of non-redressed grievances, and the court should make an earnest endeavour to take up those cases, where the subjective purpose of the lis justifies the need for it.

16. In Ghulam Qadir v. Special Tribunal & Ors., (2002) 1 SCC 33, this Court considered a similar issue and observed as under:- "There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the case where the writ prayed for is for habeas corpus or quo warranto. Another exception in the general rule is the filing of a writ petition in public interest. The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid article. The orthodox rule of interpretation regarding the locus standi of a person to reach the Court has undergone a sea change with the development of constitutional law in our country and the constitutional Courts have been adopting a liberal approach in dealing with the cases or dislodging the claim of a litigant merely on hyper-technical grounds. In other words, if the person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi." (Emphasis added)

17. In view of the above, the law on the said point can be summarised to the effect that a person who raises a grievance, must show how he has suffered legal injury.

Generally, a stranger having no right whatsoever to any post or property, cannot be permitted to intervene in the affairs of others.

16. Now another fact which needs to be examined is the fact as to whether the present petition which is in fact in the guise of public interest litigation is maintainable at the behest and instance of the petitioner.

17. Learned counsel for the petitioner has relied upon the judgment of the Hon'ble Apex Court in the case of **Raju Ramsingh Vasave (Supra)** while referring to paragraph 45.

45. We must now deal with the question of locus standi. A special leave petition ordinarily would not have been entertained at the instance of the appellant. Validity of appointment or otherwise on the basis of a caste certificate granted by a committee is ordinarily a matter between the employer and the employee. This Court, however, when a question is raised, can take cognizance of a matter of such grave importance suo motu. It may not treat the special leave petition as a public interest litigation, but, as a public law litigation. It is, in a proceeding of that nature, permissible for the court to make a detailed enquiry with regard to the broader aspects of the matter although it was initiated at the instance of a person having a private interest. A deeper scrutiny can be made so as to enable the court to find out as Cate "Segy HOW to whether a party to a lis is guilty of commission of fraud on the Constitution. If such an enquiry subserves the greater public interest and has a far-reaching effect on the society, in our opinion, this Court will not shirk its responsibilities from doing so.

18. According to Sri Yadav, the present proceedings cannot be said to be a public interest litigation but it is Public Law Litigation and thus the same is maintainable.

19. On the other hand, learned Standing Counsel has referred to certain judgments of the Apex Court so as to contend that in service matter Public Interest Litigation is not maintainable. Namely:-

20. In **Dr. B. Singh Vs. Union of India and others (2004) 3 SCC 363** paragraph 16 is quoted hereunder:-

"16. As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that Courts are flooded with large number of so called public interest litigations, whereas only a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives, Courts at times are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. Though in Dr. Duryodhan Sahu and Ors. v. Jitendra Kumar Mishra and Ors. (AIR 1999 SC 114), this Court held that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters continues unabated in the Courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision. This tendency is being slowly permitted to percolate for setting in motion criminal law jurisdiction, often unjustifiably just for gaining publicity and giving adverse

publicity to their opponents. The other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Apart from the sinister manner, if any, of getting such copters, the real brain or force behind such cases would get exposed to find out whether it was a bona fide venture. Whenever such frivolous pleas are taken to explain possession, the Court should do well not only to dismiss the petitions but also to impose exemplary costs, as it prima facie gives impression about oblique motives involved, and in most cases show proxy litigation. Where the petitioner has not even a remote link with the issues involved, it becomes imperative for the Court to lift the veil and uncover the real purpose of the petition and the real person behind it. It would be desirable for the Courts to filter out the frivolous petitions and dismiss them with costs as afore-stated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts."

21. In **Dattaraj Nathuji Thaware Vs. State of Maharashtra (2005) 1 SCC 590** paragraph 16 is quoted hereunder:-

"16. As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that Courts are flooded with large number of so called public interest litigations, whereas only a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives, Courts at times are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. Though in Dr. Duryodhan Sahu and Ors. v. Jitendra Kumar Mishra and Ors. (AIR 1999 SC 114), this Court held that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters continues unabated in the Courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision. This tendency is being slowly permitted to percolate for setting in motion criminal law jurisdiction, often unjustifiably just for gaining publicity and giving adverse publicity to their opponents. The other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Apart from the sinister manner, if any, of getting such copters, the real brain or force behind such cases would get exposed to find out whether it was a bona fide venture. Whenever such frivolous pleas are taken to explain possession, the Court should do well not only to dismiss the petitions but also to impose exemplary costs, as it prima facie gives impression about oblique motives involved, and in most cases show proxy litigation. Where the petitioner has not even a remote link with the issues involved, it becomes imperative

for the Court to lift the veil and uncover the real purpose of the petition and the real person behind it. It would be desirable for the Courts to filter out the frivolous petitions and dismiss them with costs as afore-stated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts."

22. In **Neetu Vs. State of Punjab and others (2007) 10 SCC 614** paragraphs 7 and 8 are quoted hereunder:-

"(7) When a particular person is the object and target of a petition styled as PIL, the court has to be careful to see whether the attack in the guise of public interest is really intended to unleash a private vendetta, personal grouse or some other mala fide object.

(8) Therefore, as rightly submitted by learned counsel for the appellant, writ petition itself was not maintainable, to that extent the High Court's order cannot be maintained. But it appears that the official respondents have already initiated action as regards the caste certificate. Though PIL is not to be entertained in service matters, that does not stand on the way of the officials from examining the question in the right perspective. In the present case admittedly the officials have initiated action. What action will be taken in such proceedings is not the subject matter of controversy in the present appeal. However, it shall not be construed as if we have expressed any opinion on the merits of the proceedings stated to be pending. The only issue which has been examined relates to the locus standi of the writ petitioner (respondent No.7) to file PIL.

23. Analysing the judgment meticulously, this Court finds that the judgment so relied upon by the learned counsel for the petitioner being **Raju Ramsingh Vasave (Supra)** is not applicable in the facts of the case as the present case does not fall within the exceptions so culled out in the said judgment. The present case also does not come within the parameters of Public Law Litigation and further the issue so sought to be raised by the petitioner is not of any public importance.

24. Nonetheless, the present case is nothing but the proceedings relating to Public Interest Litigation in service matters which as per the law laid down by the Hon'ble Apex Court is not maintainable.

25. There is another reason for not interfering in the present proceedings at the instance of the petitioner particularly in view of the fact that the petitioner happens to be the wife of Yogesh Kumar, who had been dismissed from service and further he has also preferred departmental appeal which is stated to be pending thus the present proceeding is nothing but collateral proceedings just in order to obtain a benefit indirectly which cannot be granted by this Court directly particularly when the dismissal order has not been challenged by an aggrieved party being the dismissed employee itself.

26. Petitioner herein is not an aggrieved party and she happens to be a wife of the dismissed employee, who has her own agenda of getting not only monetary benefits but other benefits attached thereto which cannot be granted by this Court in present proceeding. Nonetheless this Court could have taken a pause on the issue of maintainability of present petition but this Court is also examining the validity of Rule 3-B-(iv) of the 1999 Rules.

27. This Court before embarking any enquiry with respect to the constitutional validity of the provisions contained under Rule 3-B-(iv) of the Rules, 1999 has to bear in mind the relevant factors which need to be taken into consideration for adjudicating the validity of the statutory enactment while forming an opinion as to whether the same needs to be declared to be ultra-virus.

28. It is the settled principal of law that in case any party asserts and assails the validity of a provision on the ground that it is violative of Article 309 and 311 of the Constitution of India then it is for the said party to not only make necessary pleadings but also adduce materials to show that the same is in violation of Article 309 and 311 of the Constitution of India. Even otherwise the presumption is always that legislature understands and correctly appreciates the need of the people and in order to rebut the said presumption, the onus is upon the party who alleges it to be unconstitutional.

29. The Hon'ble Supreme Court in the case of **Chiranjit Lal Chaudhary Vs. Union of India, AIR 1951 SC 41** in paragraph-10 has held as under: -

"..I consider to be well-founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles..."

30. In the case of **State of Bihar Vs. Sm. Charusila Dasi, AIR 1959 SC 1002**, in paragraph 14, the Apex Court has held as under:-

"... It is now well settled that there is a general presumption that the legislature does not intend to exceed its jurisdiction, and it is a sound principle of construction that the Act of a sovereign legislature should, if possible, receive such an interpretation as will make it operative and not in- operative;.."

31. In **AIR 1997 SC 1511, State of Bihar vs. Bihar Distillery Ltd.**, the Supreme Court in paragraph 18 has held as under:-

"18. The Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the Legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void."

32. In **Greater Bombay Coop. Bank Ltd. Vs. United Yarn Tex (P) Ltd, 2007(6) SCC 236**, provides as under:-

"82. The constitutional validity of an Act can be challenged only on two grounds, viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. In State of A. P. & Ors. v. McDowell & Co. & Ors. [(1996) 3 SCC 709], this Court has opined that except the above two grounds, there is no third ground on the basis of which the law made by the competent legislature can be

invalidated and that the ground of invalidation must necessarily fall within the four corners of the afore-mentioned two grounds.

(83) Power to enact a law is derived by the State Assembly from List II of the Seventh Schedule of the Constitution. Entry 32 confers upon a State Legislature the power to constitute co- operative societies. The State of Maharashtra and the State of Andhra Pradesh both had enacted the MCS Act, 1960 and the APCS Act, 1964 in exercise of the power vested in them by Entry 32 of List II of the Seventh Schedule of the Constitution. Power to enact would include the power to re-enact or validate any provision of law in the State Legislature, provided the same falls in an Entry of List II of the Seventh Schedule of the Constitution with the restriction that such enactment should not nullify a judgment of the competent court of law. In the appeals/SLPs/petitions filed against the judgment of the Andhra Pradesh High Court, the legislative competence of the State is involved for consideration. Judicial system has an important role to play in our body politic and has a solemn obligation to fulfil. In such circumstances, it is imperative upon the Courts while examining the scope of legislative action to be conscious to start with the presumption regarding the constitutional validity of the legislation. The burden of proof is upon the shoulders of the incumbent who challenges it. It is true that it is the duty of the constitutional courts under our Constitution to declare a law enacted by the Parliament or the State Legislature as unconstitutional when Parliament or the State Legislature had assumed to enact a law which is void, either for want of constitutional power to enact it or because the constitutional forms or conditions have not been observed or where the law infringes the Fundamental Rights enshrined and guaranteed in Part III of the Constitution.

(84) As observed by this Court in CST v. Radhakrishnan in considering the validity of a Statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, objection of the legislation and all other facts which are relevant. It must always be presumed that the legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations. It is also well-settled that the courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. A provision conferring very wide and expansive powers on authority can be construed in conformity with legislative intent of exercise of power within constitutional limitations. Where a Statute is silent or is inarticulate, the Court would attempt to transmutate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. These principles have given rise to rule of "reading down" the provisions if it becomes necessary to uphold the validity of the law."

33. In **Zaheer Ahmed Latifur Rehman Sheikh Vs. State of Maharashtra and others, JT 2010(4) SCC 256** in paragraph 34 and 35, the Supreme Court has held as under:-

"(34) It is a well-established rule of interpretation that the entries in the List being fields of legislation must receive liberal construction inspired by a broad and generous spirit and not a narrow or pedantic approach. Each general word should extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended within it. [Reference in this regard may be made to the decisions of this Court in Navinchandra Mafatlal v. Commr. of I.T. [AIR 1955 SC 58], State of Maharashtra v. Bharat Shanti lal Shah [(2008) 13 SCC 5]]. It is also a cardinal rule of interpretation that there shall always be a presumption of constitutionality in favour of a statute and while construing such statute every legally permissible effort should be made to keep the statute within the competence of the State Legislature [Reference may be made to the cases of: Charanjit Lal Choudhary v. Union of India [AIR 1951 SC 41], T.M.A. Pai Foundation v. State of Karnataka [(2002) 8 SCC 481], Karnataka Bank Ltd. State of AP [(2008) 2 SCC 254]]

(35) One of the proven methods of examining the legislative competence of a legislature with regard to an enactment is by the application of the doctrine of pith and substance. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme. This doctrine is an established principle of law in India recognized not only by this Court, but also by various High Courts. Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the Court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an entry in the State List but there is only an incidental encroachment on any of the matters enumerated in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the matters in the Union List."

34. In **Namit Sharma Vs. Union of India, 2013(1) SCC 745**, in paragraph 51 and 61, the Supreme Court has held as under:-

"(51) Another most significant canon of determination of constitutionality is that the courts would be reluctant to declare a law invalid or ultra vires on account of unconstitutionality. The courts would accept an interpretation which would be in favour of the constitutionality, than an approach which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the courts. The courts would preferably put into service the principle of "reading down' or "reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. These are the principles which clearly emerge from the consistent view taken by this court in its various pronouncements.

(61) It is a settled principle of law, as stated earlier, that courts would

generally adopt an interpretation which is favourable to and tilts towards the constitutionality of a statute, with the aid of the principles like ''reading into' and/or ''reading down' the relevant provisions, as opposed to declaring a provision unconstitutional. The courts can also bridge the gaps that have been left by the legislature inadvertently. We are of the considered view that both these principles have to be applied while interpreting Section 12(5). It is the application of these principles that would render the provision constitutional and not opposed to the doctrine of equality. Rather the application of the provision would become more effective."

35. Another additional aspect needs to be further noticed at this juncture that though the earlier law was to the effect that the Constitutional validity of Act can be challenged only on two grounds namely (I), lack of legislative competence and (ii) violation of any of the fundamental rights guaranteed in Part-III of the Constitution. However, the exception to the said Rule has been noticed in the case of Shayara Bano Vs. Union of India, 2017 (9) SCC 1, wherein a third exception was carved out with regard to the fact that the Courts of law can even hold the statutory enactment to be ultra vires, where there is "manifest arbitrariness. The Hon'ble Apex Court in its majority opinion 3:2 has held in paragraphs-87, 88, 89 and 101 as under: -

"(87) The thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three Judges' Bench decision in McDowell (supra) when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

(88) We only need to point out that even after McDowell (supra), this Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of Article 14 of the Constitution of India. In Malpe Vishwanath Acharya v. State of Maharashtra, (1998) 2 SCC 1, this Court held that after passage of time, a law can become arbitrary, and, therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of Article 14 of the Constitution of India (see paragraphs 8 to 15 and 31).

(89) Similarly in Mardia Chemicals Ltd. & Ors. v. Union of India & Ors. etc. etc., (2004) 4 SCC 311 at 354, this Court struck down Section 17(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as follows:

"(64) The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (i) it is

imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet, (iii) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meagre amount, and (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not only onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution.

(90) In two other fairly recent judgments namely State of Tamil Nadu v. K. Shyam Sunder (2011) 8 SCC 737 at paragraphs 50 to 53, and A.P. Dairy Development Corpn. Federation v. B. Narasimha Reddy (2011) 9 SCC 286 at paragraph 29, this Court reiterated the position of law that a legislation can be struck down on the ground that it is arbitrary and therefore violative of Article 14 of the Constitution.

(101) It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

36. Recently, in one of the decisions in the case of **K.S. Puttaswamy (Aadhar) Vs. Union of India, reported in 2019 (1) SCC 1** in paragraphs 103, 104 and 105 has held as under:-

"103. In support of the aforesaid proposition that an Act of the Parliament can be invalidated only on the aforesaid two grounds, passages from various judgments were extracted 21. The Court also noted the observations from State of A.P. & Ors. v. MCDOWELL & Co. & Ors.22 wherein it was held that apart from the aforesaid two grounds, no third ground is available to validate any piece of legislation. In the process, it was further noted that in Rajbala & Ors. v. State of Haryana & Ors.23 (which followed MCDOWELL & Co. case), the Court held that a legislation cannot be declared unconstitutional on the ground that it is "arbitrary' inasmuch as examining as to whether a particular Act is arbitrary or not implies a value judgment and courts do not examine the wisdom of legislative choices, and, therefore, cannot undertake this exercise.

104. The issue whether law can be declared unconstitutional on the ground of arbitrariness has received the attention of this Court in a Constitution Bench

judgment in the case of Shayara Bano v. Union of India & Ors.24. R.F. Nariman and U.U. Lalit, JJ. 21 State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312; Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 22 (1996) 3 SCC 709 23 (2016) 2 SCC 445 24 (2017) 9 SCC 1 discredited the ratio of the aforesaid judgments wherein the Court had held that a law cannot be declared unconstitutional on the ground that it is arbitrary. The Judges pointed out the larger Bench judgment in the case of Dr. K.R. Lakshmanan v. State of T.N. & Anr.25 and Maneka Gandhi v. Union of India & Anr.26 where "manifest arbitrariness' is recognised as the third ground on which the legislative Act can be invalidated. Following discussion in this behalf is worthy of note:

"87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in McDowell [State of A.P. v. McDowell and Co., (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

88. We only need to point out that even after McDowell [State of A.P. v. McDowell and Co., (1996) 3 SCC 709] , this Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of Article 14 of the Constitution of India. In Malpe Vishwanath Acharya v. State of Maharashtra [Malpe Vishwanath Acharya v. State of Maharashtra, (1998) 2 SCC 1] , this Court held that after passage of time, a law can become arbitrary, and, 25 (1996) 2 SCC 226 26 (1978) 1 SCC 248 therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of Article 14 of the Constitution of India (see paras 8 to 15 and 31).

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99. However, in State of Bihar v. Bihar Distillery Ltd. [State of Bihar v. Bihar Distillery Ltd., (1997) 2 SCC 453] , SCC at para 22, in State of M.P. v. Rakesh Kohli [State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312 : (2012) 3 SCC (Civ) 481], SCC at paras 17 to 19, in Rajbala v. State of Haryana [Rajbala v. State of Haryana, (2016) 2 SCC 445], SCC at paras 53 to 65 and in Binoy Viswam v. Union of India [Binoy Viswam v. Union of India, (2017) 7 SCC 59], SCC at paras 80 to 82, McDowell [State of A.P. v. McDowell and Co., (1996) 3 SCC 709] was read as being an absolute bar to the use of "arbitrariness" as a tool to strike down legislation under Article 14. As has been noted by us earlier in this judgment, McDowell [State of A.P. v. McDowell and Co., (1996) 3 SCC 709] itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following McDowell [State of A.P. v.

McDowell and Co., (1996) 3 SCC 709] are, therefore, no longer good law."

105. The historical development of the doctrine of arbitrariness has been noticed by the said Judges in Shayara Bano in detail. It would be suffice to reproduce paragraphs 67 to 69 of the said judgment as the discussion in these paras provide a sufficient guide as to how a doctrine of arbitrariness is to be applied while adjudging the constitutional validity of a legislation.

"67. We now come to the development of the doctrine of arbitrariness and its application to State action as a distinct doctrine on which State action may be struck down as being violative of the rule of law contained in Article 14. In a significant passage, Bhagwati, J., in E.P. Royappa v. State of T.N. stated: (SCC p. 38, para 85) "85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by

Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16." (emphasis supplied)

68.This was further fleshed out in Maneka Gandhi v. Union of India, where, after stating that various fundamental rights must be read together and must overlap and fertilise each other, Bhagwati, J., further amplified this doctrine as follows: (SCC pp. 283-84, para 7) "The nature and requirement of the procedure under Article 217. Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in E.P. Royappa v. State of T.N. , namely, that: (SCC p. 38, para 85) "85. ... From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14....' Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied." (emphasis supplied)

37. This Court has also considered the validity of a statutory enactment after following the judgments of Hon'ble Apex Court, while holding that the third ground is also available with a party, who alleges that the statutory enactment is unconstitutional, but it has been observed that the party, who alleges that an enactment is unconstitutional, is possessed with a heavy burden to prove the same and he cannot discharge its onus in a cavalier manner by merely stating that the Amendment Act is unreasonable. In the case of **Noida Employees Association and others Vs. State of U.P, 2019(5) ADJ 602,** this High Court has held as under: -

"23. Coming to the exact challenge raised by the petitioners, the learned Advocate General would submit, the challenge being to the enactment of the State Legislature, the grounds of challenge are limited i.e. two and strict, being either the Act be shown to be beyond the legislative competence of the State Legislature or in violation of any of the fundamental rights guaranteed under Part-III of the Constitution of India or of any other constitutional provision. There does

not exist any third ground to challenge the Amending Act. Relying on that principle firmly emphasised by the Supreme Court in State of A.P. & Ors Vs MCDOWELL & Co. & Ors., (1996) 3 SCC 709, it has been submitted, the burden to establish unconstitutionality of a Statute is a heavy burden that lies strictly on the challenger/petitioners. It cannot be discharged in a cavalier manner by merely stating that the Amending Act is arbitrary or unreasonable. In absence of any challenge raised to the legislative competence or any constitutional infirmity in the Amending Act, it does not lie with the petitioners to set up a loose plea of the Amending Act being contrary to the original Act. Such a ground does not exist. According to him, 'arbitrariness' does not exist as a ground to challenge plenary legislation."

38. Now let us examine the various provisions so engrafted in the constitution as well as the statutory enactment which are occupying the field.

ARTICLES OF CONSTITUTION OF INDIA

309. Recruitment and conditions of service of persons serving the Union or a State*.--Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State: Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor 2*** of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.*

311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.*--(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed. [(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges [Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:*

Provided further that this clause shall not apply--]

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that

authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.]

THE UTTAR PRADESH GOVERNMENT SERVANT (DISCIPLINE AND APPEAL) RULES, 1999

In exercise of the powers conferred by the proviso to Article 309 of the Constitution and in suppression of the Civil Service (Classification, Control and Appeal) Rules, 1930 and Punishment and Appeal Rules for Subordinate Service Uttar Pradesh, 1932, the Governor is pleased to make the following rules :

1. Short title and commencement.-(1) These rules may be called the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999.

(2) They shall come into force at once.

(3) They shall apply to Government servants under the rule making power of the Governor under the proviso to Article 309 of the Constitution except the Officers and the Servants of the High Court of Judicature at Allahabad covered under Article 229 of the Constitution of India.

***3. Penalties:**-The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed upon the Government Servant:*

*A- **Minor Penalties.**.....*

*B- **Major Penalties***

(i) Withholding of increments with cumulative effect;

(ii) Reduction to a lower post or grade or time scale or to a lower stage in a time scale:

(iii) Removal from the service which does not disqualify from future employment;

(iv) Dismissal from the service which disqualify from future employment.

39. Article 309 of the Constitution of India itself provides that subject to the provisions of the Constitution, Acts of the appropriate legislature, they may regulate the recruitment and condition of service of persons appointed to public services and post in connection with the affairs of the Union or of any State.

40. Proviso has also been appended to Article 309 of the Constitution of India envisaging that it shall be competent for President or such persons as it may direct in the case of services and post in connection with the affairs of Union and

for the Governor of a State or such person as it may direct in case of services and post in connection with the affairs of the State to make Rules regulating the recruitment and condition of service of persons appointed to such services and post until provision in that behalf is made by or under an Act of appropriate legislature.

41. Notably Article 311 of the Constitution of India puts an obligation that no person who is a member of civil Services of Union or All India Service or a Civil Service of State or holds Civil Post under Union or a State shall be dismissed or removed by an authority subordinate to that by which he/she was appointed.

42. Undisputedly, in the case in hand the Rules, 1999 have been enacted in exercise of powers conferred by proviso to Article 309 of the Constitution of India which itself explicitly depicts that the enactment of the Rules is supported by statutory backing and the source of power is referable to proviso to Article 309 of the Constitution of India.

43. Now a question arises as to whether insertion of Rule 3-B-(iv) of the Rules, 1999 in so far as it provides for a disqualification for future employment in case of dismissal ultra-virus or not.

44. A bare reading of Article 311 of the Constitution of India itself depicts that a safeguard has been provided to the persons holding civil post either under Union or State that they should not be dismissed or removed by the authority subordinate to that by which they have been appointed and further the fact that before dismissing removing or reducing in rank an enquiry is must while giving reasonable opportunity to be heard.

45. It is not the case of the petitioner that there has been any violation of Article 311 of the Constitution of India with respect to dismissal or removal by an authority subordinate to appointing authority or the dismissal, removal or reduction has been made without giving reasonable opportunity. However, according to the pleadings and the arguments so set forth by the counsel for the petitioner, the words pertaining to disqualification from future employment could not have been attached with the penalty of dismissal.

46. This Court finds that the argument so sought to be raised by the learned counsel for the petitioner is totally misconceived besides the misplaced and also out of context particularly in view of the fact that in the matter of service jurisprudence, there is a marked difference between dismissal and removal. There is always disqualification attached for future employment in former case and in the later case, there is no such disqualification for future employment.

47. Proviso to Article 309 of the Constitution of India itself confers the source of framing of the Rules and rightly so the Rules,1999 have been framed and so far as Article 311 of the Constitution of India is concerned it guarantees certain protection to the person holding civil post either in the Union or State.

48. The petitioner herein cannot question the wisdom of the employer to include or exclude any penalty but the Constitutional guarantee so bestowed under Article 311 of the Constitution of India remains alive with respect to necessary safeguard that the employer or the officer working under Union or State cannot be

dismissed or removed by an authority below the appointing authority or without affording reasonable opportunity in this regard. Hence the submissions so raised by the learned counsel for the petitioner that Rule 3-B-(iv) of the Rules 1999 is totally misplaced and misconceived and out of context.

49. Hon'ble Apex Court in the recent judgment in **Civil Appeal No.2365 of 2020, Nisha Priya Bhatiya Vs. Union of India** decided on 24.4.2020 in paragraph 42 has observed as under:-

42. A conjoint reading of Articles 309 and 311 reveals that Article 311 is confined to the cases wherein an inquiry has been commenced against an employee and an action of penal nature is sought to be taken. Whereas, Article 309 covers the broad spectrum of conditions of service and holds a wider ground as compared to Article 311. That would also include conditions of service beyond mere dismissal, removal or reduction in rank. It holds merit to state that this wide ground contemplated under Article 309 also takes in its sweep the conditions regarding termination of service including compulsory retirement. In Pradyat Kumar Bose Vs. The Hon'ble The Chief Justice of Calcutta High Court 12, this Court touched upon the ambit and scope of Article 309 of the Constitution and expounded that the expression "conditions of service" takes within its sweep the cases of dismissal or removal from service.

50. Applying the judgments the present facts of the case an irresistible conclusion stands drawn that in view of the provisions contained under Article 309 and 311 of the Constitution of India, the conditions of services takes within its ambit, the cases of dismissal or removal from service.

51. Nevertheless the penalties of dismissal and removal is nowhere foreign in service jurisprudence as the said penalties amongst others finds its presence in almost all the disciplinary Rules through out the various services and there difference is widely accepted.

52. The distinction between dismissal and removal had also been subject matter of judicial scrutiny by the Hon'ble Apex Court in several judgments. Namely:

In **AIR 1954 S.C. 369 Shyamlal v. State of Uttar Pradesh and another** relevant para 15 is quoted hereunder:-

" The word "removal" which is used in the rules is also used in this clause and it may safely be taken, for reasons stated above, that under the Constitution removal and dismissal stand on the same footing except as to future employment. In this sense removal is but a species of dismissal. Indeed, in our recent decision in 'Satischandra Anand v. Union of India', AIR 1953 SC 250 at p. 252 (D) it has been said that these terms have been used in the same sense in Article 311."

53. Following the said judgment the Hon'ble Apex Court in the case of **Dr. Dattatraya Mahadev Nadkarni Vs. Municipal Corporation of Greater Bombay (1992) 2 SCC 547** in paragraph nos. 6, 7 & 8 have observed as under:-

6. We find force in the contention raised by the appellant. In Shyamlal v. State of U.P.[1] while dealing with the provisions of Article 311 of the Constitution

of India it was held that under the Constitution removal and dismissal stand on the same footing except as to future employment. In this sense removal is but a species of dismissal. Removal, like dismissal, no doubt brings about a termination of service but every termination of service does not amount to dismissal or removal.

7. In S.R. Tiwari v. District Board, Agra[2] (SCR p. 69) it has been observed:

"It is settled law that the form of the order under which the employment of a servant is determined is not conclusive of the true nature of the order. The form may be merely to camouflage an order of dismissal for misconduct, and it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form merely of determination of employment is in reality a cloak for an order of dismissal as a matter of punishment, the Court would not be debarred merely because of the form of the order in giving effect to the rights conferred by statutory rules upon the employee."

8. The only difference in the punishment of dismissal and removal is that in case of dismissal the employee is disqualified from future employment while in case of removal he is not debarred from getting future employment. In the present case a perusal of Section 83 clearly shows that the punishments provided are: fine, reduction, suspension or dismissal from service.

54. Net analysis of the above caption judgment itself mandates that though the penalty of dismissal and removal stand on same footing except as to the issue future employment. Mentioning thereby that by no stretch of imagination it can be said that attachment of a disqualification of future employment can where be said to be ultra-virus, arbitrary or discriminatory.

55. Resultantly, in view of the foregoing discussions, the present writ petition is wholly misconceived besides being not maintainable and is liable to be dismissed.

56. Accordingly, it is **dismissed**.

57. No order as to costs.

(2022)07ILR A729
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2022

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ B No. 98 of 2021

Om Prakash Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Kumar Singh, Sri Yogesh Singh

Counsel for the Respondents:
C.S.C., Sri Bhupendra Kumar Tripathi, Sri Sunil Kumar Singh

A. Civil Law - Constitution of India, 1950- Article 226 - U.P. Revenue Code, 2006- Section 101 - exchange of land proceeding-petitioner run a school and for that purpose the petitioners moved an application requesting for exchange of their plot with the plots of Gaon Sabha- the Tehsil authorities submitted reports

thrice in favour of exchange but the application was rejected on account of difference of valuation between the plots which were sought to be exchanged-the revisional court has given a perverse finding that the Gaon Sabha was not agreed upon for exchange whereas resolution was passed in favour of the petitioners and the same has never been withdrawn by the Gaon Sabha-Trial court and Board of revenue committed same error in deciding the case without considering the reports submitted by Tehsil authorities with respect to the valuation of plots under exchange.(Para 1 to 14)

The writ petition is partly allowed. (E-6)

List of Cases cited:

1. Gram Panchayat Pusawali Block Junawai, Tehsil Gunnaur, District Badaun Vs St. of U.P. & ors. (2007) 1 ADJ 263

2. Babu Ram Verma Vs Sub-DiVs Officer & ors. (1996) 2 AWC 1036

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard learned counsel for the petitioners, learned counsel for Gaon Sabha and the learned Standing Counsel.

2. Petitioners have invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India challenging the order dated 12.10.2020 passed by the Board of Revenue (Respondent no.2) in Revision No. 3097 of 2018 and the order dated 30.10.2018 passed by the Sub Divisional Officer (Respondent no.3) in Case No. 09244 of 2018 in a proceeding for exchange of land under Section 101 of the U.P. Revenue Code, 2006 (in brevity the Code, 2006).

3. Facts culled out from the pleadings of the parties are that plot no.524 area 0.150 hectare and plot no.523 (kha) area 0.053 hectare, belongs to the Gaon Sabha (Respondent no.4), are situated adjacent to a school namely Nageshwar Prasad Shyam Sunder Shikshan Sanstha allegedly run by the petitioners. Considering the suitability of the aforesaid plots to be used as a playground for school children, the petitioners, who are the recorded tenure holders of plot no.318 area 0.466 hectare situated in Village Suichak, Tehsil Rajatalab, District Varanasi, have moved an application dated 15/17.5.2017 (Annexure-4) under Section 101 of the Code, 2006, requesting for exchange of their plot no.318 area 0.203 hectare (out of total area 0.466 hectare) with the plots of the Gaon Sabha i.e. plot nos. 524 and 523(Kha). The Gaon Sabha, in turn, has passed resolution dated 04.06.2017 (Annexure-3) accepting the proposal of the petitioners for exchange of the land, as mentioned above. It appears that on the application for exchange, the Tehsil authorities have submitted their report thrice in favour of exchange which are annexed as Annexures-5, 6, 7 & 8 respectively. During pendency of the application for exchange, an objection dated 27.06.2018 (Annexure-9) purported to have been filed on behalf of Gaon Sabha through the Standing Counsel (Revenue). The petitioners have filed their replication dated 25.07.2018 (Annexure-10), inter alia, raising the question of maintainability of the aforesaid objection dated 27.06.2018.

4. Exchange application moved by the petitioners was rejected by respondent no.3, vide order dated 30.10.2018 (Annexure-12), basically on account of difference of valuation between the plots which were sought to be exchanged. Having been aggrieved with the order passed by respondent no.3, a revision petition

(Annexure-13) has been preferred by the petitioners which was dismissed as well, affirming the order passed by respondent no.3, vide order dated 12.10.2020 (Annexure-14) passed by respondent no.2. Both the aforesaid orders are under challenge in this writ petition.

5. Learned counsel for the petitioners submits that the petitioners have moved an application for exchange and a resolution dated 04.06.2017 was passed by the Gaon Sabha accepting the proposal for exchange. On the aforesaid application, the Tehsil authorities have submitted their report dated 29.06.2017, 30.07.2017 and 24.08.2017 respectively. He has questioned the authority of Vijay Kumar Pandey, Standing Counsel (Revenue) who has illegally filed objection dated 27.06.2018 whereas Gaon Sabha has not passed any resolution as required under Section 62 of the Code, 2006, authorizing any person to contest the aforesaid matter. Detail provision, as enunciated under Appendix-II of the U.P. Revenue Code Rules, 2016 (in brevity Rules, 2016) has not been followed in filing the said objection. It is further submitted that respondents no. 2 & 3 have illegally discarded the exchange, only relying upon the objection filed by the Standing Counsel (Revenue), without considering the reports submitted by the Lekhpal, Naib Tehsildar and Kanoongo. Next submission is that the trial court has illegally emphasized the difference of valuation of plots which were subject matter of exchange proceeding, whereas in all the reports submitted by the revenue authorities no such difference of valuation has been shown. Location of the plot, adjacent to road side, belongs to Gaon Sabha cannot be a solitary ground for rejection of the said application unless the difference of valuation of plots in exchange, as enshrined under Section 101 (2) (b) of the Code, 2006, is made out. It is also submitted that the revisional court has given a perverse finding that the Gaon Sabha was not agreed upon for exchange whereas the resolution dated 04.06.2017 was passed in favour of the petitioners and the same has never been withdrawn by the Gaon Sabha and even till date the said resolution stands.

6. Per contra, learned counsel for the Gaon Sabha contended that in pursuance of the resolution dated 04.06.2017, no approval was granted by the authority concerned as was sought to be obtained in the said resolution. Further contention is that all the reports submitted by the revenue authorities are not in favour of the petitioners for exchange of land. He has also emphasized the provision as enunciated under Section 101(3) of the Code, 2006 and contended that the property was undivided, therefore, the petitioner cannot exchange their land with the Gaon Sabha. He has supported the conduct of the Standing Counsel (R) who has filed objection on behalf of the Gaon Sabha and contended that no particular resolution had been passed for exchange of plots. According to counsel for Gaon Sabha, provision, as enunciated under Section 62 of the Code, 2006, is applicable only with respect to the matters of compromise and withdrawal and so far as the matter of consent of Gaon Sabha is concerned, the Standing Counsel (Revenue) is free to contest the matter on behalf of the Gaon Sabha. Further contention is that exchange of Gaon Sabha's land with plot of the petitioners is not beneficial in the interest of Gaon Sabha, therefore, such exchange cannot be permitted. Learned counsel for the Gaon Sabha has also made emphasis that there was a difference of valuation of

more than 10% between the plots sought to be exchanged, in contravention of provision under Section 101 (2) (b) of the Code, 2006. Lastly, it is contended that the petitioners have no locus standi to move an application for exchange of land for benefit of the school.

7. I have carefully considered the rival submissions advanced by the learned counsel for the parties and perused the record on Board.

8. Having regard to the submissions advanced by the learned counsel for the parties, vexed question for consideration arises qua maintainability of objection dated 27.06.2018 said to have been filed on behalf of Gaon Sabha through Standing Counsel (Revenue) and the legal sanctity of the impugned orders passed by respondents no.2 and 3, without considering the Tehsil reports in respect of the valuation of plots under exchange.

9. A perusal of impugned order evinces aversion of plea with respect to the maintainability of objection dated 27.06.2018 said to have been filed on behalf of Gaon Sabha. There is nothing on record to show that any person has been authorized to do pairvi in the matter on behalf of Gaon Sabha. In paragraph nos. 18, 21, 25 etc. of the writ petition, the petitioner has specifically averred with regard to the non-maintainability of the objection allegedly filed on behalf of Gaon Sabha through the Standing Cousnel (Revenue) and existence of resolution dated 04.06.2017 passed by Gaon Sabha for exchange of plots in question. It is also averred in the writ petition that Gaon Sabha concerned has not consented to contest the matter on its behalf. In the counter affidavit evasive denial has been made on behalf of Gaon Sabha in this regard. No specific plea has been taken in the counter affidavit to show that against the resolution dated 04.06.2017 any subsequent resolution was passed by Gaon Sabha for its denial or to pursue the lis in opposition initiated by the petitioners for exchange of plots. There are succinct provision under the Code, 2006 relating to the litigation on behalf of Gaon Sabha to sue or to be sued. Section 62 and 72 of the Code, 2006 enunciate the provision conduct of suit and legal proceeding and the appointment of lawyers. Relating procedures are made under Rules 72 to 76 of the Rules, 2016. In this respect Appendix-II to the Rules, 2016 is also relevant with respect to the procedure of litigation.

10. Provision with respect to the litigation of Gaon Sabha as mentioned in the Code, 2006 and the Rules, 2016 are mandatory in nature, as expounded by the Division Bench of this Court in the case of **Gram Panchayat Pusawali Block Junawai, Tehsil Gunnaur, District Badaun vs. State of U.P. & Others** reported in **2007 (1) ADJ, 263** discussing the similar provision as it was mentioned in the U.P.Z.A.&L.R. Act and U.P. Gaon Sabha & Bhumi Prabandh Samiti Manual. In the matter of Gram Panchayat Puswali (Supra) the earlier Division Bench's decision in the matter of **Babu Ram Verma vs. Sub Divisional Officer & Others** reported in **AWC 1996 (2), 1036** was considered.

11. A perusal of the objection dated 27.06.2018 (Annexure-9) reveals that it was only signed by the Standing Counsel (Revenue) but the pleadings, as made in the objection, has not been verified by the person authorized on behalf of Gaon Sabha. Counsel appointed on behalf of the parties is not supposed to verify the facts relating

to the case. He may take a legal ground or plea in the pleadings but cannot make denial with respect to the factual aspect of the case. Both the courts below are miserably failed to consider the maintainability of the objection in the eyes of law, as raised on behalf of the petitioners. In the litigation, verification of pleading is held mandatory under the provisions as enunciated under Order VI Rule 15 C.P.C.

12. So far as difference of valuation of plots is concerned, which were subject matter of exchange, it is evident from the record that the Tehsil authorities have submitted reports thrice in favour of exchange mentioning the valuation of the plots. All the Tehsil reports were submitted in favour of exchange showing the equal valuation of plots. There is nothing on record to show that there is difference of valuation more than 10% of the lower valuation between the plots, which were sought to be exchanged as required under Section 101(2) of the Code, 2006. Though the trial court has given a vague ground qua difference of valuation of plots, without pointing out their valuation, but has failed to discuss the case precisely in light of the reports submitted by Tehsil authorities.

13. The Board of Revenue also committed the same error in deciding the revision without considering the reports submitted by Tehsil authorities with respect to the valuation of plots under exchange. Moreover, the Board of Revenue has considered the new aspect of the matter showing unwillingness of Gaon Sabha in exchange of plots in question. There is nothing on record to show the reluctant attituted of Gaon Sabha in exchanging the plots in question. Counsel for Gaon Sabha has failed to place any document to prove that the resolution dated 04.06.2017 was ever reversed by the subsequent resolution. Under the law, resolution dated 04.06.2017 still considered to be in existence.

14. In this conspectus as above, this Court finds force in the present writ petition. Learned counsel for Gaon Sabha has failed to substantiate his submissions in supporting the impugned orders. Resultantly, the impugned order dated 12.10.2010 (Annexure-14) passed by respondent no. 2 and the order dated 30.10.2018 passed by respondent no. 3 (Annexure-12) are hereby quashed and the parties are relegated before the respondent no.3 who is hereby directed to revisit the matter, considering the maintainability of objection dated 27.06.2018 and the reports submitted by Tehsil authorities from time to time strictly in accordance with law, after giving proper opportunity of hearing to the parties.

15. Accordingly, the present writ petition is partly **allowed.**

(2022)07ILR A733
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Capital Case No. 7 of 2020
With
Reference No. 05 of 2020

Ram Pratap @ Tillu ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Agnivesh, Sri Arimardan Yadav, Sri Jadu Nandan Yadav

Counsel for the Respondents:
A.G.A., Sri Ram Naresh Singh, Sri S.D. Yadav

Criminal Law- Indian Evidence Act, 1860- Section 8- Motive- Circumstantial evidence - No doubt, in a case based on circumstantial evidence, motive has a role, particularly in assessing the probative value of the incriminating circumstances and it may serve as a vital link to the chain of circumstances but motive by itself is not sufficient to hold the accused guilty.

Settled law that in a case based on circumstantial evidence, motive may be one of the links of the circumstances, but the charge against the accused cannot be brought home solely on the ground of motive.

Criminal Law- Indian Evidence Act, 1860- Section 8- Subsequent Conduct- Abscondence after commission of offence- The prosecution has been successful in proving that the appellant-Ram Pratap @ Tillu was not available at his last known residence and could only be arrested after about more than five and a half months despite issuance of coercive steps in between. This circumstance is reflective of the conduct of the appellant of making himself scarce soon after the incident, which is relevant under Section 8 of Indian Evidence Act- No doubt, abscondence of an accused is a relevant fact and is admissible under Section 8 of the Indian Evidence Act but abscondance by itself is not a circumstance on the basis of which an accused may be convicted though, in conjunction with other surrounding circumstances, it may serve as a vital link to the chain of incriminating circumstances.

Abscondence of accused serves only as one of the vital links of circumstances against an accused but conviction cannot be based solely upon the factum of Abscondence.

Criminal Law - Code of Criminal Procedure, 1973- Section 172- Lapses on part of Investigating Officer- As per Section 172 of Cr.P.C. it is the duty of the investigating Officer to maintain a case diary of the case and note down all the steps of investigation in the case diary on a daily basis. Ordinarily, the lapses on the part of Investigating Officer do not affect the outcome of a criminal trial based on ocular account but in a case based on circumstantial evidence, these lapses assume importance and where the prosecution relies heavily upon recovery/ seizure of incriminating articles from the house of the accused then such recovery/seizure has to be proved beyond the pale of doubt therefore, here, such lapses on the part of Investigating Officer are fatal to the prosecution case.

In a case based on circumstantial evidence, the lapses on the part of the investigating officer are relevant , particularly with regard to search , seizure or recoveries; in distinction to cases based on ocular or direct evidence.

extra judicial confession

Criminal Law - Indian Evidence Act, 1860- Section 27- Though it cannot be laid as a rule that wherever prosecution has failed to prove the origin of blood found on the article, the recovery is to be held not incriminating but in any case the recovery has to be proved beyond reasonable doubts-Doubted the recovery of blood-stained towel and the lock-alleged recovery is not on the basis of a disclosure statement-When the recovery was made in absentia (i.e. when appellant was not even present in the house) of articles, which are not proved to be bearing human blood much less of the relevant group, in our view, the recovery,firstly, is not duly proved, and secondly, is not to be taken as a clinching circumstance to hold the appellant guilty.

In order to make the recovery admissible, the same has to be proved beyond reasonable doubt. Where the recovery is not based upon a disclosure by the accused and is carried out in his absence, the same could not be held to establish the guilt of the accused.

Criminal Law - Indian Evidence Act, 1860- Sections 3 & 8- Although prosecution might have been successful in proving the motive for the crime against the appellant and also that the appellant made himself scarce after the incident, but except these two circumstances prosecution failed to prove beyond reasonable doubt any other incriminating circumstance on the basis of which we may hold the appellant guilty.Merely on the basis of motive and abscondence, though it may give rise to strong suspicion, the accused cannot be held guilty-In the case at hand, the chain of circumstances pointing to the guilt of appellant could not be completed.

Settled law that suspicion howsoever strong cannot take the place of proof and therefore, the accused cannot be held guilty merely on the basis of motive and subsequent conduct of absconding. (Para 44, 45, 46, 48, 52, 55, 60, 62)

Criminal Appeal Allowed. (E-3)

Judgements/Case Law relied upon:-

1. Shatrughna Baban Meshram Vs St. of Maha. (2021) 1 SCC 596

2. Ramesh Baburao Devaskar & ors. Vs St. of Maha.,(2007) 13 SCC (501)

3. Sujit Biswas Vs St. of Assam, 2013 (12) SCC 406

4. Sahadevan Vs St. of T.N, 2012 (6) SCC 403

5. Shailendra Rajdev Pasvan Vs St. of Guj., (2020) 14 SCC 750.

6. Raghav Prapanna Tripathi Vs St. of U.P. AIR 1963 SC 74

7. Balwan Singh Vs St. of Chhattis. & anr. (2019) 7 SCC 781

8. Madhav Vs St. of M.P, AIR 2021 SC 4031

9. The St. of Odisha Vs Banabihari Mohapatra & anr, AIR 2021 SC 1375

(Delivered by Hon'ble Sameer Jain, J.)

1. The present appeal has been preferred by the appellant, Ram Pratap @ Tillu, against the judgment and order dated 21.3.2020 and 21.5.2020 passed by 8th Additional Sessions Judge, Etawah by which the trial court convicted the appellant under Section 302 IPC and awarded death sentence to him with fine of Rs.5 Lacs and in default two years R.I.

2. As death sentence was awarded, a reference, i.e., Reference No.5 of 2020 was made to the High Court under Section 366 Cr.P.C. for confirmation of death penalty.

INTRODUCTORY FACTS

3. In the present case, six persons of a family, namely, Suresh Chandra, deceased no.1 (in short D-1), Vimla Devi, deceased no.2 (in short D-2), Avnish, deceased no.3(in short D-3), Rashmi, deceased no.4 (in short D-4), Surabhi, deceased no.5 (in short D-5) and Shweta, deceased no.6 (in short D-6), were brutally murdered. Suresh Chandra (D-1) and Vimla Devi (D-2) were husband and wife whereas Avnish (D-3), Rashmi (D-4), Surabhi (D-5) and Shweta (D-6) were their son and daughters.

4. The FIR of the present case was lodged by Hom Singh (PW-1) on 28.5.2012 at about 7.45 AM. As per FIR, Vimla Devi (D-2), sister of informant (PW-1), was married to Suresh Chandra Yadav (D-1). The appellant, Ram Pratap @ Tillu is the

brother of Suresh Chandra Yadav (D-1). Both the brothers resided separately and their properties stood divided. The appellant was a criminal minded person. He had disposed of his entire property and was pressurising his brother Suresh Chandra Yadav (D-1) and Vimla Devi (D-2) for additional property and money.

5. According to the FIR, the above circumstances were conveyed by Suresh Chandra Yadav (D-1) to the informant (PW-1) and his brother Suresh (PW-2). Consequently, both PW-1 and PW-2 went to village Pilkhar to pacify the appellant but the appellant continued to pressurise Suresh Chandra Yadav (D-1) for money. On 15.6.2012 the marriage of Avnish (D-3), nephew of the informant (PW-1), was to take place. Due to all these reasons, appellant used to be annoyed with D-1 and kept an evil eye on the property of D-1. It is alleged that with that motive, in the night of 27/28.5.2012, appellant with the help of his associates committed the murder of Suresh Chandra Yadav (D-1), Vimla Devi (D-2), Avnish (D-3), Rashmi (D-4), Surabhi (D-5) and Shweta (D-6) thereby eliminating the entire family of Suresh Chandra Yadav (D-1).

6. The FIR of the present case was registered at Police Station Ikdil, District Etawah as Case Crime No.261 of 2012, under Section 302 IPC. After registration of the case, on 28.5.2012 the Investigating Officer recovered bloodstained and plain soil from the spot. He also recovered bloodstained pieces of clothes and gold earring from the spot and prepared a recovery memo (Ext.Ka-8) in respect thereof. On the same day, Investigating Officer recovered from the spot a piece of bread (Roti), 'Laddoo', 'Kachauri', three empty quarter bottle of wine, bowl containing Dal and potato vegetables in respect of which a recovery memo (Ext.Ka-9) was prepared. Thereafter, from the house of appellant, one bloodstained lock and one piece of bloodstained towel was recovered in respect whereof, a recovery memo Ext.Ka-10 was prepared. Next day, on 29.5.2012, from the spot, bloodstained piece of bedsheets, bloodstained pieces of cots and bloodstained and plain pieces of bricks were also recovered in respect whereof, a recovery memo (Ext.Ka-48) was prepared. During investigation inquest reports were prepared and autopsy of the bodies were conducted. Autopsy reports Ext.42 to Ext.47 revealed as follows:-

Ante mortem injuries found on the body of Smt. Vimla Devi (Ext.Ka-42):-

1. Incised wound 14 cm x 08cm x through and through right side and back of neck, neck only attached anteriorly by skin and sub-cutaneous tissues with part of muscles, underlying C3 and C4 vertebra, spinal cord and major blood vessels on both sides of neck are cut.

Cause of death is shock and haemorrhage as a result of A/M injury mentioned above.

Ante-mortem injuries found on the body of Avneesh Yadav(Ext.Ka.43):

1. Incised wound 15 cm x 10 cm x bone deep in front side, underlying Trachea, major blood vessels of both sides, oesophagus, 3rd cervical vertebra with spinal cord are cut.

2.Incised wound 8 cm x 3 cm x bone deep on back of lower part of right forearm wrist, underlying lower end of radius and ulna bones cut.

3.Incised wound 18 cm x 5 cm x through and through on left hand between IIIrd and IVth fingers left wrist and lower part of lower forearm, underlying left IVth metacarpal and lower part of left ulna cut.

Cause of death is shock and haemorrhage as a result of A/M injury mentioned above.

Ante mortem injuries found on the body of Km. Surabhi (Ext.44):

1.Incised wound 12 cm x 4 cm x bone deep on left side of face and left ear pinna, underlying mandible maxilla, temporal are cut.

2. Incised wound 8 cm x 3 cm x bone deep on front and left side of neck, Trachea, oesophagus, major blood vessels of both sides of neck., C4 and C5 vertebra cut with spinal cord cut.

Cause of death is shock and haemorrhage as a result of A/M injury mentioned above.

Ante mortem injuries found on the body of Suresh Chandra (Ext.Ka-45):

1. Incised wound 11cm x 5 cm x cavity deep on front and lower part of neck and adjacent part of left side of chest, underlying collar bone, sternum, left Ist Rib cut, Trachea, oesophagus, left major blood vessel cut.

Cause of death is shock and haemorrhage as a result of A/M injury mentioned above.

Ante mortem injuries found on the body of Km. Shewta (Ext.Ka-46):

1.Incised wound 12cm x 8 cm x cavity deep on front and right side of neck lower part and right side upper chest, underlying cervical fractured; vertebra cut and incised. Trachea, oesophagus, major blood vessels of right side cut.

Cause of death is shock and haemorrhage as a result of A/M injury mentioned above.

Ante mortem injuries found on the body of Km. Rashmi (Ext.Ka-47):

Incised wound 16 cm x 6cm x bone deep on front and right side of neck underlying trachea, oesophagus, major blood vessels of both sides of neck C3 and C4 cut.

Incised wound 6cm x 3cm x muscle deep on front of left shoulder.

Cause of death is shock and haemorrhage as a result of A/M injury mentioned."

7. During investigation, on 19.11.2021 appellant was arrested and at his instance an axe was recovered. Investigating Officer prepared recovery memo of the axe as Ext.Ka-2.

8. After investigation, charge sheet was submitted against the appellant and co-accused Varun Raj. The case was committed to the court of Session and on 12.4.2013 charges under Section 302 read with Section 34 IPC were framed against the appellant and co-accused Varun Raj. The appellant and accused Varun Raj denied the charges and claimed trial.

9. During trial, prosecution examined Hom Singh (PW-1), Suresh (PW-2), Malkhan Singh (PW-3), Shiv Raj Singh (PW-4), Ashok Chandra Dubey (PW-5), Vinod Kumar Pandey (PW-6), Devendra Kumar Dwivedi (PW-7), Sudhakar Singh (PW-8), Sanjay Dubey (PW-9), Manish Jaat (PW-10) and Padamakant Dubey (PW-11). Nahne Ram has been examined as CW-1. Out of 11 prosecution witnesses, PW-1, PW-2, PW-3 and PW-4 are witnesses of facts. Rest of the prosecution witnesses are formal witnesses. CW-1, Nahne Ram, the Tehsildar, is a Court witness.

10. After recording the statement of prosecution witnesses, on 14.10.2019 and 26.10.2019 the trial court recorded the statement of accused-appellant under Section 313 Cr.P.C. In the meantime, on 21.11.2019 public prosecutor filed certified copy of FSL report dated 5.3.2013. On 25.11.2019 learned defence counsel made

endorsement "No objection" on the application filed by the public prosecutor and FSL report dated 5.3.2013 was taken on record. Thereafter, on 29.11.2019, 3rd statement of appellant under Section 313 Cr.P.C. was recorded and after that Nanhe Ram, the Tehsildar, was examined as CW-1. Thereafter, on 20.1.2020, fourth statement of appellant under Section 313 Cr.P.C.was recorded.

11. On 16.12.2019, certified copy of the FSL report dated 29.8.2013 was filed and after perusing the entire evidence on record, trial court convicted the appellant under Section 302 IPC and awarded him death penalty. Co-accused Varun Raj was acquitted.

12. As according to the trial court the case fell in the category of the rarest of rare cases, trial court awarded death penalty to the appellant.

13. We have heard Sri Yadu Nandan Yadav, learned counsel for the appellant, Sri S.D.Yadav, Advocate holding brief of Sri Ram Naresh Singh, learned counsel for the informant and Sri Amit Sinha, learned AGA, for the State and have perused the record.

SUBMISSIONS MADE ON BEHALF OF APPELLANT

14. Learned counsel for the appellant submitted that the trial court committed grave error in convicting the appellant as it is a case of no admissible evidence. He submitted that there is no eye witness account of the incident. The prosecution case is based on circumstantial evidence but prosecution has miserably failed to prove the incriminating circumstances and the chain of circumstance could not be proved.

15. Learned counsel for the appellant submitted that the trial court heavily relied upon motive for the crime and subsequent abscondence of the appellant as incriminating circumstances but they by themselves cannot form basis of conviction. He submitted that the motive shown that after eliminating his brother and his family, the appellant would inherit the property is misconceived because upon conviction for murder of the deceased no one can succeed to the estate of the deceased. Sri Jadu Nandan Yadav, learned counsel for the appellant, submitted that the recovery of bloodstained lock and bloodstained towel is rendered doubtful as one of the independent witnesses of the recovery, namely, Ashok Kumar, was not examined by the prosecution. He contended that as recovery of bloodstained towel is doubtful, serological report is of no value. Even if recovery of bloodstained towel is accepted, it cannot be said that the blood found on the piece of towel is of the deceased persons inasmuch as there is no serological report to indicate that the blood group of the deceased matched with the blood found on the towel. Moreover, there is no report on record regarding the blood group of any of the deceased persons. Therefore, mere presence of blood on the recovered piece of towel is of no consequence and cannot be taken as an incriminating circumstance to hold the appellant guilty.

16. Learned counsel for the appellant also submitted that the incriminating circumstances, that is of abscondence of the appellant and recovery of bloodstained towel and lock from the house of the appellant, were not put to the appellant while recording his statement under Section 313 Cr.P.C. which caused prejudice to him therefore, those circumstances were to be eschewed. Hence, the appellant is entitled to be acquitted.

17. In the alternative, learned counsel for the appellant submitted that the facts of the case and the nature of evidence led do not warrant a death penalty.

SUBMISSIONS MADE ON BEHALF OF THE STATE AND THE INFORMANT

18. Learned AGA as well as the informant's counsel submitted that the prosecution has successfully proved the guilt of appellant beyond reasonable doubt and the trial court rightly convicted the appellant in the present case.

19. Learned AGA submitted that the appellant is the real brother of Suresh Chandra Yadav (D-1) and immediately after the crime, he absconded and could only be arrested after six months. His conduct shows he was guilty. Moreover, he eliminated the entire family of his brother only to grab his property and after the incident, property of his brother, Suresh Chandra Yadav (D-1), came to the appellant and appellant executed a Power of Attorney in favour of his wife Smt. Manju to enable transfer of the property in favour of his daughter (Diksha). Thereafter, Diksha disposed off the entire property for Rs. Five crores. Thus, the motive for the crime stands duly proved as against the appellant.

20. Learned AGA also submitted that the appellant offered no explanation in respect of blood stained towel recovered from his house. Even the recovery was not challenged during cross-examination of the witnesses. The serological report was also not challenged. In fact, the defence counsel endorsed 'no objection' on the application through which the FSL report was filed. It was submitted that in the present case as many as six person including small children were brutally murdered, therefore, trial court rightly awarded death penalty to the appellant.

21. Having noticed the rival submissions and having perused the entire record of the case, before evaluating the prosecution evidence it would be appropriate to notice in brief the deposition of the prosecution witnesses.

Prosecution witnesses:-

22. **Hom Singh PW-1** is the informant, who lodged the FIR of the present case. This witness stated that his sister Vimla Devi (D-2) was married to Suresh Chandra (D-1). Appellant was the sole brother of Suresh Chandra (D-1). Property of both the brothers had already been divided between them. Appellant disposed of his entire property and was eyeing the property of his brother. PW-1 stated that appellant is a criminal minded person and use to pressurize PW-1's sister (D-2) and Suresh Chandra (D-1) for money and property and also use to threaten them. PW-1 further stated that his brother-in-law (D-1) and his sister (D-2) conveyed all these facts to him, as a result, PW-1 and Suresh (PW-2) had gone to village-Pilkhar to settle the matter but in spite of their effort, the appellant continued to harass D-1 and D-2. PW-1 stated that the marriage of Avinash (D-3), his nephew, was fixed for 15.6.2015. Due to that, appellant was annoyed. On 27.5.2012, at about 6:00 pm, his brother-in-law, Suresh Chandra (D-1), informed PW-1 on mobile phone that appellant and co-accused Varun Raj, Kallu, Rajveer, Satyaveer, Dutt Singh and Suresh Chandra have threatened him that as, till date, land has not been transferred in the name of appellant, they will eliminate his

entire family in the night itself. As per PW-1, he assured his brother-in-law (D-1) that he will come in the morning. But, in the morning, PW-1 received information that his brother-in-law and his entire family has been killed. PW-1 proved the written report as Ext. Ka 1. PW-1 also stated that associates of appellant have threatened him that if he does not compromise the matter then his entire family will also be eliminated.

23. In his cross-examination, PW-1 stated that two-three times he participated in a panchayat held to settle the property dispute between the appellant and Suresh Chandra (D-1). PW-1 also stated that the mobile on which he received the phone call from Suresh Chandra (D-1) has been lost and, therefore, he could not provide its number as he is illiterate. He denied the suggestion that deceased No. 1 did not give him a phone call.

24. **Suresh has been examined as PW-2.** He is brother of Hom Singh (PW-1). In his statement PW-2 stated that his sister Vimla Devi (D-2) was married to Suresh Chandra Yadav (D-1). PW-2 stated that the brother of Suresh Chandra Yadav (D-1), namely, Rampratap @ Tillu (appellant), lived separately and the property had been divided between brothers. PW-2 reiterated that the appellant is a criminal type of a person and as he had disposed of his entire property, he was pressurizing his brother (D-1) and D-1's wife (D-2) for money and property. PW-2 stated that one day before the incident, he alongwith his brother Hom Singh (PW-1) went to settle the matter but all their efforts were in vain. PW-2 stated that 15.6.2012 was the date fixed for the marriage of his nephew Avnish (D-3), invitation cards had also been distributed but, in the night of 27/28.5.2012, appellant along with his associates, namely, Varun and Dileep, killed his brother-in-law Suresh Chandra(D-1); his sister Vimla Devi (D-2); his nephew Avnish (D-3); his neices Rashmi (D-4), Shweta (D-5) and Surbhi (D-6). In his cross-examination, PW-2 admitted that the appellant had a separate residence in the village where his brother-in-law Suresh Chandra (D-1) resided.

25. **Malkhan Singh has been examined as PW-3**. This witness stated that on 28.5.2012, after receiving information about the murder of Suresh Chandra (D-1) and his family members, he arrived at village-Pilkhar. In his presence, from the spot, blood stained soil and other materials were recovered. PW-3 stated that Investigating Officer prepared recovery memo i.e. Paper No. 8Ka/1, 8Ka/2, 8 Ka/3 and 8Ka/4 which were read over to him and after hearing the contents of these recovery memos, he had put his signatures. In his cross-examination, this witness denied the suggestion that recovery memo was not prepared before him and that he put his signature on plain papers. PW-3 also denied the suggestion that the entire paper work was done at the police station. Interestingly, PW-3 did not specifically state that recovery of blood stained towel and lock was made from the house of appellant. He only stated that paper No.8Ka/3 (Ext.Ka.10) was read over to him and was signed by him.

26. **Shivraj Singh was examined as PW-4**. According to this witness, he and alongwith Rajesh @ Pappu (not examined) had gone to Barthana for some work on 10.11.2012. At the outskirts of Barthana, he met the appellant on a motor cycle. At that time, there were two more persons with the appellant who disclosed their name as Dilip and Vikas @ Varun. They stated that Hom

Singh (PW-1), who comes from PW-4's family, has lodged an FIR against the appellant in respect of murder of his brother and his brother's family, therefore, he should ensure that the matter is settled. In this way, PW-4 tried to prove that the appellant had confessed his guilt. In his cross-examination, PW-4 stated that he went to Barthana to buy items for domestic use. He, however, could not disclose either the location of the shop or the name of the shopkeeper. PW-4 also stated that the day when he met the accused persons, the Sub Inspector had recorded his statement at about 10.00 AM. Interesting, PW-4 stated that he went to the market at around 12 pm and was there till 4-5 pm. In these circumstances, it be noted the trial court discarded the testimony of this witness.

27. **Ashok Chandra Dubey is PW-5**. This witness stated that he prepared parcha No. 4 of the case diary and perused the investigation parchas prepared earlier by the earlier Investigating Officer and started investigation of the case on 28.10.2012. On 30.10.2012 he recorded another statement of Hom Singh (PW-1) as also the statements of witnesses of recovery, namely, Ashok Kumar (not examined) and Malkhan Singh (PW-3). On 19.11.2012, he arrested appellant-Rampratap @ Tillu and, at his pointing out, recovered country-made pistol, empty cartridge and two motor cycles. He also stated that at the pointing out of the appellant, an axe, allegedly used in the crime, was recovered on 19.11.2012 in respect whereof, he prepared recovery memo (Ext.Ka-2). PW-5 also proved the site plan including its index (Ext. Ka-3) and proved submission of charge sheet (Ext. Ka-4) on 17.1.2013. In his cross-examination, PW-5 stated that after the arrest of appellant he did not record his statement at the spot. However, according to PW-5, on 19.11.2012 axe was recovered on the pointing out of the appellant from roof of the shop of Rajveer (not examined). PW-5 admitted that recovery of the axe was made after about six months of the incident.

28. **Vinod Kumar Pandey has been examined as PW-6.** This witness is the first Investigating Officer of the case. PW-6 stated that on 28.5.2012, he was posted as Station House Officer at P.S. Ikdil, Etawah and on that day, Hom Singh (PW-1) handed over a written report against appellant and his associates in respect of murder of six persons of the family of his brother-in-law. He recorded the statement of PW-1 and inspected the spot and recovered blood-stained and plain soil from the spot alongwith blood stained golden earring and prepared recovery memo (Ext.Ka-8). He also prepared the site plan (Ext. Ka-6) of the spot. PW-6 also prepared the site plan (Ext. Ka 7) of the house of appellant; and recovery memo (Ext.Ka-9) of food items including empty quarter bottles of wine found in the house of the deceased. PW-6 stated that he recovered a blood stained lock and blood stained towel from the house of the appellant. He proved the recovery memo of the same as Ext. Ka 10. PW-6 also produced these items in Court as material Ext. ka-2 to ka-16. In his cross-examination, PW-6 stated that Parcha No. 1 of the case diary is not in his hand writing. He also stated that details of both the site plans i.e. Ext. Ka-6 and Ka-7 were not in his writing. PW-6 stated that the site plan Ex. Ka-6 and Ex. Ka-7 were prepared on the instructions of the informant and at his pointing out.PW-6 admitted that the sample seal of material exhibits is not available on record as it was sent to the Forensic Laboratory. PW-6 denied the suggestion that he did not inspect the spot and that he

completed the investigation exercise sitting at the police station.

29. **Devendra Kumar Dwivedi has been examined as PW-7.** He is the 3rd Investigating Officer of the case. He stated that on 5.8.2012, he was posted at Police Station-Ikdil and during investigation of the case, he prepared Parcha No. 20 of the case Diary. On 17.8.2012, he prepared parcha No. 21. He disclosed about his attempts to arrest the appellant-Rampratap @ Tillu. In his cross-examination, PW-7 stated that parcha Nos. 20 and 21 of the case diary were not in his hand writing and that those were in the hand writing of Head Constable. Likewise, parcha Nos. 22 and 23 of the case diary was also not in his hand writing.

30. **S.I. Sudhakar Singh has been examined as PW-8.** He was a Sub Inspector posted at Police Station Ikdil. On 28.5.2012, he prepared the inquest report of Suresh Chandra (D-1) (Ext.Ka-11) and his wife Smt. Vimla Devi (D-2) (Ext.Ka-16). PW-8 proved the inquest reports of Suresh Chandra (D-1) and Smt. Vimla Devi (D-2) as Ext.Ka-11 and Ka-16. He also proved preparation of other documents, like, Challan Nash, Photo Nash etc. which were marked as Ext. Ka-11 to Ka-20. PW-8 stated that inquest report of Avnish Chandra (D-3) and Km. Surabhi (D-4) was prepared by HCP Amar Singh, who has since retired. He stated that inquest report of Km. Rashmi (D-5) and Km. Shweta (D-6) was prepared by SI Babu Lal Dohre, who has since expired. PW-8 proved the inquest report of Avnish Chandra (D-3), Km. Surabhi (D-4), Km. Rashmi (D-5) and Km. Shweta (D-6) which were marked as Ka-21, Ka-26, Ka-32 and Ka-37, respectively He also proved other documents, like, Challan Nash, Photo Nash etc.

31. **PW-9 Sanjay Dube, Nursing Assistant, CHC Jashwant Nagar, Etawah.** According to this witness, on 28.5.2012 he was posted as Nursing Assistant at Police Hospital, Etawah and he was present along with Dr. D.P.Singh at the post mortem house. He stated that on that day autopsy of all the six deceased persons was conducted by Dr. D.P.Singh. PW-9 proved the post mortem reports of all the six deceased persons as Ext.Ka.42 to Ka-47. This witness identified/proved the signature of Dr. D.P.Singh on the post mortem reports.

32. **In his cross-examination PW-9, Sanjay Dubey,** stated that he was not assigned duty in the post mortem house. He denied the suggestion that Dr. D.P.Singh did not prepare the post mortem report in his presence. He also stated that his job is to note the name of the dead body. He stated that in the post mortem house only the Doctor who conducts the post mortem and Sweeper are present. PW-9 admitted that he was not in the post mortem house at the time of autophy. He also admited that the entries in autopsy reports Ext.Ka-42 to Ka-47 were not made in his presence. He stated that he cannot state about the contents of the autopsy reports. PW-9, however, denied the suggestion that he wrongly verified the signature of Dr. D.P.Singh who conducted the autopsy of the bodies.

33. **The prosecution examined Manish Jaat as PW-10.** He is the second Investigating Officer of the case. He stated that on 29.5.2012 he was assigned investigation of the present case. On 29.8.2012 he prepared CD Parcha No. 2 and recorded the clarificatory statement of the informant. On 30.5.2012 he prepared CD ParchaNo. 3 and made copy of inquest

report and autopsy reports. On 29.5.2012 prepared the recovery memo (Ext. Ka-48) of all bloodstained items recovered from the spot. He deposed about attempts to arrest the appellant. On 7.6.2012 he prepared CD Parcha No.8 in respect of obtaining the process under Section 82 Cr.P.C. against the appellant. In CD Parcha no.15 of the case diary, dated 29.6.2012, he entered his efforts to arrest the appellant, He also conducted raids on the house of appellant and his sister to arrest the appellant,which was entered in CD Parcha No. 17, dated 8.7.2012, and in Parcha no. 18, dated 11.7.2012. He also copied the list of the items seized from the house of the appellant under Section 83 Cr.P.C. He stated that after making entry in CD parcha no. 19, dated 3.8.2012, he was transferred.

34. In his cross-examination PW-10 stated that parcha nos. 2 to 18 of the case diary are in one writing but they are not in his handwriting. PW-10 stated that informant is a resident of village Bandhana; he was not a witness of the incident; and that he arrived at the place of the incident on receipt of information from the villagers. He also stated that the previous Investigating Officer did not lift any item from the spot even though it was there and it was PW-10 who prepared the memo Ext.Ka.48. He further stated that witnesses of recovery memo (Ext.Ka-48) were not from that village but from a place falling under other Police Stations. PW-10 stated that he did not prepare site plan of the spot. He also stated that during investigation he did not record statement of any witness of fact or of any formal witness. He, however, denied the suggestion that he did not inspect the spot or had completed the investigation sitting at home.

35. **Head Constable, Padamkant Dubey, has been examined as PW-11**. He proved the chik FIR (Ext.Ka-49) and G.D.entry (Ext.Ka-50) in respect thereof. PW-11 stated stated that Sushil Kumar, who prepared chik FIR (Ext.Ka-49) and G.D.entry (Ext.Ka-50) had died. He proved the entries by recognizing his handwriting and signature.

36. **Nahne Ram, Tehsildar, has been examined as CW-1.** This witness stated that Ram Sanehi (father of the appellant) died on 10.11.1997 and after his death his agricultural land was equally divided between his two sons, namely, Suresh Chandra (D-1) and Ram Pratap (appellant). He stated that the appellant disposed of his entire agricultural land between the year 2004 and 2011 through six sale deeds. CW-1 stated that half of the ancestral land of Suresh Chandra (D-1) was inherited by the appellant vide entry dated 25.7.2015. On 7.2.2016, appellant executed a power of attorney in favour of his wife, Manju. On 12.4.2016, Manju executed a sale deed of the property in favour of her minor daughter, Km. Diksha Yadav @ Aaradhya and for 22 plots of different sizes, she executed sale deeds in favour of several persons. Later , in the year 2019, Km. Diksha Yadav, daughter of the appellant, after attainment of majority, executed six sale deeds in favour of different persons of the property which came to her on transfer from her mother. According to CW-1, these properties were located on National Highways No.2 and were extremely valuable with a going rate of about Rs. Two Crores per hectare. He stated that the properties sold using power of attorney would be of the value of about Rs. Five Crores.

37. In his cross-examination, CW-1 stated that, during investigation, the Investigating Officer did not record his statement. CW-1 admitted that the appellant inherited the property of Suresh Chandra (D-1) and being the owner had all the rights to transfer the property.

38. After statements of the prosecution witnesses were recorded, trial court recorded the statement of appellant under Section 313 Cr.P.C. on 14.10.2019, 26.10.2019 and 29.11.2019. After the statement of CW-1 was recorded an additional statement of the appellant was recorded on 20.1.2020.

39. On 21.11.2019 the prosecution filed a certified copy of the FSL report through an application on which, on 25.11.2019, defence counsel endorsed "No objection" as a consequence whereof, the same was taken on record.

40. The trial court convicted and sentenced the appellant as above.

Analysis:-

41. The present case is based on circumstantial evidence. There is no eye witness account of the murders/incident. As to when conviction can be recorded in a case based on circumstantial evidence, the law is well settled. For the sake of brevity, instead of noticing multiple legal pronouncements in that regard, we deem it appropriate to notice a recent decision of a three-Judge Bench of the Apex Court in the case of ***Shatrughna Baban Meshram Vs. State of Maharashtra (2021) 1 SCC 596***, where, in paragraph 42, legal principles to be followed in a case based on circumstantial are crystallised as follows :-

".....42. Before we deal with the second submission on sentence, it must be observed that as laid down by this Court in Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116], a case based on circumstantial evidence has to face strict scrutiny. Every circumstance from which conclusion of guilt is to be drawn must be fully established; the circumstances should be conclusive in nature and tendency; they must form a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused; and such chain of circumstances must be consistent only with the hypothesis of the guilt of the accused and must exclude every possible hypothesis except the one sought to be proved by the prosecution. The decision in Sharad Birdhichand Sarda V. State of Maharashtra [(1984) 4 SCC 116] had noted the consistent view on the point including the decision of this Court in Hanumant v. State of M.P. [1952 SCR 1091] in which a bench of three judges of this Court had ruled (AIR pp 345-46, para 10):-

"10. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show

that within all human probability the act must have been done by the accused."

42. Keeping the aforesaid legal principles in mind, we shall evaluate the prosecution evidence. In the present case, prosecution had relied upon following **circumstances:-**

(A) Motive;

(B) Long abscondence of appellant Ram Pratap @ Tillu;

(C) Receipt of phone call by the informant-Hom Singh (PW-1) from Suresh Chandra (D-1) in the evening, preceding the night of the incident, that the appellant has threatened to kill D-1 and his family.

(D) Recovery of blood stained lock and blood stained towel from the house of the appellant;

(E) Extra judicial confession of the appellant before Shiv Raj Singh (PW 4);

(F) Recovery of blood stained axe on the pointing out of appellant;

(G) The serologist report which indicated presence of blood on the towel recovered from the house of appellant.

Motive:-

43. In the present case the motive set up by the prosecution is that the appellant who is the brother of Suresh Chandra Yadav (D-1) wanted to grab D-1's property as the appellant had already disposed off his entire property. Hom Singh, the informant (PW-1), and Suresh PW-2 stated that several times they participated in a Panchayat held to resolve the dispute between the appellant and the deceased No. 1 (Suresh Chandra). As per their testimony, appellant had already disposed of his entire property therefore he use to pressurize Suresh Chandra (D-1) and his wife Vimla (D-2) for money and property and to grab D-1's property, appellant committed the murder of his brother (D-1) and of his entire family. Tehsildar-Nanhey Ram (CW-1) stated that after death of D-1's father, the entire property equally devolved upon Suresh Chandra (D-1) and Ram Pratap (appellant) but appellant disposed of his entire property by executing registered deeds between the year 2004 and 2011. CW-1 further proved that after the death of Suresh Chandra (deceased No. 1), half of the property was inherited by the appellant on 25.7.2015 regarding which, on 7.2.2016, appellant executed power of attorney in favour of his wife, Manju and, on 12.4.2016, Manju, executed a sale deed in favour of her daughter Km. Diksha Yadav @ Aradhya. In addition to that she executed sale deeds in favour of different persons of 22 plots and, later, after attaining majority, Diksha (daughter of appellant), in the year 2019, executed sale deeds of the properties in favour of different persons. CW-1 proved that the property of Suresh Chandra (D-1) was very valuable and the property transferred through several sale deeds would be worth Rs. Five crores.

44. Thus, from the statement of Hom Singh (informant) PW-1, Suresh (PW-2) and Nanhey Ram-Tehsildar (CW-1), it is proved that appellant was a beneficiary of his brother's murder and could, therefore, be said to have motive to wipe out his brother Suresh Chandra (D-1) and his entire family to grab his property.

No doubt, in a case based on circumstantial evidence, motive has a role, particularly in assessing the probative value of the incriminating circumstances and it may serve as a vital link to the chain of circumstances but motive by itself is not sufficient to hold the accused guilty.

The Apex Court in the case of ***Ramesh Baburao Devaskar and others Vs.***

State of Maharashtra reported in ***[(2007) 13 SCC (501)*** observed as follows:-

".....26. Proof of motive by itself may not be a ground to hold the accused guilty. Enmity, as is well-known, is a double edged weapon. Whereas existence of a motive on the part of an accused may be held to be the reason for committing crime, the same may also lead to false implication. Suspicion against the accused on the basis of their motive to commit the crime cannot by itself lead to a judgment of conviction."

Long abscondence of the appellant-

45. According to the prosecution, after the incident, appellant absconded and in spite of best efforts, he could not be promptly arrested. The statement of Sub Inspector-Ashok Chandra Dubey (PW-5) shows that appellant was arrested on 19.11.2012 i.e. after about five and a half months of the incident. Sub Inspector-Manish Jaat (PW-10), one of the Investigating Officers of the case, stated that on 7.6.2012, he approached the Court to obtain process under Section 82 Cr.P.C. against the appellant and on 8.6.2012, he got a news item published in news paper for the arrest of the appellant and thereafter, he tried to obtain a proclamation against the appellant under Section 83 Cr.P.C. Later, on 11.7.2012, in Parcha No. 18, PW-10 entered the list of the articles attached from the house of appellant. Thus, the testimony of Sub Inspector- Manish Jaat (PW-10), one of the Investigating Officers, reveals that efforts were made to arrest the appellant and as the appellant made himself scarce coercive processes under Sections 82 & 83 Cr.P.C. were undertaken to secure his arrest. From this it can be held that the prosecution has been successful in proving that the appellant-Ram Pratap @ Tillu was not available at his last known residence and could only be arrested after about more than five and a half months despite issuance of coercive steps in between. This circumstance is reflective of the conduct of the appellant of making himself scarce soon after the incident, which is relevant under Section 8 of Indian Evidence Act. Illustration (i) to Section 8 Evidence Act says:-

"(i) A is accused of a crime. The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant."

46. The Supreme Court in the case of ***Sujit Biswas Vs. State of Assam*** **[2013 (12) SCC 406]** observed in paragraph 23, as follows:-

"23..... the mere abscondence of an accused does not lead to a firm conclusion of his guilty mind. An innocent man may also abscond in order to evade arrest, as in light of such a situation, such an action may be part of the natural conduct of the accused. Abscondence is in fact relevant evidence, but its evidentiary value depends upon the surrounding circumstances, and hence, the same must only be taken as a minor item in evidence for sustaining conviction. (See: Paramjeet Singh V. State of Uttarakhand, (2010) 10 SCC 439; and S.K. Yusuf v. State of W.B., (2011) 11 SCC 754." Thus, no doubt, abscondence of an accused is a relevant fact and is admissible under Section 8 of the Indian Evidence Act but abscondance by itself is not a circumstance on the basis of which an accused may be

convicted though, in conjunction with other surrounding circumstances, it may serve as a vital link to the chain of incriminating circumstances.

CALL OF D-1 To PW-1 ON THE EVE OF THE INCIDENT:

47. Hom Singh (PW 1) stated that on the eve of the incident, at about 6 pm, he received a phone call from his brother-in-law Suresh Chandra (D-1) that appellant has threatened him that D-1's entire family will be killed in the night. In his cross examination, PW-1 neither disclosed the mobile number on which the call was received nor mobile number of D-1 from which the alleged call was made. Interestingly, PW-1, to avoid close cross-examination, stated that the mobile on which he received the call from Suresh Chandra (D-1) has been lost. In these circumstances, the statement of PW-1 in respect of receipt of phone call from the deceased on the eve of the incident does not inspire our confidence. We are therefore of the view that prosecution cannot take help of this alleged circumstance, inasmuch as, prosecution has failed to prove the said circumstance beyond reasonable doubt.

Recovery of blood stained lock and blood stained towel from the house of the appellant-

48. The fourth circumstance relied by the prosecution is recovery of blood stained lock and towel from the house of the appellant on 28.5.2012, i.e. on the day, FIR of the present case was lodged. PW-6, Sub Inspector- Vinod Kumar Pandey, first Investigating Officer of the case, stated that on 28.5.2012 he recovered a blood stained lock and blood stained piece of towel from the house of appellant and he prepared a seizure memo (Ext. Ka-10). Perusal of the seizure memo dated 28.5.2012 reveals that on 28.5.2012, Vinod Kumar Pandey (PW-6) in the presence of two witnesses, namely, Malkhan Singh (PW-3) and Ashok Kumar (not examined), recovered/seized a blood stained lock and blood stained towel from the house of the appellant. Strangely enough, in the seizure memo (Ext. Ka-10), dated 28.5.2012, no time is mentioned and except the signature of Vinod Kumar Pandey (PW-6), the Investigating Officer, there is no signature of any other police personnel who was in the team of Policemen headed by Vinod Kumar Pandey (PW-6) at the time the house of the appellant was searched. If PW-6 alone carried out the search then it creates a serious doubt about the whole exercise as to why he did not involve the other team members in the exercise. Further, it is also not clear from the seizure memo (Ext. Ka 10), dated 28.5.2012, as to whet the verandah from where the blood stained towel was recovered could be accessed from outside or not. If that verandah was accessible from outside, the presence of towel would not be of much significance. Notably, the towel was not recovered on the basis of a disclosure statement but in a search operation. Therefore, it was necessary for the prosecution to establish that the place from where recovery of the towel was made was not accessible to all and sundry but only to the accused by showing that he had been in exclusive control or possession of that house. It is also not mentioned in the seizure memo (Ext. Ka-10), dated 28.5.2012, as to how witnesses Malkhan Singh (PW-3) and Ashok Kumar (not examined) were present at the time of search even though they were residents of different village.

49. Site plan (Ext. Ka-7) shows that the blood stained towel was recovered from place-'B' which is an inner portion of the

house. A careful scrutiny of the site plan (Ex.Ka-7) would reflect that the lock was recovered from the main door (Point no.A) which opens in the front verandah. In this front verandah there is opening of two more rooms. One is of appellant's wife Manju and the other is towards east. Both these rooms have entry to other portions of the house including the inner verandah as well as point "B' from where the alleged towel was recovered. Neither the seizure memo (Ext.Ka-10) nor the site plan shows that those two rooms were found locked. Hence, there is no clinching evidence that the inner verandah where "Point B' is located was not accessible from outside. Interestingly, in his cross examination, PW-6 (Vinod Kumar Pandey) stated that he prepared the site plan (Ext.Ka-7) of the house of the appellant on the instructions of informant-(Hom Singh)(PW-1). He also stated that he prepared the site plan (Ext. ka-7) of the house of appellant exactly as narrated by Hom Singh (PW-1). This is strange because perusal of seizure memo (Ext. Ka-10) dated 28.5.2012 would show that search and seizure was made in the presence of witnesses Malkhan Singh (PW-3) and Ashok Kumar (not examined) but not Hom Singh (PW-1) i.e.informant. It is not even mentioned in seizure memo dated 28.5.2012 (Ext. Ka-10) that at the time of search and seizure, PW-1 was present. In fact, there is no signature of PW-1 on Ext. Ka-10.

50. Further, PW-3 Malkhan Singh does not state that the blood stained lock and blood stained towel was recovered in his presence from the house of appellant. He only stated that paper No. 8 Ka/3 (Ext. Ka-10) was prepared before him and read over to him and thereafter, he put his signature thereon. The testimony of PW-3 therefore does not support the recovery of lock and towel although it supports the preparation of recovery memo. The other witness of the recovery, namely, Ashok Kumar has not been examined.

51. In addition to above, PW-6 Vinod Pandey, the Investigating Officer, stated that he did not himself prepare parcha No. 1 of the case diary dated 28.5.2012 and that it is not mentioned in the case diary as to who has written Parcha No. 1. He also admitted that Parcha No. 1 to 16 of the case diary are in one handwriting. If parcha No.1 of the case diary dated 28.5.2012 has not been written by PW-6, the Investigating Officer, who allegedly made recovery of blood stained towel and lock from the house of appellant on 28.5.2012, and it is not known as to who wrote parcha No.1, then the entire exercise of recovery of blood stained items from the house of appellant is rendered doubtful. Similar statements have been given by other Investigating Officers. Sub Inspector Devendra Kr. Dwivedi (PW 7), in his cross examination, stated that parcha Nos. 20 and 21 of the case diary are not in his hand writing. He also admitted that parcha Nos. 22 and 23 are not in his handwriting. In fact, he could not disclose as to who had written parcha Nos. 22 and 23 of the case diary. Further, PW-10, Sub Inspector, Manish Jaat, in his cross examination, stated that parcha Nos. 2 to 18 are in one handwriting but those were not in his handwriting.

52. In our opinion, these circumstances suggest that investigation of the present case was not conducted properly. Rather, it appears tainted. As per Section 172 of Cr.P.C. it is the duty of the investigating Officer to maintain a case diary of the case and note down all the steps of investigation in the case diary on a

daily basis. Ordinarily, the lapses on the part of Investigating Officer do not affect the outcome of a criminal trial based on ocular account but in a case based on circumstantial evidence, these lapses assume importance and where the prosecution relies heavily upon recovery/ seizure of incriminating articles from the house of the accused then such recovery/seizure has to be proved beyond the pale of doubt therefore, here, such lapses on the part of Investigating Officer are fatal to the prosecution case.

53. Thus, on the basis of the discussion above, we are of the view that the alleged recovery of blood stained lock and bloodstained towel from the house of the appellant on 28.5.2012 has not been proved beyond reasonable doubt and it has also not been established beyond reasonable doubt that the place from where the towel was recovered was not accessible without removal of the lock allegedly put on the main door.

Extra Judicial Confession-

54. The fifth circumstance relied by the prosecution is extra judicial confession alleged to have been made by appellant before Shivraj Singh (PW-4). The law in respect of the value of an extra judicial confession is settled by a catena of decisions of the Apex Court. The Apex Court in the case of ***Sahadevan Vs. State of Tamil Nadu*** reported in ***[2012 (6) SCC 403]*** observed as follows:-

"14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra- judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra- judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration."

The case of ***Sahadevan (supra)*** has been discussed and approved by a three Judges Bench of Supreme Court in the case of ***Shailendra Rajdev Pasvan Vs. State of Gujarat etc***. reported in ***(2020) 14 SCC 750.***

In the instant case, as per Shivraj Singh (PW 4), on 10.11.2012, when he alongwith Rajesh @ Pappu (not examined) had gone to village-Bharthana, the appellant alongwith two other co-accused, Dileep and Vikku@Varun, had contacted him and had informed him about the existence of FIR against the appellant in respect of the murder and had requested PW-4 to ensure a settlement at any cost. In his cross examination, Shivraj Singh (PW-4) stated that on 10.11.2012 i.e., the date when he met the appellant, his statement was recorded by the police at 10:00 am. He stated that he had gone to market at about 12:00 noon and remained there till 4-5 pm. PW-4 could not disclose the location of the shop which he had visited that date. Thus, if the statement of Shivraj Singh (PW-4) was recorded at about 10.00 AM how could he have made a disclosure about the meeting with the appellant when he had allegedly met him after noon. Thus, the statement of PW-4 does not inspire our confidence. Moreover, the statement of PW-4 is not in respect of any specific statement made by the appellant by way of

confession of his guilt but it is in respect of the knowledge of the FIR being lodged against him and for settlement of the matter. We are, therefore, in agreement with the finding of the trial court that the testimony of PW-4 (Shivraj Singh) is not worthy of credit. We therefore discard the circumstance of extra judicial confession alleged to have been made by the appellant.

Recovery of blood stained axe on the pointing out of the appellant-

55. According to the prosecution, on 19.11.2012 appellant was arrested and on his pointing out a bloodstained axe was recovered. S.I. Ashok Chandra Dubey (PW-5) stated about the recovery of axe at the instance of the appellant. Recovery memo of axe (Ext. Ka-2) shows that on 19.11.2012 at the instance of the appellant from the roof of a shop of Rajbeer Singh (not examined) a bloodstained axe was recovered. Learned AGA submitted that recovery of axe is admissible under Section 27 of Indian Evidence Act and is therefore an incriminating circumstance against the appellant. Notably, the alleged axe was recovered after about five and half months of the incident and that too, from an open place which is not proven to be inaccessible or concealed. Rather, it is an open roof, therefore, in our view, it has hardly any relevance more so, when there is no evidence on record to show that the axe was sent for forensic examination to find out whether there was presence of human blood on it. Thus, in our view, recovery of the axe cannot be treated as an incriminating circumstance to convict the appellant for the murder of the deceased.

Serological Report-

56. As, we have already disbelieved the recovery of bloodstained lock and bloodstained towel from the house of appellant, the report of the serologist loses its relevance. Even otherwise though the serologist report dated 05.03.2013 (paper no. 122 ka/2) shows presence of blood on the towel but its origin is not ascertained. Report of the serologist shows that the sample quantity on the lock was so small that it could not be ascertained whether it was bloodstained or not. The note of serologist on the report suggests that in respect of the origin and classification of the blood, a separate report was awaited. Order-sheet of the case dated 16.12.2019 shows that Pairokar of Police Station Ikdil filed a supplementary case diary, alongwith certified copy of FSL report dated 29.8.2013. FSL report dated 29.8.2013 shows that origin of the blood on the piece of towel (recovered from the house of appellant) could not be ascertained as it got disintegrated. Thus, there is no clinching evidence that the blood found on the towel was human blood much less of the group of the deceased.

57. In the case of **Raghav Prapanna Tripathi Vs. State of U.P. AIR 1963 SC 74** the issue was whether the two missing persons were killed or not because their bodies were not traced out though some blood-staines were found. In that context, in absence of serologist's report that the blood was of human origin, by a majority view, the Supreme Court observed, in paragraph no. 21, as follows:-

"In this connection, reference may also be made to circumstances 9 and 10, relating to the recovery of the bloodstained earth from the house. The blood-stained earth has not been proved to be stained with human blood, Again we are of opinion that it would be far-fetched to conclude from the mere presence of blood-

stained earth that earth was stained with human blood and that the human blood was of Kamla and Madhusudhan. These circumstances have, therefore, no evidentiary value."

58. In **Balwan Singh Vs. State of Chhattisgarh and another (2019) 7 SCC 781** a three judges Bench of the Apex Court after discussing several earlier judgments of the Supreme Court including the judgment in **Raghav Prapanna Tripathi (supra)**, in paragraph no. 23, held as under:-

"From the aforementioned discussion, we can summarise that if the recovery of bloodstained articles is proved beyond reasonable doubt by the prosecution, and if the investigation was not found to be tainted, then it may be sufficient if the prosecution shows that the blood found on the articles is of human origin though, even though the blood group is not proved because of disintegration of blood. The Court will have to come to the conclusion based on the facts and circumstances of each case, and there cannot be any fixed formula that the prosecution has to prove, or need not prove, that the blood groups match."

59. Recently, the Apex Court after discussing all the relevant judgments this regard, in the case of **Madhav Vs. State of Madhya Pradesh AIR 2021 SC 4031** observed, in paragraph no. 32, as follows:-

"Therefore, as pointed out by this Court in Balwan Singh Vs. State of Chhattisgarh (2019) 7 SCC 781, there cannot be any fixed formula that the prosecution has to prove, or need not prove that the blood groups match. But the judicial conscience of the Court should be satisfied both about the recovery and about the origin of the human blood."

60. From the above noted judgments of Supreme Court, what emerges is that though it cannot be laid as a rule that wherever prosecution has failed to prove the origin of blood found on the article, the recovery is to be held not incriminating but in any case the recovery has to be proved beyond reasonable doubts. In the instant case, we have already doubted the recovery of blood-stained towel and the lock. Moreover, this alleged recovery is not on the basis of a disclosure statement. In these circumstances, when the recovery was made in absentia (i.e. when appellant was not even present in the house) of articles, which are not proved to be bearing human blood much less of the relevant group, in our view, the recovery,firstly, is not duly proved, and secondly, is not to be taken as a clinching circumstance to hold the appellant guilty.

61. That apart, we also notice that the serologist report dated 29.8.2013 was not even put to appellant u/s 313 Cr.P.C. However, as there is nothing incriminating in it against the appellant, we do not propose to remand the matter to trial court on that ground.

62. In view of the discussion above, we find that although prosecution might have been successful in proving the motive for the crime against the appellant and also that the appellant made himself scarce after the incident, but except these two circumstances prosecution failed to prove beyond reasonable doubt any other incriminating circumstance on the basis of which we may hold the appellant guilty. Merely on the basis of motive and abscondence, though it may give rise to

strong suspicion, the accused cannot be held guilty. The Apex Court in case of **The State of Odisha Vs. Banabihari Mohapatra and another AIR 2021 SC 1375**, in paragraph no. 38, observed:-

"It is well settled by a plethora of judicial pronouncement of this Court that suspicion, howsoever strong cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond reasonable doubt. This proposition has been reiterated in Sujit Biswas v. State of Assam reported in AIR 2013 SC 3817."

Recently, a three judges bench of Apex Court in the case of **Shailendra Rajdev Paswan** (supra), in paragraph 16, observed as follows:-

"16. It is well settled by now that in a case based on circumstantial evidence the Courts ought to have a conscientious approach and conviction ought to be recorded only in case all the links of the chain are complete pointing to the guilt of the accused. Each link unless connected together to form a chain may suggest suspicion but the same in itself cannot take place of proof and will not be sufficient to convict the accused."

63. In the case at hand, the chain of circumstances pointing to the guilt of appellant could not be completed. Therefore, in our view, the appellant is entitled to be acquitted.

64. For all the reasons recorded above, the judgment of the trial court in our opinion cannot be sustained and is liable to be set aside. The appeal is **allowed.** The reference to confirm the death penalty is answered in negative and reference to confirm the death penalty awarded to accused-appellant Ram Pratap @ Tillu is rejected. The judgment and order of the trial court is set aside. The appellant Ram Pratap @ Tillu is acquitted of all the charges for which he has been tried. The appellant shall be released forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437-A Cr.P.C. to the satisfaction of the court below.

65. Let a copy of the judgment be sent to the court below for information and compliance.

(2022)07ILR A752
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Capital Case No. 15 of 2021
(Reference No. 12 of 2021)

Virendra Baghel ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Rizwan Ahmad, Sri Dilip Kumar (Senior Adv.)

Counsel for the Respondents:
A.G.A.

Criminal Law- Indian Evidence Act, 1872-Circumstantial Evidence-There is no eye witness account of either rape or murder-For conviction to rest solely on circumstantial evidence, it is necessary for the prosecution to prove beyond reasonable doubt each of the circumstances that is to be relied against the accused and must demonstrate that the circumstances form a chain so complete that it leaves no reasonable ground for the conclusion consistent with

the innocence of the accused and shows that in all human probability the act has been done by the accused.

Settled law that in a case of circumstantial evidence the prosecution has to prove each circumstance beyond reasonable doubt so that the same makes the links of a chain complete pointing only to the guilt of the accused.

Criminal Law-Indian Evidence Act, 1872-Section 3- Chance witness had to explain his presence at the place where he witnessed the deceased in the company of the appellant-Explanation rendered by PW-4 for his presence there is not satisfactory and convincing-Conduct of the chance witness subsequent to the incident is also important, particularly, whether he has informed anyone about the fact.

Where a chance witness fails to explain his presence at the place of occurrence as well as his subsequent conduct, then his testimony cannot be held to be trustworthy and reliable.

Criminal Law- Indian Evidence Act, 1872-Sections 25 & 27- Confession made by an accused to the Investigating Officer is concerned, it is not admissible in evidence by virtue of Section 25 of the Indian Evidence Act-However, that portion of the confession that leads to the recovery of any incriminating material, such portion alone, is admissible under Section 27 of the Evidence Act-Material discrepancy in the testimony of witnesses with regard to the time of arrest of the accused. Ordinarily, where the arrest of the accused becomes doubtful a taint gets attached to the testimony of police witnesses with regard to the disclosure of the accused being the basis of recovery-recovery of slippers of the deceased and bricks were allegedly made in the presence of a number of witnesses but none of those witness were examined during trial. Recovery was sought to be proved solely on the basis of testimony of Sanjay Singh (PW-11), the Investigating Officer, whose testimony, in respect of arrest, we have found unreliable.

Only that portion of the confession of the accused that distinctly pertains to the recovery is admissible in evidence but where the arrest is doubtful, independent witnesses have not been examined and the testimony of the investigating officeris also unreliable, then no credibility can be assigned to the recovery.

Criminal Law - Code of Criminal Procedure, 1973- Section 293- Human blood on the jeans (pant) of the appellant is not a clinching circumstance against the appellant as it has not been confirmed whether the blood was of the deceased or of the appellant-There was no semen found and so far as blood is concerned its origin was not ascertained, that is, whether it was of the appellant or the deceased- Neither the recovery memo of nail clipping of the appellant nor the medical report of the appellant was prepared and proved. Even the doctor, who examined the appellant and took his nail clipping, was not examined. Further, there is no evidence on record to show that the alleged nail clipping of the appellant was sealed and forwarded to forensic lab for analysis. In absence of these material evidences, merely on the basis of bald statement of the Investigating Officer, it cannot be held that the nail clipping sent to forensic lab was of the appellant. Otherwise also, we do not consider the presence of blood in the nail clipping as a clinching circumstance against the appellant for the reasons: (a) due to disintegration it could not be determined that blood found on nail clipping was human blood; and (b) if one uses nail to scratch one's body, often traces of blood get trapped in the nails hence presence of blood there, in absence of determination of its origin, in our view, is not a clinching incriminating circumstance.

Where the prosecution has failed to ascertain the origin of the blood, as the blood was found to be disintegrated, and has also failed to prove the recovery memo of the nail clipping then the same cannot be said to constitute a clinching evidence against the accused.

Criminal Law - Code of Criminal Procedure, 1973- Section 53 A-When the appellant was arrested, as per provisions of Section 53A Cr.P.C., his medical examination should have been conducted. No such medical examination of the appellant has been brought on record much less proved.

Not conducting the medical examination of the accused would be one of the grounds for disbelieving the story of the prosecution.

Criminal Law- Indian Evidence Act, 1872 - Section 106 of the Evidence Act does not absolve the prosecution of its primary responsibility to prove the prosecution case beyond reasonable doubt-Before shifting the burden upon the accused to furnish explanation of the incriminating circumstances appearing against him, it is necessary for the prosecution to prove its case beyond reasonable doubt-The prosecution has failed to prove beyond reasonable doubt that the deceased was last seen alive with the accused-appellant and that the recoveries were made at the instance of the appellant therefore, burden could not have been placed upon the appellant to explain those circumstances.

Settled law that the burden under Section 106 of the Evidence Act cannot be shifted upon the accused before the prosecution proves its case beyond reasonable doubt. (Para 43, 44, 51, 55, 56, 58, 59, 61, 62)

Criminal Appeal allowed. (E-3)

Case Law/Judgements relied upon:-

1. Anwar Ali Vs St. of H.P, 2020 (10) SCC 166

2. Rajesh Yadav & ors. Vs St. of U.P., 2022 (3) ADJ 114 (SC)

3. Jarnail Singh Vs St. of Punj., 2009 (9) SCC 719

4. Rammi @ Rameshwar Vs St. of M.P. (1999) 8 SCC 649

5. Krishan Kumar Malik Vs St.of Har. (2011) 7 SCC 130

6. Shivaji Chintappa Patil Vs St. of Maha. 2021 (5) SCC 626

(Delivered by Hon'ble Sameer Jain, J.)

1. The appellant (Virendra Baghel) has been convicted under Section 302, 201, 363, 376AB IPC and 3(2)(V) SC/ST Act vide judgment and order dated 17.09.2021/18.09.2021 passed by Additional District and Sessions Judge/ Additional Special Judge, POCSO Act Court No.1, Firozabad in P.S.T. No. 1730 of 2019 (State of U.P. Vs. Virendra Baghel) and has been awarded following punishment:-

(i) death penalty under Section 302 IPC and 376AB IPC read with Section 3(2)(V) SC/ST Act

(ii) 7 years R.I. with fine of Rs. 5,000/- and in default one month additional imprisonment under Section 201 IPC and 363 IPC

2. As for offences punishable under Section 302, 376 AB IPC, read with Section 3(2)(V) SC/ST Act, capital sentence has been awarded, the court below has sent a reference for confirmation of death penalty, which has been registered as Reference No. 12 of 2021..

3. The appellant has also submitted his appeal from jail against the aforesaid judgment and order, which has been forwarded by the Superintendent (Jail), Firozabad vide letter dated 23.09.2021. The same has been registered as Capital Case No. 15 of 2021. The appellant has prayed that the judgment and order of conviction and sentence recorded by the trial court be

set aside and that he be acquitted of the charges.

4. To represent the appellant, who could not engage a private counsel, Sri Dilip Kumar, learned Senior Counsel, was appointed as Amicus Curiae.

5. Considering the nature of the crime, we are not disclosing the name of the victim, members of her family as well of the witnesses of that area (locality) and, therefore, wherever required, they have been described by their witness number.

Introductory facts

6. The prosecution story in a nutshell is that an FIR was lodged by PW-1 on 26.04.2019, at about 6.10 hours at Police Station Linepar, District Firozabad, under Section 363 IPC, against unknown person, which was registered as Case Crime No. 61 of 2019. As per the FIR, on 25.04.2019, at about 11.00 AM, the deceased (i.e. daughter of the informant-PW-1), aged about 11 years, had gone missing. The FIR neither named any suspect nor disclosed where the girl could have gone yet, without any basis it was registered under Section 363 IPC.

7. On 26.04.2019, at about 13.16 hours, an information is received by Police Station Basaipur Mohamadpur, Firozabad that dead body of a lady is lying in Gram Sofipur behind the shop of Barashree in a burnt condition. This information is entered as G.D. Entry No. 20 at 13.16 hours on 26.04.2019 whereafter S.I. Sahab Singh (PW-10) arrived at the spot and prepared the inquest report (Ext. Ka-13), by about 16.30 hours. By the time the inquest report was prepared, the identity of the body could not be established. Therefore, inquest proceeding was conducted in respect of an unknown body of a girl aged about 13 years.

8. On 27.04.2019 family members of the deceased identified the dead body as to connect it with the missing girl referred to in Case Crime No. 61 of 2019 (supra).

9. The autopsy of the body was conducted on 27.04.2019 at about 3.30 PM. As per autopsy report (Ext. Ka-4) the body was in a decomposed condition, rigor mortis had passed all over the body and the skin had peeled off at places. The autopsy surgeon found following ante mortem injuries:-

1. Fracture of Nasal Bone and mandible, skin and muscles absent.

2. Fracture right radious and ulna lower part, right palm missing, skin and muscle absent, bone exposed of whole right upper limb

3. Depressed fracture of left tempo parietal, skin absent, bone exposed.

4. Contusion 8cm X 4cm upper part of chest, right of midlime

5. Abraded contusion 18cm X 3cm on back of chest

Note:- Skin and muscle missing at places (face, scalp, right upper limb).

Genital Organs (vagina) found lacerated. Uterus was non gravid. Vaginal smear slide was prepared and sent for examination.

10. As per autopsy report, death occurred about two days before due to shock and haemorrhage as a result of ante mortem injuries. After autopsy, a sealed bundle of clothes i.e. Salwar, Kurta and one pair of Payal was handed over to police.

11. On 28.04.2019, the appellant was arrested regarding which, an arrest memo (Ext. Ka-10) was prepared and, on his

pointing out, four bloodstained bricks and one pair of black colour Chappal (slipper) of the deceased were recovered from the spot on 28.04.2019. Investigating Officer also lifted bloodstained and plain earth from the spot and prepared the recovery memo (Ext. Ka-14). Recovery memo of slipper of deceased is Ext. Ka-15 and recovery memo of bloodstained bricks is Ext. Ka-16. On 28.04.2019, Investigating Officer also seized Jeans (pant) of the appellant which he allegedly wore at the time of the incident and was wearing at the time of arrest. In this regard a seizure memo (Ext. Ka-17) was prepared. The jeans (pant) of the appellant was seized to find out whether it carried semen stain. During investigation, Top, Kurta, one pair Payal, bloodstained and plain earth, Bricks, Jeans (pant of appellant), Vaginal smear and nail clippings of the victim were sent to Forensic Lab, Agra, U.P. Forensic Lab Report, dated 15.06.2019, was forwarded to C.O. Sadar, Firozabad. As per Forensic report, dated 15.06.2019, on all the items blood was found. On item nos. 1 (Top), 2 (Kurta), 4 (earth piece), 5, 6 (Bricks), 7 (Jeans Pant) and 8 (Vaginal smear) human blood was found. On item no. 8 (vaginal smear) blood/sperm of human origin was found. No sperm could be found on Jeans Pant.

12. After investigation, Investigating Officer submitted charge-sheet against the appellant under Sections 363, 302, 376AB, 201 IPC and Section 3(2)(V) SC/ST Act and 5(m) POCSO Act. After submission of charge sheet cognizance was taken and on 26.8.2019 charges were framed under section 363, 302, 376 A B, 201 IPC and 3(2)(v) SC/ST Act and 5(m)/6 POCSO Act against the appellant. Appellant denied all the charges and claimed trial.

Prosecution Evidence

13. During trial, prosecution examined 11 witnesses. Their testimony is noticed below:-

14. **PW-1 is the informant of the case.** She is the mother of the deceased. She stated that on 25.4.2019, at about 11 am, her daughter (the deceased), aged about 11 years, had gone to play but she did not return. At that time, she (the deceased) wore payjama-kurta. PW-1 stated that report of the incident was dictated by her to X (not examined), who wrote it, and the same was given by her at the police station. The written report was marked Ext. Ka-1. PW-1 stated that, later, she came to know that the appellant raped and killed her daughter by crushing her head with the help of bricks. She further stated that the bricks used in the incident were recovered at the instance of the appellant.

15. During cross-examination, PW-1 stated that she is illiterate but can sign. On the report, she had put her thumb impression. PW-1 stated that the incident is of 25th but she is not aware about the month and the year as she is illiterate. PW-1 stated that now she does not remember who was the scribe of the report. PW-1 stated that she named the appellant. His name was disclosed by her Jethani (PW-2). During cross-examination, PW-1 stated that the house of the appellant is in front of her house and that after lodging the report, the appellant was apprehended by her and others and they took him to the police station. She further stated that she does not remember after how many days of the report, appellant was apprehended and taken to the police station. She also could not tell as to for how many days the appellant was detained at the police station. PW-1 could not tell as to on how many papers police got her thumb impression.

She stated that the written report was dictated by her and was scribed at the police station. She stated that the police did not take her to any other place except the police station. PW-1 also stated that the written report (Ext. Ka-1) was read over to her. She denied the suggestion that the report was not read over to her.

16. **PW-2 is the Aunt of the deceased (wife of the elder brother of the father of the deceased).** She stated that on 25.4.2019, at about 11:00 AM, when she was sitting at her house, deceased was seen crossing the railway track. PW-2 requested the deceased not to cross the track but she (deceased) did not pay any attention to her advise and crossed the railway track. When the deceased was standing across the track, she saw the accused also crossing the track and talking to the deceased and thereafter the appellant took her away. During cross-examination, PW-2 stated that the railway track is near her house but she does not know the place from where the dead body was recovered. She (PW-2) also stated that she had informed the informant (PW-1) on the same about what she had seen but she was not aware as to who was the accused in the report. PW-2 stated that she witnessed the deceased crossing the railway line at about 11 AM. But after the train passed from the line, she did not see the deceased thereafter. PW-2 stated that the appellant and the deceased were spotted together, talking to each other, for five minutes and, thereafter, where they went she does not know. PW-2 denied the suggestion that she did not witness the deceased in the company of the appellant.

17. **PW-3 is the uncle of the deceased.** According to PW-3, the deceased was enticed away and killed by the appellant after committing rape. PW-3 stated that the deceased belonged to Bahalia caste, which is a scheduled tribe. During cross-examination, PW-3 stated that on the date of incident, he was not at home. He had gone to buy bangles. He stated that his wife (PW-2) informed him about the incident, at about 3 pm. PW-3 stated that his brother and brother's wife (PW-1) had gone to lodge the report on the date of incident. He stated that he had gone to the police station along with the wife of his brother (PW-1) to lodge the FIR but he is not aware whether any person's name was disclosed in the FIR or not. PW-3 stated that after a day or two of the incident, dead body of the deceased was recovered. PW-3 accepted the suggestion that he did not witness the deceased (i.e. the victim) going with any one and that what he has stated is on the information received from his wife.

18. **PW-4 is the neighbour of informant (PW-1).** He stated that on 25.4.2019 when he was going to the market, he saw the appellant with the deceased standing in front of a bank in Ram Nagar. He asked the deceased as well as the appellant as to where they were going and the appellant informed him that they were going to the market. PW-4 stated that thereafter he did not see the deceased alive. He stated that the appellant enticed away the deceased, raped and murdered her.

19. During cross-examination, PW-4 stated that he is a graduate and sells bangles. He has no relationship with the family of the deceased and that his house is about 50 meters away from the house of the informant. He stated that on 25.4.2019 he had left his house to go to Shikohabad for business at about 5.30 am; sold bangles till about 10 am and returned back home by about 2.00 pm. PW-4 stated that he used

the same path for going and coming back home and on that route no Bank is located. During cross-examination, PW-4 stated that he saw the deceased at Ram Nagar S.B.I. Bank at about 11.30 am but admitted that this information was not given by him either to the informant or to the police.

20. **Constable Ravindra Singh, is PW-5.** He proved the chik FIR as Ext. Ka-2 and computerized G.D. Entry of kayami mukadma as Ext. Ka-3.

21. In his cross-examination, PW-5 stated that the case was lodged against unknown person and at the police station, the informant (PW-1) and the scribe (not examined) had arrived on 26.4.2019 at 6:10 am in the morning and they had come with a written report (Ext. Ka-1). PW-5 denied the suggestion that he did not prepare the chik FIR as per the application given by the informant (PW-1).

22. **Jitendra Singh is PW-6.** He is one of the witnesses of the inquest report (Ext. Ka-13). He stated that on 26.4.2019, in Sofipur region of police station Basai Mohammadpur, a dead body of an unknown female was recovered which was in a decomposing state. The inquest of the body was completed by about 1:00 PM.

23. In his cross-examination, PW-6 stated that he is a resident of Sofipur; while he was going towards his field, on the way, seeing the crowd, he stopped; police arrived there 5 to 6 minutes after his arrival; he does not know who informed the police; the dead body was lying in field but he does not know whose field it was. PW-6 stated that dogs had eaten a major portion of the body. The body was carrying a payjama. But the condition of the body was very bad, therefore, it was not possible to identify the same. PW-6 stated that where the body was lying, there were no bushes around.

24. **Dr. Anurag Vyas is PW-7**. He is the autopsy surgeon who conducted the autopsy of the body, on 27.4.2019. PW-7 stated that he received the body in an unsealed condition. According to PW-7, dead body was in a decomposed condition and rigor mortis had passed from all over the body. Skin peeled off at the places and eyes, mouth, tongue and teeth were not present. He described the injuries noticed by him, which we have already noticed above.

25. According to PW-7, vagina was ruptured and he had prepared a vaginal smear slide and had sent it for pathological examination. According to PW-7, time of death was about two days before autopsy and cause of death was due to ante mortem injuries. PW-7 stated that salwar, kurta and one pair of anklet (after sealing) were sealed and handed over to the police. PW-7 proved the autopsy report as Ext. Ka-4. In his cross-examination, PW-7 stated that the right hand of the body of the deceased was missing, skin and muscles of face and scalp were also missing. According to PW-7, the age of the deceased would be around 13 years. PW-7 stated that the deceased might have taken food 3 to 5 hours before her death. He stated that the body of the deceased was identified as per information provided by father or uncle of the deceased.

26. **Baldev Singh Khaneda is PW-8.** He is the 3rd Investigating Officer who investigated the case from 21.6.2019. He proved few stages of the investigation and addition of Section 3 (2)(v) SC/ST Act. He proved the charge sheet as Ext. Ka-11.

27. In his cross-examination, PW-8 stated that he perused the caste certificate of the victim (deceased) she was member of SC/ST caste. He stated that during investigation he had asked the doctor whether the victim had been raped and the doctor had confirmed it.

28. **PW-9 is Sub Inspector Chhatrapal Singh.** He is the first investigating Officer of the case. He stated that on 26.4.2019, he was posted at police station Linepar as Sub Inspector. On registration of the case, he recorded the statement of witnesses including PW-1 (mother of the deceased). PW-9 stated that PW-1 in her statement recorded under Section 161 Cr.P.C. had expressed suspicion against the appellant and at her instance, he inspected the spot. PW-9 proved the site plan as Ext. Ka-12. PW-9 further stated that on 27.4.2019 it was entered in C.D. Parha No.2 that the kidnapee's body has been recovered and identified by her family members; and that dead body was sent to mortuary for post mortem. He stated that during investigation name of the appellant surfaced and Sections 302, 376 AB IPC ¾ POCSO Act were added whereafter, the investigation was conducted by the Station House Officer.

29. In his cross-examination, PW-9 stated that after lodging the FIR, he went to the house of informant (PW-1) and had recorded her statement. PW-1 supported the FIR and expressed suspicion against the appellant. Other than the name of the appellant, PW-1 did not disclose name of any other person. PW-9 stated that PW-1 had informed him that although nobody was named in the FIR but she has suspicion against the appellant. He further stated that when he went to the house of the appellant he could not find him. PW-9 admitted that neither the dead body of the deceased was recovered by him nor he sent the body for autopsy. He stated that the body was sent for post mortem by police of police station Basai Mohammadpur, Firozabad. PW-9 stated that he received the autopsy report from police station Basai Mohammadpur, Firozabad. PW-9 stated that while he investigated the matter, he could not arrest the appellant because after addition of sections 302, 376 AB IPC, investigation was taken over from him by S.H. O. Sanjay Singh (PW-11). PW-9 stated that except expression of suspicion by PW-1 against the appellant, he could not collect any other evidence against the appellant. PW-9 stated that after recovery of dead body, the name of appellant surfaced in the statement of witnesses. According to those witnesses, the appellant had taken away the deceased.

30. **Sub Inspector, Sahab Singh is PW-10.** He stated that on 26.4.2019 while he was posted at Basai Mohammadpur, Firozabad he received information from mobile No. 8006288765 at No. 100 that in village Sofipur, behind the shop of Bara, a body of a lady is lying in a burnt condition. After receiving the information, he arrived at spot along with lady constables and prepared the inquest report (Ext. Ka-13). PW-10 produced the clothes of the deceased in Court, which were made material Ext. Nos. 15, 16 and 17.

31. During cross-examination PW-10 stated that the dead body was in a decomposed condition and at the time of inquest, the identity of the body could not be fixed. The body was in a red-green colour kurti, which had yellow prints, and maroon coloured salwar. PW-10 stated that he handed over the clothes in a sealed condition to the police of police station -

Linepar. He stated that after the inquest proceeding, he did not carry out any further investigation of that case.

32. **Sub Inspector, Sanjay Singh is P.W. 11.** He is the Second Investigating Officer of the case. He stated that on 27.4.2019 he prepared parcha No. II A of the case diary and on 28.4.2019, arrested the appellant who confessed his guilt and on his pointing out, from the spot, blood stained and plain earth was lifted and recovery memo (Ext. Ka 14) was prepared. PW-11 produced the blood stained and plain earth which were made material Ext. 1 to 6. PW-11 stated that he also recovered slippers of the deceased from the spot and prepared recovery memo (Ext. Ka-15). According to PW-11, the slippers were identified by deceased's father (not examined). According to PW-11, from the spot, four bricks and one blood stained main brick was recovered of which a recovery memo Ext. Ka-16 was prepared. PW-11 produced the bricks as material Ext. 7 to 10 and also produced the main brick used by the appellant to crush the face of the deceased, which was marked material Ext. 11 and 12. PW-11 stated that he recovered the jeans (pant) of the accused-appellant and prepared its recovery memo (Ext. Ka-17). PW-11 produced the jeans (pant) of the appellant as material Ext. 14. PW-11 proved the arrest memo of the appellant as Ext. Ka-18. According to PW-11, on 29.4.2019 medical examination of appellant was conducted and his nail clippings were taken by the doctor. PW-11 stated that on 29.5.2019, he collected the caste certificate of deceased and added Section 3(2)(v) of the SC/ST Act thereafter, further investigation was conducted by Circle Officer (PW-8) as the deceased belonged to Bahalia caste, which is one of the scheduled tribes. On 25.8.2021, examination-in-chief of PW-11 was again recorded. He stated that he had prepared site plan of the place of the incident. The same was marked Ext. 19. During cross-examination, PW-11 stated that he arrested the appellant on 28.4.2019 on the basis of information furnished by the informer. He stated that at the time of appellant's arrest, there was no public witness. PW-11 stated that the place of incident was a secluded place where new plots were being carved out. At the spot there was a half constructed room. Only its wall was there. The place of incident was about 400 to 500 meters away from the main road. PW-11 stated that at the time when the accused had taken him to the spot, there was no dead body. He denied the suggestion that the case was not properly investigated and that he deliberately did not rope in independent witnesses.

33. After the prosecution evidence was recorded, the trial court recorded statement of the appellant under Section 313 Cr.P.C. The appellant denied the incriminating circumstances and stated that dead body of an unknown lady was recovered in a decomposed condition; without identification, inquest report was prepared; and merely on the basis of suspicion, he has been made accused.

Defence Evidence

34. After the statement of appellant was recorded two defence witnesses were examined, namely:-

35. **Seetu is DW-1**. He stated that the appellant is his uncle. On 24.4.2019, there was a marriage of his sister -Mangla. Appellant attended the marriage of his sister from the evening of 24.4.2019 and was there till 26.4.2019. DW-1 stated that

attending that marriage, Mannu s/o Sultan, who happens to be son of his Bua, was also present. In his cross-examination, DW-1 stated that he resided in District Jalaun whereas the appellant is resident of District Firozabad. DW-1 stated that he did not go to invite the appellant. The invitation was given by his brother on phone. He admitted that during the course of marriage video was prepared and photographs were taken but there is no photograph of the appellant with DW-1. He also stated that the appellant is not his close relative. He denied the suggestion that his uncle (appellant) did not attend the marriage of his sister and his photo is not there in the video.

36. **Mannu is DW-2**. He stated that Seetu (DW-1) is his friend. DW-2 came on 23.04.2019 to attend the marriage of sister of Seetu (DW-1) there he met the appellant in the evening of 24.04.2019. DW-2 stated that he returned from the marriage on 27/28.04.2019. DW-2 stated that he is not aware as to when appellant returned from the marriage. During cross-examination, DW-2 stated that he is not aware as to from where the Baraat came and when the Baraat arrived. At that time he was in his house, having food. He denied the suggestion that appellant was not present in the marriage.

37. The trial court upon consideration of the evidence on record found the appellant guilty of rape and murder of the deceased and, accordingly, convicted him under Sections 363, 302, 376 AB, 302 IPC read with Sections 3(2)(v) SC/ST Act and awarded death penalty under Sections 302, 376 AB IPC read with Section 3(2)(v) SC/ST Act.

38. We have heard Sri Dilip Kumar, learned Senior Counsel, assisted by Sri Rizwan Ahmad for the appellant; and Sri Amit Sinha, learned AGA for the State and have perused the record.

Trial Court Findings

39. Trial court found following incriminating circumstances proved:-

(i) The deceased was last seen alive in the company of the appellant on 25.04.2019, firstly, at about 11.00 am near the railway crossing by PW-2 and, secondly, at about 11.30 am near SBI Ram Nagar by PW-4 and, thereafter, she was not seen alive;

(ii) Body of the deceased was recovered on 26.04.2019. The autopsy conducted on 27.04.2019 and the serologist report disclosed that she was raped and murdered two days before;

(iii) On the disclosure made by the appellant on 28.04.2019 blood stained brick and slippers of the deceased was recovered;

(iv) At the time of arrest on 28.04.2019, the Jeans (Pant) worn by the appellant carried blood stain; and

(v) The serologist report confirmed presence of human blood on the brick recovered at the instance of the appellant as also on the Jeans (pant) and nail clippings of the appellant.

40. Trial court found that the proven circumstances constituted a chain so complete that it conclusively pointed towards the guilt of the appellant and as the appellant failed to discharge the burden placed upon him under Section 106 of the Evidence Act to explain as to why he should not be held guilty, convicted the appellant and sentenced him accordingly as already noticed above.

Submission of behalf of the appellant

41. Learned counsel for the appellant submitted that there is no admissible evidence on record against the appellant and trial court failed to appropriately appreciate the evidence on record and wrongly convicted the appellant in the present case. Learned counsel for the appellant submitted that perusal of the FIR (Ext. ka 2) shows that it was lodged against unknown person but the informant (PW-1), who lodged the FIR, in her testimony stated that she had named the appellant. This shows that prosecution did not come with clean hands and have contrived the story on suspicion/guess work. He submitted that as per the informant (PW-1), after the FIR, the appellant was apprehended by the informant (PW-1) and others and was handed over to the police and, therefore, the prosecution story that the appellant was arrested by the police on 28.4.2019 on the information of an informer, appears false and as arrest of the appellant become doubtful, the alleged recoveries at the instance of the appellant would neither be admissible nor can be used against the appellant. Learned counsel for the appellant further submitted that the evidence of PW-2 and PW-4 in respect of the circumstances of last seen is neither reliable nor conclusive. Further, even if it is accepted then too, merely on the basis of the evidence of last seen, appellant cannot be convicted as the time gap between the appellant last seen alive with deceased and the recovery of dead body is very large. Moreover, the prosecution has failed to show that the place where the deceased was last seen alive with the appellant was in close proximity to the place from where her body was recovered. He further submitted that the name of the appellant surfaced on the basis of information given by PW-2 but, according to PW-2, she had given that information on the very first day yet, the appellant was not named in the FIR, which was lodged on 26.04.2019. This casts a pale of doubt on the testimony of PW-2 that she saw the appellant with the deceased on 25.04.2019 at about 11.00 am. Learned counsel for the appellant submitted that though the serological report mention that human blood was found on the jeans (pant) of the appellant but the recovery memo (Ext. Ka-17) of the pant does not mention blood stain on the pant, therefore, it appears, after recovery of the pant, false evidence was created by the police. Moreover, the blood group was not matched with the deceased. Hence, it cannot be said with certaintly that the blood found on the pant of the appellant was of the deceased. He also submitted that the dead body of the deceased was found in village Sofipur, behind the shop of Barashree, within the jurisdiction of police station Basi Mohammad Pur whereas, according to the prosecution, the place of incident was a half constructed room. This place is totally different from the place from where the dead body was found. Thus, the alleged disclosure statement becomes totally doubtful because if the appellant, after committing rape and murder, covered the body in a half constructed room with bricks how the same was recovered from some other place. Therefore, the prosecution story appears false and no reliance can be placed on it. Learned counsel for the appellant also submitted that according to Jitendra (PW-6), one of the witnesses of the inquest report, the dead body was lying in an open field. If it was so, then the alleged hiding of the body in a half constructed room and recovery of bricks therefrom, allegedly on the basis of disclosure, falls to the ground. It was urged that the trial court failed to consider this important aspect of the case and without properly evaluating the

evidence related to recovery and last seen convicted the appellant and thereby committed a grave mistake. Learned counsel for the appellant submitted that the present case is a case based on circumstantial evidence; the prosecution miserably failed to prove the incriminating circumstances beyond reasonable doubt and the chain of circumstances was not complete and, therefore, conviction and sentence recorded by court below is liable to be set aside. In the alternative, learned counsel for the appellant submitted that as the present case totally rests upon circumstantial evidence, reference to confirm death penalty should be negatived.

Submission on behalf of the State

42. Per contra, learned AGA submitted that there is evidence on record which proves that the appellant was last seen along with the deceased and on the same day, deceased was murdered; that apart from last seen evidence, on the pointing out of the appellant blood stained bricks were recovered and as per the forensic lab report, on the bricks human blood was found. As per evidence of autopsy surgeon, the vagina was found ruptured, therefore, it is apparent that before murder the girl was raped. Learned AGA submitted that forensic lab report confirmed that on the Jeans (pant) of the accused-appellant there was human blood and in nail clipping of the appellant, blood was found, which is a corroborative piece of evidence confirming the involvement of the appellant in the rape and murder of the deceased. Learned AGA further submitted that the prosecution has successfully proved the chain of circumstances and the trial court rightly convicted the appellant. On the question of sentence, learned counsel for the state submitted that since it is a case of rape of a minor girl and, thereafter, the girl was brutally murdered, death sentence awarded to the appellant is justified and, therefore, the appeal is liable to be dismissed and death penalty awarded by the trial court should be confirmed.

Analysis

43. The instant case is based on circumstantial evidence. There is no eye witness account of either rape or murder. As to when conviction can be recorded on evidence of a circumstantial nature, the law is settled. In a recent decision in the case of **Anwar Ali Vs. State of Himanchal Pradesh 2020 (10) SCC 166,** a three judge Bench of the Supreme Court, after noticing various decisions, on the issue, in para-15, 16 and 17, observed as follows:-

"15. It is also required to be noted and it is not in dispute that this is a case of circumstantial evidence. As held by this Court in a catena of decisions that in case of a circumstantial evidence, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else and the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

16. In Babu V. State of Kerala (2010) 9 SCC 189, it is observed and held in paras 22 to 24 as under:

"22. In Krishnan V. State (2008) 15 SCC 430, this Court after considering a

large number of its earlier judgments observed as follows:

"15. ...This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;

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

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

23. In Sharad Birdhichand Sarda V. State of Maharashtra (1984) 4 SCC 116 while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are: (SCC p. 185, para 153)

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;

(ii) 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;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) 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. A similar view has been reiterated by this Court in State of U.P. V. Satish (2005) 3 SCC 114 and Pawan Vs. State of Uttranchal (2009) 15 SCC 259.

24. In Subramaniam V. State of T.N. (2009) 14 SCC 415, while considering the case of dowry death, this Court observed that the fact of living together is a strong circumstance but that by alone in absence of any evidence of violence on the deceased cannot be held to be conclusive proof, and there must be some evidence to arrive at a conclusion that the husband and husband alone was responsible therefor. The evidence produced by the prosecution should not be of such a nature that may make the conviction of the appellant unsustainable. (See Ramesh Bhai Vs. State of Rajasthan) (2009) 12 SCC 603)." (emphasis supplied)

17. Even in G. Parshwanath V. State of Karnataka (2010) 8 SCC 593, this Court has in paras 23 and 24 observed as under:

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or

basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. 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, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

44. From above, it is clear that for conviction to rest solely on circumstantial evidence, it is necessary for the prosecution to prove beyond reasonable doubt each of the circumstances that is to be relied against the accused and must demonstrate that the circumstances form a chain so complete that it leaves no reasonable ground for the conclusion consistent with the innocence of the accused and shows that in all human probability the act has been done by the accused.

45. In light of the legal principles noticed above, we shall now evaluate the prosecution case on the weight of the evidence led during the course of trial.

46. In the present case, the prosecution relied upon following circumstances against the appellant:-

(i) The deceased was last seen alive with the appellant on 25.4.2019, firstly, at about 11 AM and, secondly, at 11:30 AM, and thereafter, her body was recovered on 26.04.2019 and as per the post mortem, dated, 27.04.2019, the deceased could have died two days before. Meaning thereby that she died in close proximity to the time when she was last seen alive with the appellant.

(ii) Autopsy report confirms that the deceased was raped and murdered.

(iii) When the appellant was arrested, he confessed his guilt and on his

pointing out blood stained bricks used as a weapon of assault were recovered and forensic lab report proved presence of human blood on the bricks.

(iv) The jeans (pant) worn by the appellant at the time of arrest had human blood stain as confirmed by forensic report.

(v) At the instance of the appellant slippers of the deceased were recovered.

(vi) The deceased was a minor girl aged below 12 years.

47. We will now examine whether the circumstances relied by the prosecution, have been duly proved and whether the trial court justifiably convicted the appellant.

Last seen circumstances

48. To prove the circumstances of last seen, the prosecution relied upon the testimony of PW-2 and PW-4. PW-2 is Tai of the deceased and is sister-in-law (Jethani) of mother of the deceased. She (PW-2) stated that on 25.4.2019, at about 11:00 AM when she was sitting at her house, she saw the deceased crossing the railway track in front of her house. She stated that after she had crossed the track, she saw the appellant also there. In her cross-examination, PW-2 stated that soon thereafter a train passed on that track. It took 10 minutes for the train to pass. After that train passed, she did not see the deceased. As in her cross-examination PW-2 specifically stated that after the train passed, she did not see the deceased, the evidence is not conclusive, firstly, because it is not clear that the deceased was on her own or going with the appellant and, secondly, because talking to a known person is not a conclusive indica of being together. Moreover, the testimony of PW-2 is not that the deceased and the appellant crossed the railway track together but it is of the appellant following her. Thus, in our considered view, this circumstance is not conclusive of the deceased being in the company of the appellant or vice versa. Further, PW-2 stated that on same day she informed the informant (PW-1) about the circumstance noticed by her. PW-1 admitted this fact. But, in spite of that, PW-1 did not mention this circumstance in the FIR and no suspicion is expressed against the appellant even though the FIR was lodged on the next day. Rather, it is stated in the FIR that her daughter has gone somewhere. This casts a serious doubt as to whether PW-2 actually witnessed the appellant with the deceased on 25.04.2019 at 11.00 AM. Thus, the testimony of PW-2 with regard to the appellant being noticed in the company of the deceased does not inspire our confidence. We, therefore, discard her evidence that she saw the appellant with the deceased on 25.4.2019 at about 11:00 AM.

49. In so far as PW-4 is concerned, he stated that on 25.4.2019, at about 11.30 AM while he was going to the market, he saw the deceased with the appellant in front of the Bank situated in Ram Nagar. He also stated that he inquired from the deceased as well as the appellant as to where they were going upon which the appellant informed him that they were going to the market. During cross-examination, PW-4 stated that on 25.4.2019, at about 5:30 am, he had left his house to go to Shikohabad to sell bangles. He sold bangles till 10 am and returned to his house at about 2:00 PM on 25.04.2019. PW-4 stated that he chose the same route to go to the market as he took to return home and on that route, in between, there is no Bank. Thus, the statement of PW-4 that on 25.4.2019, at about 11:30 am, he saw the deceased with the appellant in

front of SBI Bank appears incorrect because if there was no bank on way then how could he witness the appellant with the deceased at or near the Bank. The testimony of PW-4 therefore does not inspire our confidence.

50. Moreover, PW-4 is a chance witness. The law in respect of value of the testimony of a chance witness has been recently surveyed and reiterated by the Apex Court in the case of **Rajesh Yadav and others Vs. State of U.P., 2022 (3) ADJ 114 (SC).** The relevant observations are contained in paragraph 27 extracted below:-

"27. The principle was reiterated by this court in Jarnail Singh Vs. State of Punjab, (2009) 9 SCC 719:

"21. In Sachchey Lal Tiwari Vs. of U.P. [(2004) 11 SCC 410: 2004 SCC (Cri) Supp 105] this Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and a passerby had deposed that he had witnessed the incident, observed as under:

If the offence is committed in a street only a passerby will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there.

The Court further explained that the expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.

22. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence Satbir Singh v. Surat Singh [(1997) 4 SCC 192: 1997 SCC (Cri) 538], Harjindar Singh Vs. State of Punjab [(2004) 11 SCC 253: 2004 SCC (Cri) Supp 28], Acharaparambath Pradeepan [(2006) 13 SCC 643: (2008) 1 SCC (Cri) 241] and Sarvesh Narain Shukla v. Daroga Singh [(2007) 13 SCC 360: (2009) 1 SCC (Cri) 188]). Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (vide Shankarlal vs. State of Rajasthan [(2004) 10 SCC 632: 2005 SCC (Cri) 579]).

23. Conduct of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident (vide Thangaiya Vs. T.N. (2005) 9 SCC 650. Gurcharan Singh (PW 18) met the informant Darshan Singh (PW 4) before lodging the FIR and the fact of conspiracy was not disclosed by Gurcharan Singh (PW 18) and Darshan Singh (PW 4). The fact of conspiracy has not been mentioned in the FIR. Hakam Singh, the other witness on this issue has not been examined by the prosecution. Thus, the High Court was justified in discarding the part of the prosecution case relating to conspiracy. However, in the fact situation of the present case, acquittal of the said two co-accused has no bearing, so far as the present appeal is concerned."

51. In view of the law noticed above, PW-4 being a chance witness had to explain his presence at the place where he witnessed the deceased in the company of the appellant. In the present case, PW-4 stated that enroute to the place of business

he had the occasion to witness the appellant and the deceased together but, during cross-examination, he admitted that in that route no Bank falls therefore, the place where he witnessed them together does not fall in that route. Thus, we can safely conclude that the explanation rendered by PW-4 for his presence there is not satisfactory and convincing. Further, as per case of ***Jarnail Singh Vs. State of Punjab, 2009 (9) SCC 719,*** which was discussed by Apex Court in case of Rajesh Yadav (supra), conduct of the chance witness subsequent to the incident is also important, particularly, whether he has informed anyone about the fact. In the present case, PW-4, in his testimony, specifically stated that he did not inform the fact that he witnessed the deceased along with the appellant on 25.4.2019 at about 11:30 am. Therefore, on this ground also, the testimony of PW-4, who is a chance witness, is not reliable and is unworthy of acceptance.

52. As, both the witnesses i.e. PW-2 and PW-4 of the last seen circumstance, in our view, do not inspire our confidence, we come to the conclusion that the prosecution could not prove beyond reasonable doubt that the deceased was last seen alive in the company of the appellant.

Confession before police and consequential recovery

53. Another circumstance relied by the prosecution is that when the appellant was arrested, he confessed his guilt and on his pointing out, blood stained bricks were recovered and the Forensic Lab report confirmed the presence of human blood on these bricks. As far as confession made by an accused to the Investigating Officer is concerned, it is not admissible in evidence by virtue of Section 25 of the Indian Evidence Act which reads as follows:-

25. Confession to police officer not to be proved. --*No confession made to a police officer, shall be proved as against a person accused of any offence.*

However, that portion of the confession that leads to the recovery of any incriminating material, such portion alone, is admissible under Section 27 of the Evidence Act.

54. As far as the recovery of the bricks and slippers of deceased on the pointing out of appellant is concerned, the same appears doubtful because, in our view, the arrest of the appellant, alleged to have been made on 28.04.2018 on the basis of information received from an informer, is extremely doubtful. Notably, PW-1, the informant and mother of the deceased stated that the appellant was apprehended by her and others, after lodging the FIR, and was brought to the police station where he was detained. Although, PW-1 was not aware as to how long the appellant was detained at the police station but, as per her (PW-1's) testimony, he was apprehended by PW-1 and other persons after lodging the FIR. There is no evidence that after being handed over to the police, the appellant was released. Whereas, as per police witness, appellant was arrested on 28.04.2019, at about 2.00 PM, on the basis of information received from an informer. Consequently, there arises a serious doubt in respect of the arrest of appellant on 28.04.2019.

55. In the case of **Rammi alias Rameshwar Vs. State of M.P. (1999) 8 SCC 649,** the Apex Court declined to place reliance on the evidence of recovery on the basis of information furnished by accused on the ground that there was material discrepancy in the testimony of witnesses with regard to the time of arrest of the accused. Ordinarily, where the arrest of the

accused becomes doubtful a taint gets attached to the testimony of police witnesses with regard to the disclosure of the accused being the basis of recovery. In the present case, the testimony of PW-1 creates a serious doubt with regard to the arrest of the appellant on 28.04.2019, therefore, recovery of bloodstained bricks on his pointing out, after his arrest, also becomes doubtful more so, when it has no support from an independent witness testimony. At this stage, we may observe that recovery of slippers of the deceased and bricks were allegedly made in the presence of a number of witnesses but none of those witness were examined during trial. Recovery was sought to be proved solely on the basis of testimony of Sanjay Singh (PW-11), the Investigating Officer, whose testimony, in respect of arrest, we have found unreliable in view of the statement of PW-1. This fact also cast a doubt on the recovery. Thus, it hardly matters if, as per forensic lab report, the bricks recovered carried human blood.

56. Further, human blood on the jeans (pant) of the appellant is not a clinching circumstance against the appellant as it has not been confirmed whether the blood was of the deceased or of the appellant. It is very much possible that there may be traces of blood on one's trouser for multiple reasons such as presence of an injury or a bleeding boil or scratch, etc. Notably, the recovery memo of the pant (Ext. Ka-17) does not reflect that at the time of recovery the pant carried blood mark or stain. In fact, Ext. Ka-17 (recovery memo of the jeans of the accused-appellant) reflects that the jeans of the appellant was recovered and sent to forensic lab to ascertain whether there was any semen on it. There was no semen found and so far as blood is concerned its origin was not ascertained, that is, whether it was of the appellant or the deceased. Thus, in our considered view, the presence of blood on the Jeans of the appellant is not an incriminating circumstances which may clinch the issue against the appellant.

57. Another notable feature which creates a doubt as to the genuineness of the recovery is that as per the inquest report (Ext. Ka-13), dead body of the deceased was lying behind the shop of Barashree whereas Jitendra Singh (PW-6), a panch witness, stated that the body was lying in a field. While the recoveries (slippers, bricks) were made from an under constructed room in a colony where, according to the disclosure, the girl was raped, killed and the body was hidden. There is no evidence as to how dead body came near the shop of Barashree from that room where it was hidden, if the disclosure statement is to be accepted. This unexplained inconsistency in the prosecution case casts a serious doubt on the alleged recoveries made at the instance of the appellant.

FSL Report

58. Trial court also relied upon the forensic laboratory report, dated 15.06.2019, which indicates that in the nail clipping blood was found. Although, as per the forensic lab report, the nail clipping was of the deceased, but the trial court in its judgment observed that there is no evidence that nail clipping of the deceased was taken and sent for chemical analysis. The court below observed that as per the testimony of Sanjay Singh (PW-11), the Investigating Officer, nail clipping of the appellant was taken. Therefore, the trial court concluded that nail clipping sent to forensic lab was of the appellant and as blood was found on the nail clipping, it is a

clinching circumstance/evidence against the appellant. We do not agree with the findings and observations of the trial court in this regard. No doubt, PW-11 (Sanjay Singh), the Investigating Officer, stated that on 29.04.2019 he prepared parcha no.4 of the case diary and entered that the appellant was medically examined and the doctor had taken his nail clipping, but neither the recovery memo of nail clipping of the appellant nor the medical report of the appellant was prepared and proved. Even the doctor, who examined the appellant and took his nail clipping, was not examined. Further, there is no evidence on record to show that the alleged nail clipping of the appellant was sealed and forwarded to forensic lab for analysis. In absence of these material evidences, merely on the basis of bald statement of the Investigating Officer, it cannot be held that the nail clipping sent to forensic lab was of the appellant. Otherwise also, we do not consider the presence of blood in the nail clipping as a clinching circumstance against the appellant for the reasons: (a) due to disintegration it could not be determined that blood found on nail clipping was human blood; and (b) if one uses nail to scratch one's body, often traces of blood get trapped in the nails hence presence of blood there, in absence of determination of its origin, in our view, is not a clinching incriminating circumstance. Therefore, this piece of evidence does not help the prosecution.

Non-compliance of Section 53A Cr.P.C.

58. In the present case when the appellant was arrested, as per provisions of Section 53A Cr.P.C., his medical examination should have been conducted. No such medical examination of the appellant has been brought on record much less proved. Sanjay Singh (PW-11), the Investigating Officer, though stated that the appellant was medically examined but during trial neither medical report of the accused nor the doctor who examined him was produced. The Apex Court in the case of **Krishan Kumar Malik Vs. State of Haryana (2011) 7 SCC 130** highlighted the object of section 53A of the Code of Criminal Procedure by observing as under:-

"44. Now, after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, but they did not do so, thus they must face the consequences."

60. In the present case as per FSL report dated 15.06.2019 sperm was found in the vaginal smear of the victim (deceased), therefore, by DNA profiling of the biological material, if any, obtained from the accused-appellant it could have been determined whether the sperm found had its origin in the appellant. But, unfortunately, no effort in that regard was made. Therefore, in light of the observations of the Apex Court in Krishan Kumar Malik's case (supra), the prosecution has to face the consequences.

Section 106 Evidence Act

61. Trial court placed reliance on the provisions of Section 106 of the Evidence Act to hold the appellant guilty as he failed to explain the circumstance of last seen and other circumstances relied by the prosecution. Section 106 of the Evidence Act does not absolve the prosecution of its primary responsibility to prove the prosecution case beyond reasonable doubt. In **Shivaji Chintappa Patil Vs. State of Maharashtra 2021 (5) SCC 626,** in paragraph no. 23, the Apex Court clarified the law as to when Section 106 of the Evidence Act would operate by observing as follows:-

"It could thus be seen, that it is well-settled that Section 106 of the Evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused."

62. From above, it is clear that before shifting the burden upon the accused to furnish explanation of the incriminating circumstances appearing against him, it is necessary for the prosecution to prove its case beyond reasonable doubt.

63. In the present case the prosecution has failed to prove beyond reasonable doubt that the deceased was last seen alive with the accused-appellant and that the recoveries were made at the instance of the appellant therefore, burden could not have been placed upon the appellant to explain those circumstances. Thus, in our view, the court below wrongly took aid of the provisions of Section 106 of the Evidence Act to convict the appellant.

64. In view of the discussion made above, we are of the considered view that the prosecution failed to prove the guilt of the appellant beyond reasonable doubt, the conviction of the appellant is therefore unsustainable. Consequently, the appeal is **allowed.** The judgment and order of the trial court is set aside. The reference to confirm the death penalty is rejected. The appellant is acquitted of the charges for which he has been tried. As he is in jail, he shall be released forthwith, unless wanted in any other case, subject to compliance of the provisions of section 437-A Cr.P.C. to the satisfaction of the trial court below.

65. Let the lower court record be sent along with certified copy of the order to the trial court for compliance.

(2022)07ILR A771
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.07.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 843 of 2014

Vipin ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Shri Ram Kant Jayswal, Advocate

Counsel for the Respondent:

Ms. Ruhi Siddiqui, A.G.A.

Criminal Law - Indian Penal Code, 1860- Section 302- Conviction under- Death of wife by burning – Indian Evidence Act, 1872- Section 11- Plea of Alibi- The convict /appellant has taken the plea of alibi that he was in field when the incident occurred, but this fact has not been proved by him by any evidence. The burden of proving his presence in the field at the time of incident was on the convict/appellant himself but he did not adduce any evidence to prove the same.

Where the accused adopts the plea of alibi then the burden is upon him to prove the same by relative evidence, failing which the court may take an adverse inference against him.

Criminal Law - Indian Evidence Act, 1872- Section 106- The accused has stated that the deceased got burnt accidentally but this fact is also not believable in the absence of any evidence/material on record to prove the accidental burnt specially when the contusions were found on the cadaver of body in the post-mortem-examination. If the deceased caught fire accidentally, then how contusions have occurred on her body has not been explained by the convict/appellant.

Failure to explain the injuries of the deceased who was living with the accused will constitute an incriminating fact against the accused.

Criminal Law - Indian Evidence Act, 1872- Section 106- Code of Criminal Procedure, 1973- Section 113- The convict/ appellant himself has stated in his statement under Section 313 of the Cr.P.C. that he used to live with his wife Seema Devi in his house. He did not say that his parents were there when accident took place or the deceased caught fire accidentally while cooking food.

Where the explanation given by the accused to discharge the burden of proof cast upon him under section 106 of the Evidence Act, is not consistent with his statement given under Section 113 of the Cr.Pc, then such explanation may not be accepted by the court. (Para 10, 12, 22)

Criminal Appeal rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Samsul Haque Vs St. of Assam : 2019(18) SCC 161 (cited)

2. St. of Raj. Vs Parthu: (2009) 3 SCC (Cri) 507

3. Shaikh Sattar Vs St. of Maha. :(2010) 3 SCC (Cri) 906

4. Ranjit Kumar Haldar Vs St. of Sikkim: (2019) (3) JIC 192 (SC).

5. St. of Raj. Vs Thakur Singh : 2014(12) SCC 211

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This criminal appeal has been preferred against the judgement and order dated 15.5.2014 passed by Additional Sessions Judge, Court No.2, Hardoi in Sessions Trial No.18/2013 arising out of Case Crime No.315 of 2012 wherein convict/appellant was tried under Sections 498-A, 304-B of the Indian Penal Code, 1860 (in short I.P.C.) and under Section 3/4 of the Dowry Prohibition Act (in short D.P. Act.) and in alternate to Section 304-B to under Section 302 I.P.C., Police Station Atrauli, District Hardoi whereby the convict/appellant was acquitted under Sections 498-A, 304-B I.P.C. and under Section 3/4 of the D.P.Act but convicted under Section 302 I.P.C. and sentenced to life imprisonment coupled with a fine of Rs.20,000/- and in default of payment of fine, to undergo further imprisonment for six months.

2. The facts necessary for disposal of this appeal shorn of unnecessary details, are as follows :-

i). A First Information Report (in short F.I.R.) was registered as Case Crime No.315 of 2012, under Sections 498-A and 304-B I.P.C. and under Section 3/4 of the D.P.Act. at Police Station Atrauli, District Hardoi on 26.4.2012, on the basis of a written report submitted by the complainant Newaji. It was narrated in the written report that the complainant married his daughter Seema Devi to Vipin about two years ahead. Vipiin, Bachaan and Bittan were demanding one gold chain, one gold ring and a motorcycle in dowry. It was told by Seema Devi, daughter of the complainant many times that she was being tortured for non -fulfillment of the demand of dowry. The complainant placated them many times but they did not yield. On 22.4.2012, Seema Devi, daughter of the complainant was burnt after dousing with kerosene oil by Vipin, Kedar and Bittan. After burning Seema Devi, persons from her matrimonial home carried her to the hospital where she died during treatment and in-laws ran away after leaving the dead body. He (the complainant) somehow got the information and reached at Balrampur Hospital alongwith his family members and found the dead body of Seema Devi. The complainant got the post-mortem-examination done in the medical college and brought the dead body to his home and cremated.

ii). The report was lodged on 26.4.2012 at 4.00 p.m. The inquest of the dead body was also made on 23.4.2012 at 5.45 p.m. to 6.45 p.m. at mortuary of Balrampur Hospital, Lucknow, on the information received from the Balrampur Hospital, Lucknow which is Exhibit Ka-5 on the record. Thereafter, the dead body was sent for post-mortem-examination alongwith necessary papers by the officer who conducted the inquest. The post-mortem-examination of the deceased was conducted on 24.4.2012 at 12.50 p.m. by a panel of two doctors. Thereafter, the F.I.R. was registered on 26.4.2012 and case was investigated and chargesheet was submitted against the accused Vipin(husband of the deceased), Bachaan, brother in law of the deceased (Jeth) and Smt. Bittan, sister-in-law of the deceased (Jethani) under Section 498-A and 304-B of the I.P.C. and Section 3/4 of the D.P.Act. The Magistrate concerned took cognizance of the case and committed the same to the court of Sessions for trial. Learned Sessions Court framed charges against all the three accused persons namely Vipin, Bachaan and Smt. Bittan, under Sections 498-A and 304-B and in alternate, a charge under Section 302 I.P.C. was also framed. Further a charge under Section 3/4 of the D.P.Act was also framed.

iii). All the accused persons denied the charges and claimed to be tried.

iv). The prosecution in order to prove its case, examined seven witnesses, which are as under :

a. P.W.-1- Newaji (the complainant and father of the deceased)

b. P.W.-2 - Smt. Shiv Pyari (the mother of the deceased).

c. P.W.-3- Shri Vivek Chandra, C.O. who investigated the case, initially.

d. P.W.-4 - Police Constable Rakesh Bahadur Singh who registered the case and made entry in the concerned General Diary (G.D.)

e. P.W.-5 - Shri Surendra Bahadur Yadav, S.D.M. who conducted the inquest of the dead body and sent the same for post mortem.

f. P.W.-6 -Shri Sukh Ram Bharti, who is second investigating officer and took over the investigation from Shri Vivek Chandra (P.W.- 3).

g. P.W.-7- Dr. Sushil Kumar Srivastava who conducted autopsy on the cadaver.

v). Apart from oral evidence, relevant documents have also been proved by the prosecution, which are as under :-

a. Exhibit Ka-1- Written report.
b. Exhibit Ka-2 - Site Plan.
c. Exhibit Ka-3- Chik F.I.R.
d. Exhibit Ka-4- Concerned G.D.
e. Exhibit Ka-5 - Inquest report.
f. Exhibit Ka-6 - A letter to the C.M.O.
g. Exhibit Ka-7- Challan Nash.
h. Exhibit Ka-8- Photo Nash.
i. Exhibit Ka-9- Specimen Seal.
j. Exhibit Ka-10- Chargesheet.
k. Exhibit Ka-11 - Post-Mortem-examination Report.

vi). After close of prosecution evidence, the statement of the accused persons were recorded under Section 313 Cr.P.C. wherein accused Vipin admitted his marriage with the deceased but disputed the date of marriage. He denied the allegation of demand of dowry and stated that Seema Devi got burnt accidentally. When the fact came to his knowledge, he got her admitted in the hospital where she died. He denied the fact that he ran away from the hospital leaving the dead body of the deceased. He also stated that report was lodged due to enmity and witnesses have deposed falsely. He further stated that he himself informed about the incident to the family of the deceased. In the last, he stated that he used to live alongwith Seema Devi in his own house. Seema Devi was alone in the house and she got burnt accidentally while cooking food. When he received information about the incident in the field, then he carried her for treatment and sent the information to her parental home. On this, persons from her parental home came and demanded money from him. When he did not pay then they got lodged the F.I.R. falsely. No witness in defence was produced by the convict/ appellant, though opportunity was given by the trial Court.

vii). The learned trial Court after hearing the arguments of both the sides and analyzing the evidence available on record, came to the conclusion that all the ingredients of Section 304-B I.P.C. are not proved. It has not been proved that the incident occurred within seven years of marriage as the period of marriage or the date of marriage has not been proved by the prosecution. Learned trial Court also came to the conclusion that the fact of demand of dowry was also remained unproved as P.W.-1 and P.W.-2 father and mother of the deceased, respectively have stated in their statements made before the trial court that they sent their daughter with Vipin last time happily and there was no demand at that time. Learned trial court also took note of the statement of P.W.-1 that no report of demand of dowry or of torture was lodged by him nor any 'panchayat' was called by him. P.W.-1 and P.W.-2 both in their statements, have stated that they are poor persons but the accused Vipin has some agricultural land and he does farming on that. Learned trial Court also concluded that the information was given by the convict himself as in the cross examination, both P.W.-1 and P.W.-2 have accepted that they received the information of the incident from Vipin on telephone.

viii). Learned trial court acquitted Bachaan and Bittan finding no role of them as there was evidence on record that they live separately in their own house and the investigating officer also did not show in the site plan the house of the Bachaan and Bittan as per their statement, their house is after 10-15 houses of the place of occurrence. The trial Court held guilty

Vipin for the alternate charge framed i.e. under Section 302 I.P.C. as in the opinion of the trial court, the deceased died of burnt injuries in the house of her husband and in the post-mortem-examination report four contusions were found on the cadaver. No explanation about contusions found were offered by the convict. In the opinion of the learned trial Court, it was the duty of the convict Vipin who is the husband of the deceased to explain how she died and who caused contusions on her body. Under *Section 106* of the Indian Evidence Act, the onus lies on the accused to explain the facts specially within knowledge. Hence, the learned trial court held the convict guilty under Section 302 I.P.C. and sentenced him to life imprisonment coupled with a fine of Rs.20,000/- and in default, further sentence of six months.

ix). Learned trial court acquitted the convict of charges framed under Section 498-A, 304-B I.P.C. and Section 3/4 of the D.P.Act.

3. Being aggrieved of the above conviction and sentence, this appeal has been preferred.

4. Heard Shri Rama Kant Jaiswal, learned counsel for the convict/appellant and Mrs. Ruhi Siddiqui, learned A.G.A. for the respondent State.

5. Learned counsel for the convict/appellant argued that the judgement and order passed by he learned court below is erroneous and against the evidence available on record. The F.I.R.was lodged after a delay of four days of the incident i.e. after due deliberations with *mala fide* intentions. The oral evidence and medical evidence do not inspire confidence and are contradictory. The appellant was not present at the place of occurrence as he was working in his field at the time of the incident. When he received the information of the incident, he himself admitted the deceased in a hospital and sent information to the parental home of the deceased. He further submitted that no odour of kerosene oil was found by the doctor conducting the post- mortem-examination. He further argued that the question regarding contusions found on the body of the deceased was not put to the appellant under Section 313 of the Cr.P.C. which is a great error and the accused cannot be supposed to explain these contusions. He further argued that *Section 106* of the Evidence Act shall not apply in the facts and circumstances of the case because prosecution did not prove its case beyond reasonable doubt. First, the prosecution has to prove its case only after that the burden shifts on the appellant to offer explanation. He further argued that in fact the deceased caught fire accidentally while cooking food. He further argued that the appellant was not the only person who was residing in the house, his parents also reside in the same house, so the burden under *Section 106* of the Evidence Act does not lie on him only, to explain the injuries found on the body of the deceased. He further argued that the contusions found on the body of the deceased might occur while running here and there in a burning state with pegs and grass-cutting machine which is usually kept in the villages for cutting the fodder for the cattle.

6. Learned counsel for the convict/appellant relied upon the case laws ***Samsul Haque Vs. State of Assam : 2019(18) SCC 161.*** and also on extracts of book ***C.D. FIELD'S Commentary on LAW OF EVIDENCE ACT, 1872*** contained on page no.4640 and 4641.

7. Contrary to it, learned A.G.A. argued that the deceased was staying with her husband, the convict, in the same

house. The convict got her admitted in the hospital. Thereafter, he ran away from the scene. It is the version of the convict himself that he got her admitted in the hospital. The fact that the cremation was done by the parents of the deceased, has not been disputed. The conduct of the convict/appellant after the incident gives support to the version of the prosecution. The convict in his statement under Section 313 of the Cr.P.C. has stated that the deceased caught fire accidentally while cooking food but this statement of the convict is not reliable because in the site plan, the place of incident has been shown as a room with a bed. If the deceased was cooking food there and caught fire accidentally, then why other articles kept in the room were not burnt. The convict/appellant has also stated in his statement under Section 313 Cr.P.C. that he was not present at the spot when incident occurred. But no such evidence has been led by the convict/appellant to prove the plea of alibi i.e. his absence from the place of incident. The contusions found on the body of the deceased has not been explained and no such suggestion has been put to the doctor P.W.-7 that these contusions occurred due to the fact that the deceased was running here and there in a burning state and dashed to pegs or the grass cutting machine. The husband and wife living in a house and wife died an unnatural death i.e. due to burn injuries and contusions were found on her body, then a heavy burden lies on the husband under *Section 106* of the Evidence Act, to explain how she sustained the contusions and got burnt.

8. Learned A.G.A. relied upon the following case laws :

i). State of Rajasthan Vs. Parthu : (2009) 3 SCC (Cri) 507.

ii). Shaikh Sattar Vs. State of Maharashtra : (2010) 3 SCC (Cri) 906.

iii). Ranjit Kumar Haldar Vs. State of Sikkim : (2019) (3) JIC 192 (SC).

9. Considered the rival submissions, perused the original record of the trial court as well as of the appeal and also gone through the referred case laws.

10. Perusal of the record shows that in this matter, it is not disputed that the deceased was the wife of the convict Vipin and she was living with him in the same house. The date and place of occurrence is also not disputed. It is also not disputed that the deceased died of burn injuries that too in the house of the convict/appellant. The convict/appellant has also stated that after the deceased got burnt, he admitted her in the hospital. The stand of the convict Vipin is that the deceased caught fire accidentally while she was cooking food and he received information in the field where he was working and he came to the house and got her admitted in the hospital. Under Section 313 Cr.P.C., he has stated that he himself sent the information to the parental home of the deceased. On that, the persons from her parental home came and demanded money from him. He could not give money, therefore he was implicated falsely. His statement shows that he has admitted that he used to live alongwith the deceased in his house. According to him, Seema Devi was alone in the house at the time of incident. It is also deducible from his statement that he was in the field at the time of the incident. Thus, the convict /appellant has taken the plea of alibi that he was in field when the incident occurred. But this fact has not been proved by him by

any evidence. The burden of proving his presence in the field at the time of incident was on the convict/appellant himself but he did not adduce any evidence to prove the same. Secondly, he has stated that the deceased got burnt accidentally but this fact is also not believable in the absence of any evidence/material on record to prove the accidental burnt specially when the contusions were found on the cadaver of body in the post-mortem-examination. If the deceased caught fire accidentally, then how contusions have occurred on her body has not been explained by the convict/appellant.

11. Learned counsel for the convict/ appellant has tried to justify the contusions by arguing that these contusions might occur by dashing with pegs and grass cutting machine while running here and there in a burnt state. But no such suggestion has been made or any question has been asked in this regard, to the medical witness i.e. P.W.-7 who conducted the post mortem examination of the cadaver. Thus, this argument has no force in it.

12. Learned counsel for the convict/ appellant has vehemently argued that the prosecution has to stand on its own legs and to prove its case beyond all reasonable doubts and cannot shift the burden on the convict/ appellant to explain how the death occurred. He relied upon the extract of the book ***C.D. FIELD'S Commentary on LAW OF EVIDENCE ACT, 1872*** and submitted that Section 106 of the Evidence Act can have no application where a number of persons reside in the house and in this case, as per the statement of P.W.-1, the mother-in-law and father-in-law of the deceased also used to reside in the same house. Hence, the house was not in the exclusive possession of the convict/ appellant, therefore the burden under Section 106 of the Evidence Act cannot be laid on the convict/ appellant to explain how the deceased got burnt and how the contusions occurred. But this argument of the learned counsel for the convict/appellant is not tenable for the reason that the convict/ appellant himself has stated in his statement under Section 313 of the Cr.P.C. that he used to live with his wife Seema Devi in his house. He did not say that his parents were there when accident took place or the deceased caught fire accidentally while cooking food.

13. In ***Ranjit Kumar Haldar Vs. State of Sikkim (supra)***, Hon'ble Apex Court in this regard has held as under :-

"14) The general rule is that the burden of proof is on the prosecution. Section 106 of the Act was introduced not to relieve the prosecution of their duty but it is designed to meet the situation in which it would be impossible or difficult for the prosecution to establish facts which are especially within the knowledge of the accused.

15) In Shambu Nath Mehra v. State of Ajmer, AIR 1956 SC 404, the Court held as under:

"8. ...Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof.

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."

Illustration (a) says-- "A desires a court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime."

9. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor [AIR 1936 PC 169] and Seneviratne v. R. [(1936) 3 All ER 36, 49].

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11. We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

14. In ***State of Rajashtan Vs. Thakur Singh : 2014(12) SCC 211***, Hon'ble Apex Court in this regard has held as under :-

15. We find that the High Court has not at all considered the provisions of Section 106 of the Evidence Act, 1872. This section provides, inter alia, that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

16. Way back in Shambhu Nath Mehra v. State of Ajmer this Court dealt with the interpretation of Section 106 of the Evidence Act and held that the section is not intended to shift the burden of proof (in respect of a crime) on the accused but to take care of a situation where a fact is known only to the accused and it is well nigh impossible or extremely difficult for the prosecution to prove that fact. It was said (AIR P 406, Para 11) :

"11. This [Section 101 lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts

that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

17. In a specific instance in Trimukh Maroti Kirkan v. State of Maharashtra this Court held that when the wife is injured in the dwelling home where the husband ordinarily resides, and the husband offers no explanation for the injuries to his wife, then the circumstances would indicate that the husband is responsible for the injuries. It was said : (SCC p 694, para 22)

"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

15. In the present matter, the convict/appellant though has stated that he was in the field at the time when the incident occurred, has not led any evidence to prove that he was not present in the house and was in the field. The fact that the deceased caught fire accidentally while cooking food is also not believable in the absence of any evidence/material to prove that the other goods kept in the same room where she was allegedly cooking food and caught accidental fire, were not burnt. Furthermore, when the convict was not present at the time of incident, then how he came to know that his wife caught fire accidentally while cooking food.

16. Learned counsel for the convict/ appellant has vehemently argued that under Section 313 of Cr.P.C., the convict was not asked about the contusions found on the body of the deceased. So he cannot be supposed to explain the contusions found on her body. In support of his contentions, he relied upon ***Samsul Haque Vs. State of Assam (supra)*** wherein the Hon'ble Apex Court has laid down as under :-

"22. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in Asraf Ali v. State of Assam. The relevant observations are in the following paragraphs:

"21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a

point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in S. Harnam Singh v. The State (Delhi Admn.) (AIR 1976 SC 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non- indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

17. No doubt the specific question has not been asked to the convict under Section 313 Cr.P.C. about the contusions found on the body of the deceased, but a question has been asked about the burning of Seema Devi by him after dousing with kerosene oil. He answered that she caught fire accidentally and he got her admitted in a hospital. When he was asked about the statement of P.W.-7, the doctor who conducted the post-mortem-examination, he showed his ignorance. In these circumstances, the referred case law is of no help to the convict/ appellant as convict/ appellant and the deceased were living in the same house at the time of the incident and she died of burn injuries and contusions were also found on her body that too on the vital parts of the body. No other articles of the house were found burnt. There is no evidence to show that the convict/ appellant was present at the spot at the time of incident as he alleges that he was in the field.

18. As far as argument of learned counsel for the convict/ appellant about the demand of money by the complainant is concerned, it is a very feeble argument, as the convict himself has stated that after the death of the deceased, they demanded money. Even if it is assumed that they lodged the report for not paying the money demanded, the factum of death of the deceased in the house of the convict due to burn injuries alongwith contusions received, cannot be wiped out merely on saying that they demanded money. No person has been examined even to prove this fact that the complainant demanded money. The medical evidence does not show the accidental death as contusions were found on the cadaver. The plea of alibi is to be established with certainty but no evidence has been led to establish the fact.

19. In ***Shaikh Sattar Vs. State of Maharashtra (supra)***, the Hon'ble Apex Court in this regard has held as under :-

"35. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence

which has not been led in the present case. We may also notice here at this stage the proposition of law laid down in the case of Gurpreet Singh Vs. State of Haryana, (2002) 8 SCC 18 as follows:

"20..... This plea of alibi stands disbelieved by both the courts and since the plea of alibi is a question of fact and since both the courts concurrently found that fact against the appellant, the accused, this Court in our view, cannot on an appeal by special leave go behind the above noted concurrent finding of fact".

20. In the present case, it has not been explained who caused the contusions. The deceased caught fire accidentally. It is also not proved that the convict/appellant was working in the field at the time of incident.

21. Thus, to sum up, in this matter, the date and place of occurrence is not disputed. The medical evidence shows that the deceased died of ante-mortem burn injuries and contusions were also found on the cadaver. The convict/appellant did not prove the fact that he was in the field at the time of the incident. The statement of the convict that deceased caught fire accidentally while cooking food is not found reliable. The deceased and convict/ appellant were residing in the same house at the time of the incident, then it was the duty of the convict/appellant to explain how the deceased caught fire and how contusions occurred on her body. Hence, the learned trial court has rightly held the convict /appellant guilty under Section 302 I.P.C. for causing the death of his wife Seema Devi, and sentenced accordingly. There appears no reason or ground to interfere with the conviction and sentence recorded by the trial Court.

22. In the result, the appeal has no merit and is hereby ***dismissed.***

23. The convict/appellant Vipin is in jail. He shall undergo the sentence awarded by the trial court.

24. Let the original record, received from trial Court be sent back alongwith the copy of this judgement, to the court concerned for information and necessary action.

(2022)07ILR A781
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.07.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 1387 of 2013

Sanjay Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Mr. Jaikaran

Counsel for the Respondent:
Govt. Advocate

Criminal Law- Indian Evidence Act, 1872- Section 32- The dying declaration of the deceased is very natural, cogent, trustworthy with ring of truth as she has given a very precise statement against the person who set her ablaze. He has not implicated any other in-laws in the crime. This dying declaration has been corroborated by the statement of P.W.10, P.W3 and also by statement of P.W.1.

Where the court finds the dying declaration to be cogent, true and trustworthy and has been further corroborated by other evidence then the same can be solely relied upon to convict the accused.

Criminal Law - Indian Evidence Act, 1872- Section 154- Hostile Witness- The evidence of a hostile witness cannot be thrown out, completely. It is settled law that the evidence of a hostile witness cannot be discarded in toto, whatever is found in his/her evidence in corroboration of the other evidence, the court can take into consideration that part of the evidence of that witness.

Settled law that the evidence of a hostile witness cannot be discarded as a whole and relevant parts ofthe testimony of a hostile witness, which are admissible in law, can be used by the prosecution or the defence.

Criminal Law - Indian Penal Code, 1860- Sections 302 & 304- The deceased died in the hospital during the treatment after four days, in the hospital, so it cannot be said the offence travels only upto the offence punishable under Section 304 instead of Section 302 of I.P.C. Hence this contention of the learned counsel for the defence has no force. In the postmortem report it has also been noted by the autopsy surgeon that deceased died "as a result of ante-mortem burn leading to septicemia and shock." Hence the evidence available on record is sufficient enough to prove the guilt of the convict/appellant and the learned trial court has rightly held him guilty and sentenced him for the offence punishable u/s 302 I.P.C.

As the deceased died after four days of the occurrence because of septicaemia caused by the burn injuries sustained by her, therefore the present offence would be that of murder and not culpable homicide not amounting to murder. (Para 12, 14, 18)

Criminal Appeal rejected. (E-3)

Case Law/Judgements relied upon:-

1. Rajesh Yadav & anr. Vs St. of U.P. 2022 SCC Online SC 150

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This Criminal Appeal has been filed by the appellant against the judgment and order dated 13/14.08.2013 passed by Special Judge (E.C.) Act/ Additional Sessions Judge, Court No.4, Rae Bareli in Sessions Trial No.116 of 2007 (State Vs. Sanjay Singh) arising out of Crime No.31 of 2007 under Section 498-A, 323, 504 and 302 of of Indian Penal Code,1860 (in short I.P.C.) and Section ¾ of Dowry Prohibition Act (in short D.P. Act). Whereby the convict/appellant has been held guilty and sentenced under Section 498A, 302 of I.P.C. and Section 4 of the D.P. Act, Police Station Shivgarh, District Rae Bareli. The convict has been awarded the following sentences :-

Sl. No.	Sections	Sentences awarded
1.	Under section 498-A I.P.C.	Rigorous imprisonment of three years coupled with a fine of Rs.5,000/- and in default of payment of fine, six months simple imprisonment.
2.	Under section 302 I.P.C.	Life imprisonment coupled with a fine of Rs.20,000/- and in default of payment of fine, two years additional imprisonment.
3.	Under section 4 of D.P. Act.	Rigorous imprisonment of two years coupled with a fine of Rs.5,000/- and in default of payment of fine, three months simple imprisonment.

2. The facts in short, necessary for disposal of this appeal are as under:-

(i) A First Information Report (in short FIR) was registered at Case Crime No.31 of 2007, under Sections 498A, 323, 504, 307 of I.P.C. and Section ¾ of D.P. Act, Police Station Shivgarh, District Rae Bareli, on the basis of a the written report submitted by the complainant Ajeet Pratap Singh. In the written report it was narrated that elder sister of the complainant Manju Singh was married to Sanjay Singh about 10 years ahead. His brother-in-law used to harass and torture his sister soon after the

marriage and used to say that her parents had not given sufficient dowry and they just show that they were rich people. Sanjay Singh used to ask his sister to bring a buffalo and a motorcycle, otherwise he will not let her live with peace. One son was born to his sister out of this wedlock. Sanjay Singh started to live separately in a house situated adjacent to his parents. After this he started torturing and harassing his sister more and pressurized her to bring a buffalo and a motorcycle. When his sister refused to accede to the demands he frequently used to beat and torture her. Due to this harassment and torture his sister came to her parental house, about 5 months before and started to live there. About one month ahead, brother of her father-in-law died, therefore, his sister went to his matrimonial home Jagatpur. When she was coming back, her mother-in-law and father-in-law asked her to stay there and assured that now Sanjay Singh has reformed himself. On this she stayed there and started to live with Sanjay Singh.

(ii) On 25.01.2007 he received a phone call from village Ahasan Jagatpur that Sanjay Singh has set ablaze Manju after pouring Kerosene oil. On this the complainant, his younger brother Sonu Singh, cousin Santosh and many other people of the village went to village Ahasan Jagatpur and found that his sister was badly burnt. The smell of kerosene oil was coming out from her body. His sister Manju told him that Sanjay Singh has set her ablaze after beating and dousing with kerosene oil. His sister was being carried by Sonu Singh and Santosh Singh to hospital in Bachhrawa. The condition of his sister was very serious.

(iii) After registration of the FIR investigation started. The dying declaration of the deceased was recorded by Mr. Piyush Srivastava, 'Naib Tehsildar' in the hospital where the deceased was under treatment. The deceased died during treatment on 29.01.2007 in the hospital. The written information of death was given by the complainant at the concerned police station (Exhibit Ka-18). After investigation chargesheet was submitted in the Court concerned against the convict/appellant under Sections 498-A, 323, 504 and 302 of I.P.C. and Section 3/4 of D.P. Act. The Magistrate concerned took cognizance on the chargesheet and committed the case to the Sessions Court for trial. The Sessions Court framed charges under sections 498A, 302 of I.P.C. and Section 3/4 of D.P. Act. The convict/appellant denied the charges and claimed to be tried.

(iv) The prosecution in order to prove its case examined ten witnesses in toto, which are as under:-

1. P.W.1 Sonu Singh brother of the deceased.

2. P.W.2 Mabood Khan an independent witness.

3. P.W.3 Santosh Singh cousin brother of the deceased.

4. P.W.4 Dr. Y.N. Tiwari, who conducted autopsy on the cadaver of the deceased Manju Singh.

5. P.W.5 Smt. Kirti Singh a witness from the family of accused.

6. P.W.6 Sub Inspector Arvind Mohan Jaiswal, who investigated the matter initially.

7. P.W.7 Sub-Inspector M. S. Khan who conducted inquest of the dead body and prepared 'Panchayatnama' and relevant papers and sent the dead body for postmortem.

8. P.W.8 Mr. Piyush Srivastava, 'Naib Tehsildar', who recorded the dying declaration of the deceased.

9. P.W.9 Sub-Inspector Mr. R.P. Singh who took over the investigation from the I.O. Arvind Mohan Jaiswal.

10. P.W.10 Raja Ram Singh, the uncle of the deceased who scribed the written report upon the dictation of the complainant Ajeet Singh.

(v) Apart from the above oral evidence, documentary evidence has also been proved by the prosecution, which are as under:-

1. Exhibit Ka-1 postmortem report.

2. Exhibit Ka-2 bed head ticket.

3. Exhibit Ka-3 discharge slip.

4. Exhibit Ka-4 prescription of Naveen Prathmik Swasthya Kendra, Bachhrawa, Rae Bareli, of deceased.

5. Exhibit Ka-5 recovery memo of the recover of burnt sari, blouse etc. from the spot.

6. Exhibit Ka-6 recovery memo of taking into custody half burnt sweater and ash.

7. Exhibit Ka-7 Site plan of the place of occurrence.

8. Exhibit Ka-8 carbon copy of concerned G.D. , whereby the case was altered under Section 302 of the I.P.C.

9. Exhibit Ka-9 Chick FIR.

10. Exhibit Ka-10 concerned G.D.

11. Exhibit Ka-11 'Panchayatnama'.

12. Exhibit Ka-12 Police Form No.13

13. Exhibit Ka-13 Police Form No.379.

14. Exhibit Ka-14 letter to C.M.O. for conducting postmortem.

15. Exhibit Ka-15 dying declaration.

16. Exhibit Ka-16 chargesheet.

17. Exhibit Ka-17 written report.

18. Exhibit Ka-18 information of the death of the deceased.

(vi) After completion of prosecution evidence the statement of convict/appellant was recorded under Section 313 of the Code of Criminal Procedure (Cr.P.C.), wherein he denied all the facts and circumstances and stated that the deceased was of blunt mind, she herself set her ablaze. He has further stated that the deceased herself set her ablaze. He was not at the spot. Whatever allegations have been made against him are false. His son Golu lives with him, previously Golu used to live with Manju, the deceased in her parental home, but now the relatives of Manju sent back Golu to him and asked his mother to get him convicted.

No defence witness was produced by the convict/appellant, though opportunity was given by the trial court.

(vii) After hearing the arguments of both the sides and analyzing the evidence available on record, the learned lower court relied upon the dying declaration made by the deceased in the hospital where she was admitted for treatment after being burnt by the convict/appellant. The dying-decleration was recorded by the 'Naib Tehsildar' on the same day, on which incident occurred. The dying declaration so made was corroborated by the evidence of witnesses of facts as well as by evidence of formal witnesses. Medical evidence is consistent with the dying declaration made by the deceased. The learned trial court did not find any reason to disbelieve the dying declaration made by the deceased.

(viii) P.W.10 Raja Ram Singh, uncle of the deceased who ascribed the written report, dictated by the brother of the deceased, Ajeet Singh. This witness has proved the written report as Exhibit Ka-17. It is noteworthy that Ajeet Singh the complainant had died during the pendency of the case. This witness has also proved all the facts stated in the written report, as he accompanied the complainant to the place

of incident when the information was received in his village about the unfortunate incident of burning of the deceased. This witness has also proved the recovery of the articles by the Investigating Officer from the place of the incident.

(ix) The learned trial court also relied upon the examination-in-chief of P.W.1, the another brother of deceased who in the cross-examination has turned hostile. On the basis of evidence available on record the learned trial court concluded that prosecution has proved the charges framed against the convict/appellant beyond reasonable doubt. The deceased was tortured and subjected to cruelty for non-fulfillment of demand of a buffalo and a motorcycle as dowry and ultimately she was burnt alive dowsing with kerosene oil on 25.01.2007 and she died of burn injuries during treatment.

(x) Learned trial court also found the convict/appellant guilty under Section 498-A and Section 4 of Dowry Prohibition Act alongwith Section 302 of the I.P.C. and the trial court sentenced the convict/appellant to imprisonment as noted above in paragraph No.1.

(xi) Being aggrieved of this conviction and sentence the convict/appellant preferred this appeal.

3. Heard Shri Jaikaran, learned counsel for the appellant and Ms. Smiti Sahai, learned A.G.A. for the State-respondent.

4. Learned counsel for the appellant argued that learned trial court did not appreciate the evidence in the right preservative and erroneously held the convict/appellant guilty and sentenced him. All the allegations made in the FIR regarding demand of dowry or setting ablaze the deceased are false. The son of the deceased was allegedly present at the time of incident, but he has not been examined by the prosecution. The mother-in-law of the deceased allegedly carried her for the treatment to the hospital, but she has not been examined. The dying declaration of the deceased was manipulated and written on the behest of the complainant. The case was registered initially under Section 307 of I.P.C., but subsequently converted under Section 302 of I.P.C. after the death of the deceased. The deceased died due to septicemia which developed for want of proper treatment. Hence the offence may not travel beyond the offence punishable under Section 304 of I.P.C. Hence this conviction should be converted to Section 304 from Section 302 of I.P.C. and the convict/appellant should be sentenced to the period already undergone and be released.

5. Contrary to it learned A.G.A. submitted that there is sufficient evidence available on record for convicting the convict/appellant for the offence for which he has been convicted and punished. She submitted that the dying declaration of the deceased is very natural and trustworthy as she has implicated only the wrong doer and none-else. The dying declaration has been recorded by the 'Naib Tehsildar' on the day of incident itself. There was no chance for tutoring or manipulating.

6. P.W. 10 Raja Ram has proved the written report and also the fact that deceased told him before the complainant and other persons who were present there that she was burnt by Sanjay Singh, her husband. This witness has also proved the fact that she was being tortured and harassed by the convict/appellant for demand of a Buffalo and a Motorcycle.

7. P.W.1 though turned hostile in the cross-examination, but in examination-in-chief he has fully supported all the facts written in the F.I.R. P.W.3 Santosh Singh, cousin brother of the deceased has also supported very well the case of the prosecution. Ms. Kirti Singh P.W.5 who is the aunt of Sanjay Singh, the convict, has also stated that she saw Manju in burnt condition as she came out of her house in a burning state. She has also stated that the deceased Manju came to his maternal home before 15 days of the incident, after hearing the news of the death of her (P.W.5's) husband. The deceased died due to burn injuries as has been noted in the postmortem report. Hence there is no error or discrepancy in the impugned judgment and order passed by the learned trial court.

8. Considered the rival submissions and perused the original record as well as the record of the appeal. The FIR which was registered on the basis of written report Exhibit Ka-17. The complainant (now dead) has narrated that his real elder sister Manju Singh was married to Sanjay Singh, ten years back. Sanjay Singh used to torture and beat his sister for demand of one buffalo and a motorcycle. Due to unbearable torture his sister came to his parental house five months before the incident, but as the brother of father-in-law of Manju namely Rajendra Singh died, so his sister Manju went there to his matrimonial home. When she was coming back to his parental house her in-laws asked him to stay there and told that Sanjay Singh has reformed himself. On this assurance, she stayed there. On 25.01.2007 at about 08:00 AM he received telephonic call that Sanjay Singh firstly thrashed Manju Singh and thereafter set her ablaze after dowsing with kerosene oil. Unfortunately the complainant died during the pendency of the trial and his statement could not be recorded in the trial court. But the report has very well been proved by P.W.10 Raja Ram Singh who is the uncle of the deceased. He has stated before the trial court that report was scribed by him upon the dictation made by Ajeet Singh and Ajeet Singh after hearing the same wrote his name and address on the same. Whatever was dictated by Ajeet Singh he wrote in the written report. He further stated that he accompanied Ajeet Singh after getting the news of Manju being burnt by Sanjay Singh on 25.01.2007. When he reached at Ahasan Jagatpur he found Manju seriously burnt and asked her about the incident then she told that Sanjay Singh firstly thrashed her, thereafter set her ablaze after dowsing with kerosene oil. This witness has also stated that whenever Manju used to come to her parental house she used to tell that Sanjay Singh tortured and harassed her for one buffalo and a motorcycle. This witness has also stated that his statement was also recorded by the Investigating Officer and he was also a witness to the recovery of articles from the place of incident. This witness recognized her signatures on recovery memos Exhibits Nos. Ka 5 & 6.

9. P.W.3 Santosh Singh, who is the cousin brother of the deceased has also supported very well the prosecution story. He also accompanied the complainant to the maternal house of the deceased where the incident occurred, after getting the news of the incident. He has stated in his examination-in-chief that on the information received he alongwith Ajeet Singh, Sonu Singh and Raja Ram Singh went to the maternal home of Manju Singh and found that mother of Sanjay Singh (convict) was taking Manju in a burnt condition on a Tanga, they all three stopped

their motorcycle and asked Manju about the incident then she told that Sanjay Singh firstly beat her and thereafter set her ablaze after dowsing with kerosene oil. Manju was seriously burnt and telling about the incident weepingly. Thereafter they took Manju to Naveen Prathmik Swastha Kendra, Bachhrawa, Rae Bareli from where she was referred to District Hospital for treatment and she died after three or four days. Thus this witness has also supported the prosecution case to the extent that Manju Singh the deceased told Ajeet Singh, Sonu Singh and Raja Ram Singh that she was beaten and burnt by convict Sanjay Singh.

10. Sonu Singh, P.W.1 is the real brother of the deceased Manju Singh. He in his examination-in-chief fully supported the prosecution case, but cross-examination was not made on the day of examination-in-chief. As the defence counsel moved the adjournment application on the date on which examination-in-chief was recorded. The examination-in-chief of this witness was recorded on 12.06.2008 and the cross-examination was made by the defence on 20.07.2009 after a period of more than a year. In cross-examination so made, this witness turned hostile and did not support the prosecution version and whatever stated by him in his examination-in-chief. Therefore, with the permission of the Court Additional District Government Counsel examined the witness. The most important witness of this case is P.W.8 Mr. Piyush Srivastava, 'Naib Tehsildar', who recorded the dying declaration of the deceased. The dying declaration so recorded is Exhibit Ka-15 on the record which reads as under:-

"आज दिनाँक 25/01/07 को प्राप्त सूचना के आधार पर जिला अस्पताल रायबरेली में श्रीमती मंजू सिंह पत्नी संजय सिंह नि. असहनजगतपुर थाना शिवगढ़ जिला रायबरेली के मृत्यु पूर्व बयान प्राप्त किया, जो निम्न प्रकार हैः—

मैं मंजू सिंह आज सुबह अपने घर पर थी, उस समय मेरे पति घर पर थे, उन्होंने पहले मुझसे लड़ाई की, और लड़ने के बाद मुझे मारा पीटा और मारपीट कर मुझ पर मिट्टी का तेल डालकर आग लगा दी और घर से भाग गये। मेरे पति का नाम संजय सिंह पुत्र भगवान बख्श सिंह नि. ग्राम असहनजगतपुर है। मेरे परिवार में सास, ससुर मेरे साथ रहते हैं। मुझे उनसे कोई शिकायत नहीं है। मेरी शिकायत मेरे पति से है, उसने ही मुझे जलाया है। मुझे मेरी सास व गाँव वालों ने बचाया और यहाँ अस्पताल लाये।"

11. This witness PW-8 has stated that on 25.01.2007 he was posted as 'Naib Tehsildar' (West) in Tehsil Sadar, Rae Bareli. On that date, on the direction of the then S.D.M. Sadar he went to record the dying declaration of Smt. Manju Singh wife of Sanjay Singh, resident of Ahasan Jagatpur, Police Station Shivgarh, District Rae Bareli. Before starting to record the statement of Manju Singh, Dr. Rajendra Sharma certified that Manju Singh is in the state of giving statement, thereafter he recorded the statement of Manju Singh. Manju Singh stated that her husband Sanjay Singh scuffled with her and beat her, thereafter set her ablaze after dousing with kerosene oil and ran away from the house. Manju Singh also stated that she has no complaint against her mother-in-law. She has further stated that she was burnt by her husband and her mother-in-law and other people of the village saved her and carried to hospital. This witness has further stated that after recording of the statement he read over the same to Manju Singh and Manju Singh affixed her thumb impression of right hand on the statement and this witness has also signed on that. This witness has further stated that doctor has given fitness certificate after recording of the statement also, the doctor signed on the

statement and put the seal of the hospital on the same. This witness has proved the dying declaration written in his handwriting and under his signature as Exhibit Ka-15. This witness has been cross-examined by the defence counsel, but nothing adverse could be brought out in his statement. There is nothing on the record to show that the dying declaration of the deceased was manipulated or given at the behest of the complainant. In the cross-examination this witness has stated that among the attendants who were present near Manju Singh when he reached, her mother-in-law was also there. He ousted all the attendants from the room before recording of the statement of Manju Singh. In the presence of the mother of the convict it was not possible to tutor Manju Singh to give statement against the convict Sanjay Singh.

12. The dying declaration of the deceased is very natural, cogent, trustworthy with ring of truth as she has given a very precise statement against the person who set her ablaze. He has not implicated any other in-laws in the crime. This dying declaration has been corroborated by the statement of P.W.10, P.W3 and also by statement of P.W.1.

13. The Investigating Officer P.W.6 Sub-Inspector Arvind Mohan Jaiswal has also stated that when he recorded the statement of the deceased in the hospital she has stated that her husband used to ask for a buffalo and a motorcycle as dowry and when she opposed he used to beat her and on the day of incident at about 7:00 AM Sanjay Singh beat her and set her ablaze dousing with kerosene oil. Hence, there is no reason on the record to doubt the veracity or truthfulness of the dying declaration of the deceased Manju Singh.

14. Learned counsel for the convict/appellant argued that the trial court has taken into consideration the statements of hostile witnesses also, which is not justified. But this argument of the defence does not carry any weight because the dying declaration of the deceased is very well being supported by P.W.3 and P.W.10. Further more, the evidence of a hostile witness cannot be thrown out, completely. It is settled law that the evidence of a hostile witness cannot be discarded in toto, whatever is found in his/her evidence in corroboration of the other evidence, the court can take into consideration that part of the evidence of that witness.

15. In this regard the Hon'ble Apex Court very recently in the case of ***Rajesh Yadav and another Vs. Sate of U.P. 2022 SCC Online SC 150*** held as under:-

"21. The expression "hostile witness" does not find a place in the Indian Evidence Act. It is coined to mean testimony of a witness turning to depose in favour of the opposite party. We must bear it in mind that a witness may depose in favour of a party in whose favour it is meant to be giving through his chief examination, while later on change his view in favour of the opposite side. Similarly, there would be cases where a witness does not support the case of the party starting from chief examination itself. This classification has to be borne in mind by the Court. With respect to the first category, the Court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. Even a chief examination could be termed as evidence. Such evidence would become complete after the cross examination. Once evidence is completed, the said testimony as a whole is meant for the court to assess

and appreciate qua a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the court. It is well within the powers of the court to make an assessment, being a matter before it and come to the correct conclusion.

22. On the law laid down in dealing with the testimony of a witness over an issue, we would like to place reliance on the decision of this Court in C. Muniappan v. State of T.N., (2010) 9 SCC 567:

"81. It is settled legal proposition that:

"6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

(Vide Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389, Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233, Syad Akbar v. State of Karnataka, (1980) 1 SCC 30 and Khujji v. State of M.P., (1991) 3 SCC 627, SCC p. 635, para 6.)

82. In State of U.P. v. Ramesh Prasad Misra [(1996) 10 SCC 360: 1996 SCC (Cri) 1278] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra [(2002) 7 SCC 543: 2003 SCC (Cri) 112], Gagan Kanojia v. State of Punjab [(2006) 13 SCC 516: (2008) 1 SCC (Cri) 109], Radha Mohan Singh v. State of U.P. [(2006) 2 SCC 450: (2006) 1 SCC (Cri) 661], Sarvesh Narain Shukla v. Daroga Singh [(2007) 13 SCC 360: (2009) 1 SCC (Cri) 188] and Subbu Singh v. State [(2009) 6 SCC 462: (2009) 2 SCC (Cri) 1106].

83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

84. In the instant case, some of the material witnesses i.e. B. Kamal (PW 86) and R. Maruthu (PW 51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law. Some omissions, improvements in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature.

85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be

expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses."

Vide Sohrab v. State of M.P., [(1972] 3 SCC 751 : (1972) SCC (Cri) 819 : AIR 1972 SC 2020], State of U.P. v. M.K. Anthony, [(1985) 1 SCC 505 : 1985 SCC (Cri) 105], Bharwada Bhoginbhai Hirjibhai v. Sate of Gujrat, [(1983) 3 SCC 217 : 1983 SCC (Cri) 728 : AIR 1983 SC 753], State of Rajasthan v. Om Prakash, [(2007) 12 SCC 381 : (2008) 1 SCC (Cri) 411], Prithu v. State of H.P., [(2009) 11 SCC 585 : (2009) 3 SCC (Cri) 1502], State of U.P. v. Santosh Kumar, [(2009) 9 SCC 626 : (2010) 1 SCC (Cri) 88] and State v. Saravanan, [(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580]."

16. The argument of the learned counsel that the son and mother-in-law of the deceased who were allegedly present at the time of incident have not been examined by the prosecution which creates doubt, is not tenable at all because it is a choice of the prosecution to whom it wants to produce to prove its case. The case of the prosecution has very well been proved by the witnesses of fact as well as by the witness who recorded the dying declaration of the deceased.

17. Learned counsel for the convict/appellant very vehemently argued that deceased was not treated medically well, therefore she died, as she was not so badly burnt as to die. So the offence can travel only upto the offence punishable under Section 304 of I.P.C. instead of Section 302 of I.P.C.. This argument of the defence counsel is also of no value. The medical-examination report, Exhibit Ka-4 where the deceased was first examined in a burnt condition, it has been noted that superficial to deep burn was found on the body and she was found 55 to 65 percent burnt and referred to District Hospital for treatment. In Exhibit Ka-2 which is 'bed-head- ticket' of the deceased issued by Rana Beni Madhav District Hospital Rae Bareli it has been noted that 55 to 65 percent burn injuries were present on the body of the victim.

18. In the postmortem report following ante-mortem injuries were found :-

"Superficial to deep skin burn at place over scalp, forehead, face, neck and interior and posterior of Chest front and back, upper part of abdomen front and back both upper limbs. Line of redness present at place"

The deceased died in the hospital during the treatment after four days, in the hospital, so it cannot be said the offence travels only upto the offence punishable under Section 304 instead of Section 302 of I.P.C.. Hence this contention of the learned counsel for the defence has no force. In the postmortem report it has also been noted by the autopsy surgeon that deceased died "as a result of ante-mortem burn leading to septicemia and shock." Hence the evidence available on record is sufficient enough to prove the guilt of the convict/appellant and the learned trial court has rightly held him guilty and sentenced him for the offence punishable u/s 302 I.P.C. There appears no ground and reason for interference in the conviction and sentence recorded by the trial court.

19. The appeal is ***dismissed***, accordingly.

20. The convict/appellant is already in jail. He shall serve the sentence awarded to

him by the trial court. Let the original record received be sent back along with copy of this judgment to the trial court for information and necessary action.

(2022)07ILR A791
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.07.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 1689 of 2017
&
Criminal Appeal No. 1425 of 2017

Pushpa Devi ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Anil Kumar Srivastava, Sri Ram Bahadur, Sri Yogesh Kumar Srivastava, A/R0050, Sri Raghubeer Singh, Sri Noor Muhammad.

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 32- Dying Declaration-This dying declaration has not been challenged by the counsel for the appellant- There is no reason for us not to accept the dying declaration and its evidentiary value under Section 32 of Evidence Act, 1872.

Where the dying declaration is found to be reliable and trustworthy and the same is also not challenged, then the Court would accept the said dying declaration and secure the conviction of the accused solely on the basis of the dying declaration**.**

Criminal Law - Indian Penal Code, 1860- Sections 302 & 304 Part – I- The deceased died due to septicemia after about 20 days. All these facts go to show that the death occurred due to septicemia which developed because of the setting her ablaze the deceased which is corroborated by oral testimony. Thus, the death has occurred due to the act of Pushpa who has been aided by the other co-accused and it is a homicidal death- The offence would be under Section 304 Part-I of IPC as (i) the death occurred after 20 days, (ii) the burns were only 36%, (iii) the death was due to septicemia - The death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I- The offence is not under Section 302 of I.P.C. but is culpable homicide and, therefore, sentence of the accused- appellants is reduced to the period of eight years with remission under Section 304 Part-I of IPC. The fine is reduced to Rs.2,000/- each.

Where the death is due to septicaemia, the offence was not premeditated and the accused did not have the intention to commit the murder of the deceased, the offence will fall under Exceptions 1 and 4 of Section 300 IPC and will therefore be punishable under Section 304 Part-1 of the IPC. (Para 14, 18, 19, 20, 24)

Criminal Appeal Partly Allowed. (E-3)

Judgements Case Law relied upon:-

1. Maniben Vs St. of Guj., 2009 (8) SCC 796

2. Chirra Shivraj Vs St. of A.P, 2010 (14) SCC 444

3. Crl. Appeal No.1438 of 2010 (Rama Devi @ Ramakanti Vs State of U.P.) dec. on 7.10.2017

4. Crl. Appeal No. 2558 of 2011 (Smt. Kanti & anr. Vs State of U.P.) dec. on 1.2.2021

5. Govindappa & ors. Vs St. of Kar., (2010) 6 SCC 533

6. Tukaram & ors. Vs St. of Mah., (2011) 4 SCC 250

7. B.N. Kavatakar & anr. Vs St. of Kar., 1994 SUPP (1) SCC 304

8. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

9. Crl. Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs St. of Guj.) dec. on 11.9.2013

10. Khokan@ Khokhan Vishwas Vs St. of Chattis., 2021 LawSuit (SC) 80

11. Anversinh Vs St. of Guj., (2021) 3 SCC 12

12. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529

13. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

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

1. Both these appeals challenges the judgment and order dated 9.2.2017 passed by Additional Sessions Judge, Court No.8, Firozabad in Sessions Trial No.245 of 2015 convicting accused-appellant- Pushpa Devi, under Section 498A of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced her to undergo simple imprisonment for two years with fine of Rs.2,000/- and in default of payment of fine, further to undergo simple imprisonment for three months; she was further convicted under Section 323 IPC and sentenced to undergo simple imprisonment for three months with fine of Rs.500/- and in case of default of payment of fine, to undergo further simple imprisonment for one months; she was further convicted under Section 302 IPC and sentenced to undergo imprisonment for life with fine of Rs.5,000/- and in default of payment of fine, further to undergo simple imprisonment for six months. The accused-appellant-Bantu @Vimal Babu and accused-appellant- Munni Devi were convicted under Section 498A IPC and sentenced them to undergo simple imprisonment for two years each with fine of Rs.2,000/- each and in default of payment of fine, further to undergo simple imprisonment for three months each. All the sentences were to run concurrently as per direction of the Trial Court.

2. Accused-appellants, Pushpa Devi, Bantu @ Vimal Babu and Munni Devi were trying along with Dilip Kumar for commission of offence under Section 498A, 304B, 314 and 323 read with Section ¾ Dowry Prohibition Act. ON 4.7.2015, learned Magistrate committed the case to the Court of sessions which was numbered as Sessions Case No. 245 of 2015 (State Vs. Dilip Kumar and others).

3. Factual scenario as culled out from the record and the judgment of the Court below is that on 03.12.2014, a written First Information Report (hereinafter referred as 'FIR) was given mentioning that Rajni was married with Dilip Kumar on 4.6.2013 but after the marriage,the in-laws started harassing the deceased-Rajni and demanded more dowry. For which on 2.12.2014, a phone was received that all the four persons had set ablaze the deceased-Rajni at about 3:00 (afternoon). She was taken to the hospital at Firozabad. Thereafter she was referred to Agra. She has pregnancy of eight months.

4. On the complaint of the father of the deceased, First Information Report being No.491 of 2014 was registered under Sections 498A, 307, 323 IPC and ¾ D.P. Act and thereafter, the investigation was moved into motion. After recording statements of various persons, the investigating officer submitted the charge-

sheet against accused persons under Sections 498A, 304B, 314, 323 IPC and ¾ D.P. Act.. The learned Chief Judicial Magistrate before whom charge sheet was laid put the same before the learned Sessions Judge. The learned Sessions Judge, on hearing the learned Government Advocate and learned counsel for the accused-Pushpa Devi, framed charges under Section 302, 498A, 323 of I.P.C. and the accused- Dilip Kumar, Bantu @ Vimal Babu and Smt. Munni Devi framed charge under Section 498A IPC.

5. On being read over the charges, the accused-appellants pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined 15 witnesses who are as follows:

1	Ramveer Singh	PW 1
2	Omkar	PW2
3	Manoj Kumar	PW3
4	Shankar Lal	PW4
5	Dharmendra Singh	PW5
6	Dr. R.C. Johri	PW6
7	Dr. Anand Kumar	PW7
8	Nanhey Ram	PW8
9	Kehar Singh Rana	PW9
10	Prashan tKumar Prasad	PW10
11	Yogendra Kumar Yadav	PW11
12	Geeta Ram	PW12
13	Raj Kamal Singh	PW13
14	Krishna Murari Dixit	PW14
15	Dr. R.D. Gautam	PW15

6. In support of ocular version following documents were filed:

1.	F.I.R.	Ex. Ka.5
2.	Written Report	Ex. Ka.1
3.	Dying Declaration	Ex. Ka.12
4.	Medical Report	Ex. Ka.13
5.	Postmortem Report	Ex. Ka.4
6.	Panchayatnama	Ex. Ka.2
7.	Charge-sheet	Ex. Ka.6
8.	Site Plan with Index	Ex. Ka.7

7. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the accused - appellants as mentioned above.

8. Heard Yogesh Kumar Srivastava, learned counsel for the appellant, Sri Vikas Goswami, learned A.G.A-I, in Criminal Appeal No.1689 of 2017 and Sri Nagendra Kumar Srivastava and Sri Janardan Prakash, learned A.G.A in Criminal Appeal No.1425 of 2017 for the State and perused the record.

9. It is submitted that the deceased in her first dying declaration mentioned that the Pushpa Devi (sister-in-law) locked her in the room and set her ablaze by pouring kerosene. Mother-in-law and husband had helped Pushpa Devi in the occurrence of the said crime. Four family members (Pushpa Devi, Banti, Mother-in-law and husband) had harassed her after marriage. The neighbors brought her to the hospital. Her statement was recorded at 5:40 p.m. on 7.12.2014 namely after five days of incident i.e. on 2.12.2014. Meaning thereby she was alive till 7.12.2014.

10. Learned counsel for appellants has thereafter taken us to the depositions of other witnesses who are declared as hostile witnesses. Be that as it may, the main crux on which submission is made by Sri Yogesh Kr. Srivastava, learned counsel for

the appellant are (i) the deceased died out of burn injuries after six days, (ii)there are multiple dying declarations in which she has given different version, (iii) The medical evidence according to the counsel for the appellant shows that she died due to septicemic shock and, therefore, it is submitted that looking to the F.I.R. and the dying declarations, it cannot be said that the deceased was done to death and she was murdered. It is submitted that even if it is considered that it was culpable homicide, it would be culpable homicide not amounting to murder.

11. In support of the these submissions, learned counsel for the appellants has relied on the decisions in **Maniben vs. State of Gujarat, 2009 (8) SCC 796, Chirra Shivraj vs. State of Andhra Pradesh, 2010 (14) SCC 444**, Criminal Appeal No.1438 of 2010 **(Rama Devi alias Ramakanti vs. State of U.P.)** decided on 7.10.2017 & Criminal Appeal No. 2558 of 2011 **(Smt. Kanti and another vs. State of U.P.)** decided on 1.2.2021 but is punishable under Section 302IPC as it was cold blooded murder with predetermination.

12. Learned A.G.A. for the state has vehemently submitted the death of the deceased was though due to septicemic shock, the burn injuries goes to show that it would not be an offence punishable under Section 304 part I or II of I.P.C.

13. While going through the evidence of the witnesses in light of the judgments of the Apex Court referred by both the learned Advocates, we would have to evaluate whether deceased was done to death with a premeditation. Just because death was due to septicemic shock will not take it out from the purview of Section 300 of I.P.C. The evidence of most of the witnesses which has been recorded goes to show that most of them have given go by of their statements before the police under Section 161 of Cr.P.C. But, the medical evidence and dying declaration which are multiple in number have to be evaluated.

14. This fact is borne out in both the dying declarations and the doctor has also opined against the accused. Therefore, this dying declaration has not been challenged by the counsel for the appellant and in the light of the decision in **Govindappa and others Vs. State of Karnataka, (2010) 6 SCC 533**, there is no reason for us not to accept the dying declaration and its evidentiary value under Section 32 of Evidence Act, 1872. The main allegations is that Pushpa Devi w/o Banti bolted the room and poured kerosine on her and at that time the husband and mother in law were present. This is the dying declaration dated 7.12.2014 taken by Krishna Murari in presence EMO Hospital. The fact is proved that the deceased had 40% burn injuries. Witnesses PW- 1 to PW-5 have not supported the prosecution case. Dr. Jauhari, has deposed on oath that he along with other doctor had treated the deceased patient from 5.12.2014 to 9.12.2014 when she had 40% burn injuries . Dr. Anand Kumar had carried out the post mortem and they were septicemic death because of the burn injuries. Her death was because to septicemia. Tehsildar as PW-8 had performed the punchnama. PW-8 is also signatory of Panchayatnama. She died due to septicemia after about 20 days. All these facts go to show that the death occurred due to septicemia which developed because of the setting her ablaze the deceased which is corroborated by oral testimony. Thus, the death has occurred due to the act of Pushpa who has been aided by the other co-accused and it is a homicidal death.

15. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants.

16. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellants under Section 302 IPC of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

17. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

18. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

19. We are holding that the offence would be under Section 304 Part-I of IPC as (i) the death occurred after 20 days, (ii) the burns were only 36%, (iii) the death was due to septicemia and the judgments on septicemia cited by the learned AGA cannot be made applicable to the facts of this case.

20. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

21. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280,** the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.*

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

*15.1 Similarly, in the case of **Maniben (supra),** the Apex Court has observed as under:*

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the

deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused.

R & P to be sent back to the trial court forthwith."

22. In latest decision in **Khokan@ Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80** where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

23. All others judgments which were pressed into service by the learned counsel for the appellant are not discussed as that would be repetition of what we have decided.

24. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but is culpable homicide and, therefore, sentence of the accused- appellants is reduced to the period of eight years with remission under Section 304 Part-I of IPC. The fine is reduced to Rs.2,000/- each. The default sentence would be six months without remission and will run after completion of eight years of incarceration. The accused-appellants are in jail. They have suffered for eight years imprisonment and must have repented to his deed which was out of anger.

25. The accused-appellants in Criminal Appeal No.1425 of 2017 have been convicted for the offence under Section 498A IPC. Looking to the facts and circumstances of the case, we confirmed the conviction of Bantu and Smt. Munni Devi to the period already undergone as they have been convicted under Section 498A IPC. The fine is maintained. The default sentence is also maintained. If they have not paid fine the fine be deposited within eight weeks from today failing which they shall surrender for undergoing the default sentence. If the fine is already paid, they did not pay the fine.

26. The accused have already undergone the punishment under Section 498A IPC and under Section 323 of IPC, hence, we do not delve into the same.

27. Both the appeals are partly allowed. Record and proceedings be sent back to the Court below forthwith.

28. This Court is thankful to learned Advocates for ably assisting the Court.

(2022)07ILR A798
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.07.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 2422 of 2008

Shrawan Kumar Maurya ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Mr. Anurag Shukla (Amicus Curiae)

Counsel for the Respondent:
Government Advocate

Criminal Law- Indian Evidence Act, 1872- Section 3 -Both these two witnesses of facts have proved the incident committed by the convict/appellant. In the lengthy cross-examinations made by the defence counsel nothing adverse can be brought in their evidence. The medical evidence is in corroboration of and consistent with the ocular evidence. The place of occurrence has very well been proved by the eye witnesses P.W.1 & 2 as well as by Investigating Officer who prepared the site plan of the spot. The site plan as Exhibit Ka-5 is on the record, wherein the place of committing the crime has been shown and proved by the Investigating Officer who has prepared the site plan of the place of occurrence- Mere absence of blood on the place of incident where the alleged incident took place will not make the whole incident untruthful when the trust-worthy ocular evidence as well as medical evidence is there, about the incident.

Where the ocular testimony is consistent, cogent and trustworthy and the same is corroborated by the medical evidence and the place of occurrence has also been established by the prosecution, then the story of the prosecution cannot be doubted merely on the basis of absence of blood on the place of the occurrence.

Criminal Law - Code of Criminal Procedure, 1973- Section 53- A- The mere non-examination of the accused medically after the incident cannot create the clouds of doubts on the evidence of eye-witnesses well supported with medical evidence specially when the accused was arrested after two days of the incident. Further more in Section 53, 53A and Section 54 of Cr.P.C. related provisions were amended and made effective on 23.03.2006, while this incident occurred on 19.03.2006.

Where the accused was taken into custody after considerable delay then his medical examination will not serve any purpose- As the provisions u/s 53-A of the Cr.Pc. were incorporated through amendment subsequent to the occurrence, hence the same cannot operate retrospectively. (Para 11, 17, 19, 19, 23)

Criminal Appeal rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Brathi @ Sukhdev Singh Vs St. of Punj. 1991 (1) SCC 519 (cited)

2. Nirmal Singh Kahlon Vs St. of Punj. 2009 (1) SCC 441 (cited)

3. Shakila Abdul Gafar Khan Vs Vasant Raghunath Dhoble & anr. 2003 (7) SCC 749 (cited)

4. Bhikari Vs St. of U.P 1966 AIR SC 1(cited)

5. Rahim Beg & anr. Vs St. of U.P. (1972) 3 SCC 759 (cited)

6. St. of Raj. Vs Satya Narain (1998) 8 SCC 404 (relied)

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This Criminal Appeal has been filed against the judgment and order dated 16.09.2008 passed in Sessions Trial No.796 of 2006, arising out of Crime No.50 of 2006, under Section 376 of Indian Penal Code,1860 (in short I.P.C.), Police Station Machhrehta, District Sitapur passed by by Additional District and Sessions Judge, Court No.8, Sitapur whereby the convict/appellant was held guilty for the offence punishable under Section 376 of I.P.C. and sentenced to life imprisonment. The trial court also directed the convict/appellant to pay Rs.25,000/- as compensation to the victim.

2. The facts necessary for disposal of this appeal, shorn of unnecessary details are as under:-

(i) A First Information Report (in short FIR) was registered at Case Crime No.50 of 2006, under Section 376/452 of I.P.C. at Police Station Machhrehta District Sitapur on the basis of written report presented by the complainant Shyamlal. It was narrated in the written report that on 19.03.2006 at about 12:30 PM his daughter (x) aged about one year was playing on the platform situated infront of his house. Shrawan Kumar Maurya, resident of the village of complainant picked up her on the pretext of giving her toffee. He (convict) took the victim in his thatched house and committed rape on her. Upon hearing the cry of the girl Sharadendu Dixit, resident of the same village, Suman wife of the complainant and Ram Kishore, brother-in-law of the complainant reached on the spot, then the convict/appellant ran away. The condition of his daughter was serious.

(ii) The FIR was registered on 19.03.2006 on the date of incident at about 3:15 PM. Investigation started, the girl was medically examined on the same day at about 6:30 PM at Dufrin Hospital, Sitapur. After investigation a chargesheet under Section 376 of I.P.C. was submitted against the convict/appellant in the Court of Magistrate concerned. The Magistrate concerned took cognizance and committed the case for trial to the Court of sessions. The Court of Sessions framed charge under section 376 of I.P.C. against the convict/appellant. He denied the charge and claimed to be tried.

(iii) The prosecution in order to prove its case examined nine witnesses in toto, which are as under:-

1. P.W.1 Shyamlal, complainant and father of the victim girl.

2. P.W.2 Smt. Suman, an eyewitness and the mother of the victim girl.

3. P.W.3 Sharadendu Dixit an eyewitness.

4. P.W.4 Head Moharrir Dinesh Bahadur Singh, who registered FIR and has proved the chick FIR and concerned G.D.

5. P.W.5 Sub-Inspector, Babau Upadhyaya, who is the 3rd Investigation Officer (in short I.O.) who finally submitted the chargesheet against the convict/ appellant.

6. P.W.6 Dr. Suman Mishra, who medically examined the victim on the date of incident itself.

7. P.W.7 Sub-Inspector Abdul Haleem who initially investigated the case.

8. P.W.8 Inspector Harilal Kardam, who is the second I.O. of the case.

9. P.W.9 Dr. Ashish Wakhlu who performed surgery on the victim girl.

(iv) Apart from oral evidence, the relevant documents have also been proved by the prosecution which are as under:-

a. Exhibit Ka-1 written report.

b. Exhibit Ka-2 Chick FIR.

c. Exhibit Ka-3 Carbon copy of the concerned G.D.

d. Exhibit Ka-4 Chargesheet.

e. Exhibit Ka-5 Medico Legal report of the victim girl.

f. Exhibit Ka-6 Site plan of the place of occurrence.

g. Exhibit Ka-7 Surgical report of the victim girl.

h. Exhibit Ka-8 Letter to Superintendent Gandhi Memorial and Associate Hospital, Lucknow.

(v) After completion of prosecution evidence statement of the convict/appellant was recorded under Section 313 of the Code of Criminal Procedure, 1973 (in short Cr.P.C.), wherein he denied the crime and has stated that all

the evidence is false. He also stated that the case was registered due to the enmity at the behest of Sharadendu Dixit because Sharadendu Dixit wanted him to work, in his field forcibly, when he denied, some altercations took place then he (Sharadendu Dixit) said that he would implicate him (convict) in a false case. No defence witness was produced by the convict/appellant though opportunity was given by the trial court.

3. Heard Mr. Anurag Shukla, learned *Amicus Curiae* on behalf of appellant and Mr. Dhananjay Kumar Singh, learned Additional Government Advocate for the State-respondent.

4. Learned counsel for the convict/appellant argued that the trial court has erred in convicting and sentencing the convict/appellant, because the place of occurrence has not been proved. The FIR is ante -*time* as the alleged time of occurrence is 12:30 PM on 19.03.2006 and the FIR was lodged on the same day at 3:15 PM and victim was medically examined at 6:30 PM.. The conduct of family members of the victim was unnatural because no person shall leave her 10 months old child unattended at the platform. As per prosecution story the child was seriously injured, but she was not taken to the hospital first. She was taken to the hospital for medical aid after six hours. The victim who is so seriously injured would not survive for such a longtime. Injury report shows that there was fresh bleeding at 6:30 PM with clotted blood. In six hours blood would dry after coagulation. There is no whisper, how and when informant did receive information about the incident when he was on his field. He further argued that allegedly the rape was committed on earth, but not a single bruise or redness was found on the back of the child. The offence as has been alleged cannot possibly be committed by a man on such a small child. He further argued that in the FIR there is nothing that anybody saw the convict/appellant committing the crime, but subsequently the witnesses have improved their versions before the trial court. No evidence is there on the record about giving the medical aid to the victim after six hours. The compliance of section 53 and 54 of Cr.P.C. was not made by the Investigating Officer. In fact the girl got injured after falling on a picket of roof of "Arhar Plant" and the convict was falsely implicated at the behest of Sharadendu Dixit. Hence the impugned judgment and order should be set-aside.

5. Learned *Amicus Curiae*, relied upon the following case laws:-

1. Brathi alias Sukhdev Singh Vs. State of Punjab 1991 (1) SCc 519.

2. Nirmal Singh Kahlon Vs. State of Punjab 2009 (1) SCC 441.

3. Shakila Abdul Gafar Khan Vs. Vasant Raghunath Dhoble and another 2003 (7) SCC 749.

4. Bhikari Vs. State of Uttar Pradesh 1966 AIR SC 1.

5. Rahim Beg and another Vs. State of U.P. (1972) 3 SCC 759.

6. Contrary to it, learned A.G.A. argued that the prosecution has proved its case beyond all reasonable doubts. The incident was witnessed by the mother of the victim girl, an independent eye witness Sharadendu Dixit who reached at the place after hearing the cry of the victim girl. The ocular account given about the incident is consistent with the medical evidence. Medical examination of the victim girl was done on the same day and serious injuries

were found on the private parts of the victim girl. The lady doctor who conducted the medical examination of the victim girl has been examined as P.W.6 and she has proved all the injuries found on the private parts of the victim girl and has also said in cross-examination that in her opinion the injuries found on the body of the victim girl would only be possible due to the rape committed on her and such injury cannot occur by fall on any article or sharp-edged object. The girl was so seriously injured due to the alleged criminal act of the convict that she was subjected to surgery and that has been proved by P.W.9 Dr. Ashish Wakhlu . Hence there is no error in the impugned judgment and order and the appeal should be dismissed.

7. Considered the rival submissions, perused the original record of trial court and gone through the case laws cited. The facts as well as the evidence available on record show that this unfortunate incident occurred with a girl aged about 11 months, who is unable to understand and speak anything about the crime. Allegedly the incident occurred on 19.03.2006 at about 12:30 PM. The victim girl was playing at the platform situated in front of her house and she was picked up by the convict from there. The convict took her in his thatched house and committed rape on her. Hearing the cry of the innocent and helpless child the mother of the child P.W.2 and one independent witness Sharadendu Dixit, resident of the same village reached at the spot and witnessed the incident. An FIR of the crime was lodged on the same day at about 03:15 PM and the girl was medically examined on the same day at about 6:30 PM. In the medical report of the victim Exhibit Ka-5, the following observation has been made by the doctor:-

*"**Physical exam.** 77 cm length, wt 9 kg. Teeth 4/4 No marks of injury present anywhere in body.*

***Local exam-** Hymen torn bleeding out. Post vag wall tear present at 8 O'clock position complete P teat at 6 O'clock position.*

***Inernal Examination-** (1) Complete P tear size 3 cm x 1 cm x communicating with rectum clotted blood present with fresh bleeding at 6 O'clock position.*

(2) Post Vag. wall torn extending up to post. fornix x 4 cm x 1 cm x muscle deep situated at 8 O'clock. Vag smear prepared. sent to pathologist for evidence of spermatozoa. Above examination done in presence of Surgeon Dr. Bhardwaj, a paediatrician, Dr. S.P. Singh and anaesthestist Dr. V.P. Singh.

***Adv.** She is referred to KGMC for further manggement adv X-ray elbow wrist with both hands for age determination.*

Supplementary report is awaited."

8. P.W.1 father of the victim girl and the complainant has proved his written report as Exhibit Ka-1. He stated before the trial court that incident occurred about ten and half months ahead at about 12:30 PM during day. His daughter was about one year old at the time and she was playing outside the house on the platform. His wife and brother-in-law Ram Kishore were present in the house. The convict took her daughter and committed rape on her. Upon hearing the cry of the girl, his wife Suman, brother-in-law Ram Kishore and independent witness Sharadendu Dixit reached at the spot, then Shrawan Kumar Maurya, convict ran away leaving his daughter in injured condition. His wife, bother-in-law and independent witness Sharadendu Dixit had told him the whole incident. Thereafter he got written the report Exhibit Ka-1 by Sharadendu Dixit, who wrote the report on his (complainant's)

dictation and read-over the same to the complainant, then he affixed his thumb impression on that and lodged the FIR in the police station.

9. He has further stated that after registering the FIR his injured daughter was sent to hospital alongwith police personnel, whereupon medical examination of the girl was conducted in the presence of his wife at female Hospital Sitapur. He has further stated that at the time of incident he was working in the field alongwith other family members and neighbours. He and other persons also reached at the spot and saw that his wife was weeping keeping the victim girl in her lap. When he asked, she told him about the incident and he saw that the blood was oozing out from the private parts of the girl. This witness is not the eye witness of the incident, he lodged the FIR of the crime upon the narrations made by the eye witnesses i.e. his wife, Sharadendu Dixit and his brother-in-law who reached at the spot after hearing the cry of the girl. Smt. Suman is the mother of the victim. She has stated in the Court as P.W.2 that at the time of incident her daughter was 11 months old, she could not speak. The incident occurred about 11 months ahead at about 12:00 O'clock in the day, her daughter was playing at the platform in front of the house and she (witness) was brooming in the courtyard of her house. The accused Shrawan Kumar Maurya, present in the Court took her daughter on the pretext of giving toffee and committed rape on her. The girl cried and when she heard the cry of the girl she came out of the house, at the same time Sharadendu Dixit and her brother-in-law was also reached at the spot after hearing the cry of the girl. All the three persons reached the spot and saw that accused Shrawan Kumar Maurya was committing rape on her daughter. They all saw the accused committing the rape on her daughter and recognized him very well. When they reached at the spot, accused Shrawan Kumar Maurya ran away towards south, leaving the girl there. The condition of the girl was serious and she was unconscious. Thereafter she went to Police Station about after one to two hours alongwith her husband. Her husband presented an application at the police station and lodged the FIR. Her daughter was medically examined at female hospital Sitapur. Thereafter her daughter was referred to Medical College as her condition was serious. She remained admitted for eight days there. Thereafter her treatment continued for about 7 months. Her (witness') statement was recorded by the Investigating Officer. In the cross-examination of this witness no major contradiction has occurred. Witness has proved the incident and denied the suggestion that accused was implicated falsely at the behest of Sharadendu Dixit.

10. Sharadendu Dixit has been examined as P.W.3, who is an independent eye witness and resident of the same village. He has stated before the Court that on 19.03.2006 at about 12:30 PM during the day he heard a cry of the victim-girl. At that time he was coming back from his grove to his house. The cry was coming from the house of Shrawan Kumar Maurya, the accused. After hearing the cry, he reached at the spot and saw that accused Shrawan Kumar Maurya was committing rape on the victim girl under the thatch of his house. At the same time, Suman mother of the girl and Ram Kishore the brother of Suman also reached there and they all witnessed Shrawan Kumar Maurya committing rape on the victim girl. When accused Shrawan Kumar Maurya saw them, he left the girl and ran away. The blood was oozing out from the private parts of the girl

and she was in unconscious state. He has further stated that he scribed the report of the incident at the dictation of wife of Shyamlal. He wrote whatever was dictated to him by the wife of Shyamlal. Thereafter he read over the same to Shyamlal, thereafter Shyamlal affixed his thumb impression on that. Thereafter Shyamlal and his wife alongwith their girl went to police station. This witness has proved the written report Exhibit Ka-1 as written in his own handwriting. This witness has further stated that the I.O. recorded his statement about the incident. This witness has also been cross-examined at length by the learned counsel for the convict / appellant, but nothing adverse has come out in his cross-examination. This witness has also denied the suggestion put by defence counsel that he has deposed in the case due to enmity with the accused. He has also denied the suggestion that the girl was injured by falling on a picket of root 'Arhar plant'.

11. Both these two witnesses of facts have proved the incident committed by the convict/appellant. In the lengthy cross-examinations made by the defence counsel nothing adverse can be brought in their evidence. The medical evidence is in corroboration of and consistent with the ocular evidence.

12. P.W.6, the lady doctor who medically examined the victim girl has proved its medical report as Exhibit Ka-5. In the cross-examination she has denied the suggestion that girl got injured by falling on some hard and sharp edged object. This witness has clearly stated that such type of injury could occur due to rape.

13. P.W.4 Head Moharir Dinesh Bahadur Singh has proved the chick FIR and concerned GD and stated before the Court that the case was registered by him on the basis of the written report presented by the complainant who came there to lodge the FIR. This witness has proved chick FIR as Exhibit Ka-2 and concerned GD as Exhibit Ka-3 written in his own hand writing. This witness has further stated that after lodging the FIR he gave the copy of the same to the complainant and sent the victim girl alongwith Constable 453 Shiv Sharma to Sitapur Hospital for medical examination and thereafter handed over the 'Nakal Chick' and carbon copy of 'Nakal Rapat' to Sub Inspector Abdul Haleem for investigation who recorded his statement.

14. Sub Inspector Abdul Haleem who initially investigated the case has been examined as P.W.7. He has proved the part of the investigation conducted by him. He has stated in examination-in-chief that on 19.03.2006 he was posted at Police Station Machhrehta as Sub Inspector. On that day the Case Crime No.50 of 2006 under Section 376 and 452 of I.P.C. was entrusted to him for investigation. 'Nakal Chick' and carbon copy of 'Nakal Rapat' was given to him. The case was registered in his presence. The girl was sent for medical examination and treatment. He recorded the statement of Head Moharir Dinesh Bahadur Singh on the same day at the Police Station, thereafter he reached at the spot where the incident occurred.

15. Thereafter S.O. Harilal Kardam reached the spot alongwith force and he took over the investigation. Inspector Harilal Kardam has been examined as P.W.8. He has stated before the trial court that the case was registered in his absence for that reason Sub Inspector Abdul Haleem was entrusted with the investigation. When he came back at Police Station and took over the investigation. He

got the medical report of the victim girl on 20.03.2006. He made an entry of the same in the case diary. Inspected the place of occurrence and prepared the site plan in his own hand writing and signature, which is correct. This witness has proved the site plan as Exhibit Ka-6. He has further stated that he arrested accused Shrawan Kumar Maurya on 21.03.2006 and recorded his statement and he confessed the crime. After this stage of investigation he was transferred from the police station.

16. Thereafter the investigation was taken over by Sub-Inspector Babau Upadhyay who completed the investigation and submitted the chargesheet against the accused under Section 376 of I.P.C. and has proved the same as Exhibit Ka-4. Sub-Inspector Babau Upadhyay has been examined as P.W.5.

17. By the evidence of P.W.2 and 3 who are the eye witnesses of the incident and evidence of formal witnesses, the charge framed against the accused has been proved beyond reasonable doubt. The medical evidence is in corroboration of the ocular account given by the eye witnesses.

18. The argument raised by learned *Amicus Curiae* on behalf of the convict/appellant that the place of occurrence has not been proved is not tenable at all. The place of occurrence has very well been proved by the eye witnesses P.W.1 & 2 as well as by Investigating Officer who prepared the site plan of the spot. The site plan as Exhibit Ka-5 is on the record, wherein the place of committing the crime has been shown and proved by the Investigating Officer who has prepared the site plan of the place of occurrence.

19. Learned counsel for the defence submitted that not a single drop of blood was found at the spot where the rape was allegedly committed. Mere absence of blood on the place of incident where the alleged incident took place will not make the whole incident untruthful when the trust-worthy ocular evidence as well as medical evidence is there, about the incident.

20. In the case ***State of Rajasthan Vs. Satya Narain (1998) 8 SCC 404*** the Hon'ble Apex Court has held that merely because of absence of blood at the place of occurrence, the occurrence of the incident itself cannot be doubted.

21. The contention of the learned *Amicus Curiae* that FIR is *ante -time* is also not tenable because as per the evidence available on record the incident occurred on 19.03.2006 at about 12:30 PM and the FIR was lodged on the same day at about 3:15 PM. The FIR was well within a reasonable time and cannot be termed as *ante- timed.*

22. Learned counsel for the *Amicus Curiae* submitted that conduct of the family members of the child was unnatural and un-believable because they did not take the injured girl to the hospital whose condition was serious instead they first went to the police station, this creates a serious doubt. This contention of the learned *Amicus Curiae* have no force, because generally in the cases where the injury has been received as a result of crime the person goes first to inform the police or lodge the FIR. So the conduct of the family members of the victim cannot be termed as unnatural, specially when they are of village and illiterate persons.

23. The argument of the learned *Amicus Curiae* that convict was not medically examined as is mandatory under Section 53 and 54 of Cr.P.C. and this goes against the prosecution. The mere non-examination of the accused medically after the incident cannot create the clouds of doubts on the evidence of eye-witnesses well supported with medical evidence specially when the accused was arrested after two days of the incident. Further more in Section 53, 53A and Section 54 of Cr.P.C. related provisions were amended and made effective on 23.03.2006, while this incident occurred on 19.03.2006.

24. The case law cited by the learned *Amicus Curiae* in ***Nirmal Singh Kahlon Vs. State of Punjab*** (supra), wherein in paragraph 28 on which the amicus relied upon the following law has been laid down by the Hon'ble Apex Court, which reads as under:-

"28. An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation. When serious allegations were made against a former Minister of the State, save and except the cases of political revenge amounting to malice, it is for the State to entrust one or the other agency for the purpose of investigating into the matter. The State for achieving the said object at any point of time may consider handing over of investigation to any other agency including a central agency which has acquired specialization in such cases."

This case law is of no help to the convict/appellant as there is nothing on record to show that fair investigation was not made or the accused was not afforded fair opportunity to defend himself or fair trial was not made. Rest of the case law cited by learned Amicus Curiae is not applicable in the matter due to the difference of facts and circumstances of the case.

25. To sum up, in the present matter the incident has been proved by the eye-witnesses P.W.1 and P.W.-2 supported with medical evidence beyond all reasonable doubt against the convict/appellant. The trial court has committed no error in holding the accused guilty and sentencing him to imprisonment for life, coupled with a direction to give Rs.25,000/- to the victim girl as compensation. There appears no reason to interfere with the judgment and order passed by the learned trial court.

26. The appellant Shrawan Kumar Maurya is stated to be in jail, accordingly he shall serve out the sentence awarded by the trial Court.

27. The appeal is ***dismissed***, accordingly.

28. Mr. Anurag Shukla, learned *Amicus Curiae* for the appellant shall be paid his remuneration from Legal Services Sub-Committee of this Court as permissible under the Rules.

29. Office is directed to send a copy of this order along with the lower Court record to the trial Court concerned for necessary information and compliance forthwith.

(2022)07ILR A807
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.07.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Appeal No. 2585 of 2007
&
Criminal Appeal No. 2809 of 2007
&
Criminal Appeal No. 2366 of 2007

Pankaj Mohan Srivastava & Anr.
...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Anand Kumar Srivastava, Alakshyendra Goel, Ankit Kumar, Arun Kumar, Durga Prasad Verma, Manoj Kumar Srivastava, Ram Kushal Tiwari, S.K. Upadhyay, S.M. Nasir, Shiv Nath Goshwami, Shobhit Mohan Shukla, Vivek Srivastava

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Code of Criminal Procedure, 1973- Sections 231 & 311 - Indian Evidence Act, 1872- Section 114- Section 131-The victim, Udit alias Vasu was not examined by the prosecution- The prosecution need not examine all its witnesses and that discretion lies with the prosecution whether to tender or not any particular witness to prove its case- Adverse inference against prosecution can be drawn only if withholding of witness was with oblique motive- No oblique motive found for which the victim was not produced by the prosecution as a witness before the trial Court. There is nothing in law which compels the prosecution to examine all such witnesses whose names find mention in the charge sheet to produce them before the trial Court and on this ground, nothing adverse against prosecution can be inferred.

It is not mandatory for the prosecution to examine all its witnesses but adverse inference can be drawn where the prosecution withholds a witness out of oblique motives.

Criminal Law - Indian Penal Code, 1860- Section 364-A - There is nothing on record to show and establish that any demand of ransom was made or communicated to the first informant- The victim as discussed above, was not examined before the trial court. Therefore, the fact that any such demand of ransom was made to the victim, has also not been established. Cumulative reading of the testimonies of prosecution witnesses of fact leads only to one irresistible inference that the case against the appellants falls within the ambit of section 364 I.P.C. only rather than one under sections 363, 364A and 368 I.P.C.- The appellants are, thus, liable to be convicted under section 364 I.P.C., for which, they are liable to be sentenced to undergo ten years' rigorous imprisonment and a fine of Rs. 10,000/- each.

Where the prosecution fails to establish the demand for ransom and the victim has been withheld from testifying, then instead of the offence u/s 363,364A and 368 of the IPC the offence would be of Section 364 IPC. (Para 28, 33, 35, 36, 37)

Criminal Appeal partly allowed. (E-3)

Case Law/Judgements relied upon:-

1. Crl. Appl. No.533 of 2021 @ SLP (Crl.) No.308 of 2021, Shaik Ahmed Vs St. of Telan.

2. Bhagwan Jagannath Markad & ors Vs St. of Maha, (2016) 10 SCC 537

3. Nand Kumar Vs St. of Chhattis, (2015) 1 SCC 776

4. Vishwanath Gupta Vs St. of U.K, (2007) 11 SCC 633

5. Malleshi Vs St. of Kar. (2004) 8 SCC 95

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. By means of the instant appeals, the appellants have assailed the judgment and order dated 27.09.2007 passed by the learned Additional Sessions Judge (Fast Track Court), Court No.4, Lucknow in Sessions Trial No.319 of 1999 arising out of Case Crime No.205 of 1997, under Sections 363, 368 and 364A of the Indian Penal Code (hereinafter referred to as "I.P.C."), Police Station Aminabad, District Lucknow whereby **the appellants, namely, Pankaj Mohan Srivastava and Neeraj Mohan Srivastava (in Criminal Appeal No.2585 of 2007)** have been convicted and sentenced for five years' rigorous imprisonment with a fine of Rs.4,000/- each for the offene under Section 363 I.P.C. and in default of payment of fine, they have further been directed to undergo for a period of six months' additional rigorous imprisonment. They have also been convicted and sentenced for life imprisonment with a fine of Rs.10,000/- each for the offence under Sections 364A & 368 I.P.C. and in default of payment of fine, a separate recovery proceeding has been directed to be initiated against them. All the sentences were directed to run concurrently except the recovery of fine.

The appellant- Rajit Ram Verma (in Criminal Appeal No.2809 of 2007) has been convicted and sentenced for five years' rigorous imprisonment with a fine of Rs.4,000/- for the offene under Section 363 I.P.C. and in default of payment of fine, he has further been directed to undergo for a period of six months' additional rigorous imprisonment. He has also been convicted and sentenced for life imprisonment with a fine of Rs.10,000/- for the offence under Sections 364A and 368 I.P.C. and in default of payment of fine, a separate recovery proceeding has been directed to be initiated against him. All the sentences were directed to run concurrently except the recovery of fine.

The appellant, namely, Rajesh (in Criminal Appeal No.2366 of 2007) has been convicted and sentenced for five years' rigorous imprisonment with a fine of Rs.4,000/- each for the offence under Section 363 I.P.C. and in default of payment of fine, he has further been directed to undergo for a period of six months' additional rigorous imprisonment. He has also been convicted and sentenced for life imprisonment with a fine of Rs.10,000/- for the offence under Sections 364A and 368 I.P.C. and in default of payment of fine, a separate recovery proceeding has been directed to be initiated against them. All the sentences were directed to run concurrently except the recovery of fine.

2. Since the aforesaid criminal appeals have been preferred against the impugned judgment and order dated 27.09.2007 passed in Sessions Trial No.319 of 1999 arising out of Case Crime No.205 of 1997, under Sections 363, 368 and 364A I.P.C., Police Station Aminabad, District Lucknow, therefore, they have been heard together and are being decided by a common judgment.

3. The prosecution case, in brief, is that a written report, Ext.-Ka-1 came to be lodged at Police Station Kotwali Qaiserbagh by the first informant, Rajendra Kumar Gupta stating therein that his son, Udit alias Vasu, aged about 4 years, a student of Class-Nursery, had gone to his

school, Saint Teressa Day School, Naya Gaon, Lucknow. When the first informant went to bring his son back to home, he came to know that someone else had taken his child away from the school.

4. On the basis of aforesaid written report, Ex. Ka-1, Case Crime No.NIL/1997 came to be registered under Section 363 I.P.C. at Police Station Qaiserbagh against unknown persons. However, since the matter pertained to territorial jurisdiction of Police Station Aminabad, therefore, original written report and F.I.R. which were initially registered at Police Station Qaiserbagh were sent to Police Station Aminabad where it came to be registered as Case Crime No.205 of 1997 under Section 363 I.P.C.

5. According to the recovery/arrest memo, Ex. Ka-2, the victim, Udit alias Vasu was recovered on 26.12.1997 from the house of co-accused, Daya Ram Verma situated at Village Changupur, Police Station Jaisinghpur, District Sultanpur where the appellants, Pankaj Mohan Srivastava, Rajit Ram Verma and Neeraj Mohan Srivastava were arrested and recovery/arrest memo, Ex. Ka-2 was also prepared on the spot.

6. Upon conclusion of investigation, charge sheet, Ex. Ka-7 came to be submitted against the appellants. The appellants, Pankaj Mohan Srivastava, Neeraj Mohan Srivastava, Rajit Ram Verma and Rajesh were charged under Sections 363, 368 and 364 I.P.C. vide order dated 03.05.1999 whereas the co-accused, Daya Ram Verma was charged under Section 368 I.P.C. only vide order dated 17.04.2003. However, co-accused, Daya Ram verma has been acquitted by the learned trial court.

7. In order to bring home guilt of appellants, the prosecution has examined following witnesses :-

(i) P.W.-1, Rajendra Kumar Gupta, the first informant, who is the father of victim, Udit alias Vasu.

(ii) P.W.-2, Asad Raja, who had accompanied the first informant, P.W.-1, Rajendra Kumar Gupta on 26.12.1997 when the victim was recovered. He is also a witness to the recovery/arrest memo, Ex. Ka-2.

(iii) P.W.-3, Paridin Rawat, who was posted as Head Moharrir at Police Station Kotwali Kaiserbagh on 18.11.1997 who registered Crime No.NIL/1997, under Section 363 I.P.C. against unknown persons and also entered the same in G. D. No.30 at 13: 20 hrs. He has also proved Chik F.I.R. as Ex. Ka-3 and G.D. as Ex. Ka-4.

(iv) P.W.-4 S. I., Rama Kant Tiwari, who headed the Special Task Force constituted by the then S.S.P., Lucknow for effecting the recovery of victim, Udit alias Vasu has proved the recovery/arrest memo, Ex. Ka-2.

(v) P.W.-5 Ram Dev Diwedi, Investigating Officer had prepared site plan of place of occurrence as Ex. Ka-5 and also prepared site plan of place of recovery of victim, Ex. Ka-6. Upon conclusion of investigation, he has submitted the charge sheet, Ex. Ka-7.

8. The statements of appellants were recorded under Section 313 Cr.P.C. In their detailed statements, the appellants have denied the allegations levelled against them. They have stated to have been falsely implicated.

9. The appellant, Rajesh has stated that on 26.12.1997 at about 8:30 P.M. he was distributing "Prasad' after

conclusion of evening prayer. The appellant, Pankaj Mohan Srivastava and his father were also present in the temple. Meanwhile, many persons appeared on the spot who wanted to know about appellant, Pankaj Mohan Srivastava. They hurled abuses. When objected, Constable R. P. Kanaujia kicked the father of appellant, Pankaj Mohan Srivastava and asked him to accompany them for being a witness.

10. The appellant, Rajit Ram Verma has, in his statements under Section 313 Cr.P.C., stated that the victim, Udit alias Vasu was shown to him at S.S.P. Office.

11. Triveni Prasad Verma was examined from the side of defence as D.W.-1, who has stated that the appellants-Rajesh and Pankaj Mohan Srivastava were present in the temple, who were taken away by the police personnel from the temple.

12. Upon conclusion of trial, learned trial Court convicted and sentenced the appellants as above by the impugned judgment and order dated 27.09.2007.

13. Aggrieved by the aforesaid impugned judgment and order dated 27.09.2007, the appellants have preferred these appeals.

14. We have heard Sri Ram Kushal Tiwari and Sri Ankit Kumar, learned counsel for the appellants and Sri Dhananjay Kumar Singh, learned Additional Government Advocate appearing for the State-respondents and have perused the entire record available before us.

15. Learned counsel for the appellants has submitted that the appellants are innocent and have been falsely implicated in this case. The finding of guilt of appellants recorded by the learned trial Court is against the weight of evidence which is illegal and, therefore, the same deserves to be set aside.

16. Learned counsel for the appellants has also argued that the prosecution has miserably failed to establish that there was any demand of ransom and any threat to the life of victim was extended by the appellants. Therefore, the conviction of appellants *dehors* the necessary ingredients which constitute offence under Section 364A I.P.C. is not sustainable. They have also submitted that the victim, who was an important witness, was not examined by the prosecution, therefore, the entire prosecution story becomes doubtful and the appellants deserve to be given benefit of doubt.

17. To buttress their aforesaid arguments, reliance has been placed on the judgment of Hon'ble Supreme Court rendered in **Criminal Appeal No.533 of 2021 @ Special Leave Petition (Crl.) No.308 of 2021, Shaik Ahmed vs. State of Telangana.**

18. Per contra, learned A.G.A. has opposed the submissions made by learned counsel for the appellants. He submits that the child of first informant, Udit alias Vasu was kidnapped in a planned manner by the appellants, some of whom were employees of the first informant, to procure ransom. The victim was recovered from the Village Changupur on 26.12.1997 from where the appellants, namely, Pankaj Mohan Srivastava, Neeraj Mohan Srivastava and Rajit Ram Verma were arrested on the spot.

He further submits that a letter demanding ransom was recovered from the possession of the appellant-Rajit Ram Verma, which was sent to Forensic Science Laboratory (hereinafter referred to as FSL) for comparison of hand writing. According to FSL report, the same was found to be in the handwriting of the appellant, Rajit Ram Verma, vide FSL Report, paper No.A17/2 and A17/1.

19. It is also contended by the learned A.G.A. that the prosecution, in exercise of its right under Section 231 Cr.P.C., has examined four witnesses of facts and has thus, successfully proved its case beyond reasonable doubt. The prosecution cannot be compelled to produce all or any particular witness mentioned in the charge sheet in order to bring home guilt of appellants. Learned A.G.A. has concluded his arguments by submitting that the impugned judgment and order is well discussed and reasoned wherein no interference in exercise of power under Section 386 Cr.P.C. by this Court is required and the appeals deserve to be dismissed.

20. Upon a close scrutiny of testimony of first informant, P.W.-1, Rajendra Kumar Gupta, we find that he is father of victim, Udit alias Vasu, aged about 4 years, a student of Class Nursery of Saint Teressa Day School situated at Naya Gaon, Lucknow. On 18.11.1997 when this witness went to receive his child back from Saint Teressa Day School, he did not find his child in the school and he came to know that his child has been taken away by some unknown persons from the school. A prompt written report in respect of aforesaid incident came to be lodged on the date of incident itself i.e. on 18.11.1997 as Ex. Ka-3. He has also stated on oath that on 26.12.1997 at about 9:30 A.M., he received a telephonic call in Hotel Vaishali, Aminabad whereby he was directed to bring Rs.5,00,000/-, failing which, he was threatened that his child, victim will be done to death.

21. P.W.-2, Asad Raja happens to be manager of the first informant. This witness, in his testimony, has stated that he accompanied the first informant, P.W.-1, Rajendra Kumar Gupta and police personnels to the place from where the victim, Udit alias Vasu was recovered.

22. P.W.-3, Paridin Rawat, Head Constable, in his testimony, has stated that the then S.S.P., Lucknow had constituted a Special Task Force for effecting recovery of victim. This Special Task Force was headed by P.W.-3. He has stated on oath that on 26.12.1997, the first informant informed him about receiving a telephonic call demanding ransom. This witness has proved recovery/arrest memo, Ex. Ka-2 which, according to this witness, was prepared at the place of recovery by him in his own handwriting.

23. S.I., Rama Kant Tiwari has been examined as P.W.-4, who, in his testimony, has stated that on 26.12.1997, he was informed by the first informant that someone has telephonicaly demanded from him Rs.5,00,000/- as ransom for releasing his child. He has been asked to reach at platform no.1, Sultanpur Railway Station. Thereafter, this witness accompanied by the first informant, Ajay Bhatnagar, P.W.2-Asad Raja and other police personnels reached Sultanpur Railway Station where the appellant-Rajesh was arrested by the police personnels, who told that the victim, Udit alias Vasu is kept in the Village-Changupur by the appellants-Pankaj

Mohan Srivastava, Neeraj Mohan Srivastava and Rajit Ram Verma. Thereafter, the police party and the appellant-Rajesh went to Village Changupur where the victim was recovered and the appellants- Pankaj Mohan Srivastava, Neeraj Mohan Srivastava and Rajit Ram Verma were arrested. This witness has proved the recovery/arrest memo, Ex. Ka-2.

24. Investigating Officer, Ram Dev Diwedi has been examined as PW-5, who, in his testimony, has stated that he prepared site plan of place of occurrence, Ex. Ka-5 and after recovery of victim from Village Changupur, he also visited and prepared the site plan of place of recovery of victim as Ex. Ka-6. Upon conclusion of investigation, he submitted charge sheet against the appellants, Ex. Ka-7.

25. We have undertaken a survey of prosecution evidence in the light of rival submissions advanced by learned counsel for the parties and we find that the appellants, namely, Pankaj Mohan Srivastava and Neeraj Mohan Srivastava were employees of the first informant. In spite of this fact, the first informant had given an innocent written report without naming them in the written report, Ex. Ka-1 when his son, victim, Udit alias Vasu had gone missing on 18.11.1997. We also find that the victim was recovered on 26.12.1997 after about 38 days from the date of incident from Village Changupur.

26. Had there been any intention of the first informant to falsely rope in appellants, namely, Pankaj Mohan Srivastava and Neeraj Mohan Srivastava, who were employees of the first informant, he would have very easily named these appellants in the first information report itself. However, he did not do so. As mentioned above, the victim was recovered on 26.12.1997 after about 38 days from the date of incident. Thus, we do not see any reason as to why the first informant would risk his son's life for false implication of the appellants, namely, Pankaj Mohan Srivastava and Neeraj Mohan Srivastava or other appellants for getting rid of appellants, namely, Pankaj Mohan Srivastava and Neeraj Mohan Srivastava from his private employment. We, thus, do not find any substance in the contention of learned counsel for the appellants that the appellants, namely, Pankaj Mohan Srivastava and Neeraj Mohan Srivastava were falsely implicated by the first informant because they were his employees.

27. For considering the submission made on behalf of the appellants that the victim, Udit alias Vasu was not examined by the prosecution, we may refer to the judgment of Hon'ble Supreme Court in the case of **Bhagwan Jagannath Markad and others vs. State of Maharashtra** reported in **(2016) 10 SCC 537 and in Nand Kumar vs. State of Chhattisgarh** reported in **(2015) 1 SCC 776** wherein their Lordships of Hon'ble Supreme Court while explaining the provisions of Sections 231 and 311 Cr.P.C. and Sections 114 and 131 of Indian Evidence Act, have held that the prosecution need not examine all its witnesses and that discretion lies with the prosecution whether to tender or not any particular witness to prove its case.

28. Adverse inference against prosecution can be drawn only if withholding of witness was with oblique motive. In the present case, we do not find, as discussed above, any oblique motive for which the victim was not produced by the

prosecution as a witness before the trial Court. There is nothing in law which compels the prosecution to examine all such witnesses whose names find mention in the charge sheet to produce them before the trial Court and on this ground, nothing adverse against prosecution can be inferred. The argument of learned counsel for the appellants to the contrary is, thus, not tenable.

29. Learned counsel for the appellants have submitted that the prosecution has failed to establish ingredients of the offence under Section 364A I.P.C. under which they have been convicted. In order to appreciate the aforesaid contention of learned counsel for the appellants, it is necessary to refer to Section 364A I.P.C. which is extracted herein below:-

*"**364A.**- Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or [any foreign State or international inter-governmental organisation or any other person] to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."*

30. The Hon'ble Supreme Court in the case of **Vishwanath Gupta vs. State of Uttaranchal** reported in **(2007) 11 SCC 633** in paragraph 9 has held as under :-

"9. The important ingredient of Section 364-A is the abduction or kidnapping, as the case may be. Thereafter, a threat to the kidnapped/abducted that if the demand for ransom is not met then the victim is likely to be put to death and in the event death is caused, the offence of Section 364-A is complete. There are three stages in this section, one is the kidnapping or abduction, second is threat of death coupled with the demand of money and lastly when the demand is not met, then causing death. If the three ingredients are available, that will constitute the offence under Section 364-A of the Penal Code....."

(emphasis supplied by us)

31. Insofar as the demand of ransom is concerned, the same has to be communicated as held by the Hon'ble Supreme Court in **Malleshi vs. State of Karnataka** reported in **(2004) 8 SCC 95** in paragraph 13, which is quoted herein below :-

*"13. To pay a ransom as per Black's Law Dictionary means "to pay price or demand for ransom". The word "demand" means "to claim as one's due"; "to require"; "to ask relief"; "to summon"; "to call in court"; "an imperative request preferred by one person to another, under a claim of right, requiring the latter to do or yield something or to abstain from some act"; "an asking with authority, claiming or challenging as due". **The definition as pointed out above would show that the demand has to be communicated. It is an imperative request or a claim made."***

(Emphasis supplied by us)

32. Adverting to the facts of the case at hand, we are able to notice a significant fact that there is nothing on record to show and establish that any demand of ransom was made or communicated to the first informant. Though, the first informant, in

his testimony, has stated that he had received a telephonic call in this regard, however, who made such call has neither been alleged nor proved by the prosecution. P.W.-5, Ram Dev Diwedi, Investigating Officer, in his testimony, has stated that he was informed by P.W.-4, S.I., Rama Kant Tiwari that a letter demanding ransom was recovered from the possession of appellant, Rajit Ram Verma at the time of his arrest, which was sent to FSL for comparison of handwriting. A photocopy of which is available on record as Paper No.A10/1 and its FSL report is also available on record as Paper No.A17/2 and A17/11.

33. The appellant, Rajit Ram Verma has denied the fact that any such letter was recovered from his possession. However, if we, for the sake of argument, assume that any such letter was recovered from the possession of the appellant, Rajit Ram Verma at the time of his arrest and the same was in his own hand writing, the prosecution has failed to prove that such letter demanding or requiring any ransom to be paid was ever communicated to the first informant or his family members or any other person. The victim as discussed above, was not examined before the trial court. Therefore, the fact that any such demand of ransom was made to the victim, has also not been established.

34. The Hon'ble Supreme Court in **Criminal Appeal No.533 of 2021@ Special Leave Petition (Crl.) No.308 of 2021, Shaik Ahmed vs. State of Telangana** in paras 12 to 16 has held as under :-

"12. We may now look into section 364A to find out as to what ingredients the Section itself contemplate for the offence. When we paraphrase Section 364A following is deciphered:-

(i) "Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction"

(ii) "and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt,

(iii) or causes hurt or death to such person in order to compel the Government or any foreign State or international intergovernmental organisation or any other person to do or abstain from doing any act or to pay a ransom"

(iv) "shall be punishable with death, or imprisonment for life, and shall also beliable to fine."

13. The first essential condition as incorporated in Section 364A is "whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction". The second condition begins with conjunction "and". The second condition has also two parts, i.e., (a) threatens to cause death or hurt to such person or (b) by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt. Either part of above condition, if fulfilled, shall fulfill the second condition for offence. The third condition begins with the word "or", i.e., or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom. Third condition begins with the word "or causes hurt or death to such person in order to compel the Government or any foreign state to do or abstain from doing any act or to pay a ransom". Section 364A contains a heading "kidnapping for ransom, etc." The

kidnapping by a person to demand ransom is fully covered by Section 364A.

14. We have noticed that after the first conditionthe second condition is joined by conjunction "and", thus, whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person.

15. The use of conjunction "and" has its purpose and object. Section 364A uses the word "or" nine times and the whole section contains only one conjunction "and", which joins the first and second condition. Thus, for covering an offence under Section 364A, apart from fulfillment of first condition, the second condition, i.e., "and threatens to cause death or hurt to such person" also needs to be proved in case the case is not covered by subsequent clauses joined by "or".

16. The word "and" is used as conjunction. The use of word "or" is clearly distinctive. Both the words have been used for different purpose and object. Crawford on Interpretation of Law while dealing with the subject "disjunctive" and "conjunctive" words with regard to criminal statute made following statement:-

".....The Court should be extremely reluctant in a criminal statute to substitute disjunctive words for cojunctive words, and vice versa, if such action adversely affects the accused."

35. After scrutinizing the evidence adduced by the prosecution to prove the charges under Section 364A I.P.C. against the appellants, we find that though the first informant, P.W.-1, Rajendra Kumar Gupta, in his testimony, has stated that he had received a telephonic call demanding Rs.5,00,000/- as ransom and had also received a letter demanding such ransom which he handed over to the Investigating Officer and that photocopy of such letter is available on record as Paper No.A-10/1, but we also notice the fact that P.W.-5, Ram Dev Diwedi, Investigating Officer, in his testimony, has very clearly stated that he was informed by P.W.-4, S.I., Rama Kant Tiwari that the alleged letter, demanding ransom was recovered from the possession of the appellant-Rajit Ram Verma, which was sent to FSL for comparison of handwriting. However, this witness, in his cross-examination, has himself admitted that the alleged letter demanding ransom which was sent to FSL for comparison of handwriting, was recovered from the possession of appellant-Rajit Ram Verma at the time of his arrest and that the first informant, P.W.-1, Rajendra Kumar Gupta had not handed over any letter demanding ransom to him. Therefore, the prosecution story regarding the letter demanding ransom having been written and sent by the appellant-Rajit Ram Verma does not inspire confidence. We are, therefore, of the considered view that the prosecution has been unable to prove that ransom was ever demanded or required to be paid. There is not even an iota of evidence against the appellants, even faintly, showing that they had either demanded or were involved in demanding any ransom. Therefore, necessary ingredients to prove the charge under Section 364A I.P.C. were not proved against the appellants.

36. Cumulative reading of the testimonies of prosecution witnesses of fact leads only to one irresistible inference that the case against the appellants falls within the ambit of section 364 I.P.C. only rather than one under sections 363, 364A and 368 I.P.C. It will be useful to extract section 364 I.P.C. herein below:

"364. Kidnapping or abducting in order to murder *- Whoever kidnaps or*

abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with 1[imprisonment for life] or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

37. Thus, upon a thorough marshaling of the facts of this case and thread bare scrutiny of the evidence on record, we have no hesitation in holding that the prosecution has miserably failed to prove by any cogent evidence that the appellants after kidnapping the victim had made any demand of ransom for releasing him or any ransom was paid to them. Thus, the prosecution has been unable to establish the necessary ingredients for convicting appellants under section 364A I.P.C.. Therefore, the recorded conviction of the appellants and the sentence awarded to them under sections 363, 364A & 368 I.P.C. by the Trial Court *vide* impugned judgement and order cannot be sustained which are accordingly liable to be set aside. The appellants are, thus, liable to be convicted under section 364 I.P.C., for which, they are liable to be sentenced to undergo ten years' rigorous imprisonment and a fine of Rs. 10,000/- each and in default of payment of fine, they would further undergo six months' additional rigorous imprisonment.

38. The instant appeals are, thus, **partly allowed**. The conviction of **appellants- Pankaj Mohan Srivastava, Neeraj Mohan Srivastava, Rajit Ram Verma and Rajesh** under Sections 363, 364A and 368 I.P.C. and sentences awarded therefor are hereby set aside and accordingly they are acquitted of these charges. The appellants are convicted under Section 364 I.P.C. and are hereby awarded sentence of rigorous imprisonment for ten years with a fine of Rs.10,000/- each and in default of payment of fine, they would undergo further six months' additional rigorous imprisonment.

39. In case, the appellants have already undergone sentences awarded to them for the offence under Section 364 I.P.C., they shall be released forthwith, unless required in any other case.

40. The appellants, after their release, shall file a personal bond of Rs.50,000/- and two sureties each in the like amount to the satisfaction of the learned trial Court in compliance of Section 437A Cr.P.C within a period of two months from the date of their release.

41. Let a copy of this judgment be placed on records of Criminal Appeal Nos.2809 of 2007 and 2366 of 2007.

42. Let the lower court record along with a copy of this judgment be transmitted forthwith to the concerned trial Court for information and necessary compliance.

(2022)07ILR A816
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.07.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Revision No. 12 of 2021

State of U.P. ...Revisionist
Versus
The Court of Spl. Judge M.P./M.L.A./A.S.J. Vi Raebareli And Ors. ...Opposite Party

Counsel for the Revisionist:

G.A.

Counsel for the Opposite Party:
Sudhir Pande

Criminal Law - Criminal Procedure Code, 1973 -Section 321 - Withdrawal from prosecution - Court is required to consider whether withdrawal from prosecution would further cause of justice or not and whether it would be in public interest to allow the withdrawal from prosecution.

Public Prosecutor filed application u/s 321 Cr.P.C. stating that there is no sufficient evidence available on record to support the charge & that prosecution case is weak - FIR got registered because of political rivalry - complainant himself submitted an application that he would have no objection, if the application is allowed - **Held -** When the complainant himself is not supporting the prosecution case, there was no chance of conviction of the accused - case has been remained pending since 2007 and continuance of trial would be nothing but a futile exercise and Court's precious time would get wasted for futile exercise, if the application for withdrawal from prosecution is not allowed (Para 24)

Allowed. (E-5)

List of Cases cited:

1. Bansi Lal Vs Chandan Lal & ors. (1976) 1 SCC 42

2. Balwant Singh & ors. Vs St. of Bihar (1977) 4 SCC 448

3. Sheonandan Paswan Vs St. of Bihar & ors. (1983) 1 SCC 438

4. Vijaykumar Baldev Mishra @ Sharma Vs St. of Mah. (2007) 12 SCC 687

5. Rahul Agarwal Vs Rakesh Jain & anr. (2005) 2 SCC

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

1. Present revision has been filed by the State under Section 397/401 Cr.P.C. against the order dated 14.10.2020 passed by learned Special Judge/M.P./M.L.A./ VI-Additional Sessions Judge, Raebareli on an application filed by the Public Prosecutor for withdrawal from prosecution in Criminal Case No.573 of 2012: State vs Mayankeswar Saran Singh and others arising out of Crime No.158 of 2007 under Sections 147, 148, 149, 307, 436, 397, 395, 323, 504, 506, 427 IPC and 2/3 U.P. Gangsters and Anti-Social Activities (Prevention) Act, (for short 'Gangsters Act') Police Station Mohanganj, District Raebareli.

2. Learned trial Court has rejected the said application on the ground that charge has not yet been framed inasmuch as the accused has not remained present before the Court. The case has remained pending since 2007. Application for withdrawal from prosecution under Section 321 Cr.P.C. was moved in the year 2012/2019. However, Public Prosecutor in application had not stated any fact on the basis of which it would be evident that withdrawal from prosecution would be in larger public interest. Public Prosecutor has only mentioned in the application that there is no sufficient evidence available on record to support the charge. Prosecution case is weak and, therefore, in public interest, permission be granted for withdrawal from prosecution. It has been observed that on the basis of present case, provisions of Section 2/3 of the Gangsters Act were invoked against the accused Mayankeswar Saran Singh. District Magistrate gives permission for invoking the provisions under Section 2/3 of the Gangsters Act only where there is sufficient evidence against the accused for his prosecution. Learned

Magistrate therefore, held that stand of the prosecution itself is contradictory.

3. It has been further observed that Public Prosecutor has not applied his judicial mind properly at the time of filing of the application. Accused, Mayankeswar Saran Singh was a sitting M.L.A. and State Minister in the Cabinet of the State Government. It has been said that despite him holding a constitutional post, he along with 20-25 people sprinkled petrol on the house of the complainant and set it on fire. Withdrawal from prosecution in such a case would not be in public interest, and if such a case is allowed to be withdrawn, wrong massage would be sent in public and it would not be in the public interest.

4. The facts of the case are that the election for U.P. Legislative Assembly 2007, respondent No.2- Mayankeswar Saran Singh, who was sitting M.L.A. from Tiloi Constituency in Raebareli was a candidate of Samajwadi Party and Dinesh Pratap Singh was the candidate of Bahujan Samajwadi Party in the said State Assembly Election. The complainant (respondent No.14) was supporter of Mr.Dinesh Pratap Singh, candidate of Bahujan Samajwadi Party. He was earlier a supporter of the accused, Mayankeswar Saran Singh.

5. During course of said election for U.P. Legislature Assembly Election 2007, an FIR came to be registered on a complaint of respondent No.14 alleging that on 03.05.2007 at around 10:00 P.M., when the complainant was sitting outside his house at that time, respondent No.2 along with his 20-25 supporters came from 4 vehicles. They started abusing him. Accused-Maynkeswar Saran Singh exhorted others to kill the complainant as he had opposed him in the election. He also exhorted his supporters to take out petrol from the vehicles and set the house of the complainant on fire. On this exhortation, Ashok Singh, Krishna Kumar Soni, Manoj Singh, Narsingh, Kunj Bihari Singh, Lallan Singh and 8-9 persons, who came along with him took out petrol from their vehicles and ran towards the complainant. The complainant went inside his house and closed the door from inside. Persons came with accused-Mayankeswar Saran Singh tried to break open the house, and when they were not successful, they sprinkled petrol and set the door of the house on fire. It was said that that complainant could flee from the place from another door. On raising alarm by him, some villagers came running towards the house of the complainant but the accused terrorized them by firing and threatened them that if anyone come near the house of the complainant, he would loose his life. After an hour, the accused went back in their vehicles. It was alleged that wife and children of the complainant were badly assaulted. It was further alleged that the accused were throwing children in the fire. However, their mother could save them. It was further alleged that the accused had also taken away jewellery, which was kept for marriage of the daughter of the complainant, and his household items were set on fire. The accused had destroyed tractor of the complainant and they had set the tractor trolley on fire.

6. On the basis of the compliant, FIR No.31 of 2007 was registered on 04.05.2007 against respondent No.2 and other accused.

7. Police after investigating the offence filed charge-sheet against respondent No.2 and other persons on

which cognizance was taken on 13.07.2009.

8. Public Prosecutor had filed an application under Section 321 Cr.P.C. for withdrawal from prosecution after the State Government granted permission for withdrawal from prosecution. In the said application, it was said that Mr.Dinesh Pratap Singh, who was rival candidate in the State Assembly Election 2007, was present at the police station when the FIR came to be registered on 04.05.2007. It was further said that medical examination of the son of the complainant was conducted on 04.05.2007 at 12:50 Hours. However, no medical examination of any other person was conducted. It was further said that the investigating officer recorded the statements of the family members of the complainant, and there were glaring contradictions in the statements of the family members and other independent witnesses. The application further mentions that on considering the evidence available in the case diary, case against the accused appears to be very weak. Complainant's son, Sajjan Singh did not mention that how he received three injuries. Son of the complainant was in security of Dinesh Pratap Singh. There is no date mentioned in the approval allegedly granted by District Magistrate for invoking provisions of the Gangsters Act against the accused and, therefore, it was prayed that the application be allowed and it should be withdrawn from prosecution.

9. Notice was issued to the complainant, respondent No.14. Initially, he opposed the application for withdrawal but on 06.03.2020, he moved another application and said that he did not press his objection agaisnt withdrawal from prosecution and his objection be rejected and he would have no objection, if application under Section 321 Cr.P.C. was allowed.

10. Heard Mr.Anurag Verma, learned A.G.A. along with Mr.V.K. Sahi, learned Additional Advocate General for the State and Mr.Sudhir Pandey, learned counsel for opposite party No.14.

11. Section 321 Cr.P.C. as applicable in the State of U.P. reads as under:-

"321. Withdrawal from prosecution. The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, *on the written permission of the State Government to that effect (which shall be filed in the Court),* with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,-

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences: Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case hag hot been appointed by the Central Government, he shall not, unless he hag been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."

12. The scope of Section 321 Cr.P.C., ambit of power and manner in which it has to be exercised by the Public Prosecutor have been dealt with in several decisions by the Supreme Court. Only a few decisions rendered by the Supreme Court would be apt to quote here to throw light on the scope of Section 321 Cr.P.C. and ambit and manner of exercise of the power by the Public Prosecutor under the aforesaid section. Ultimate authority to allow withdrawal from prosecution vests with the Court and the guiding consideration must always be interest of administration of justice when deciding the question whether prosecution should be allowed to be withdrawn or not.

13. In **Bansi Lal Versus Chandan Lal and others (1976) 1 SCC 421**, the Supreme Court has held in para-5 which, on reproduction, reads as under:-

"5.....Therefore when the Additional Sessions Judge made the impugned order, there was no material before him to warrant the conclusion that sufficient evidence would not be forthcoming to sustain the charges or that there was any reliable subsequent information falsifying the prosecution case or any other circumstance justifying withdrawal of the case against the respondents. Consenting to the withdrawal of the case on the view that the attitude displayed by the prosecution made it "futile" to refuse permission does not certainly serve the administration of justice. If the material before the Additional Sessions Judge was considered sufficient to enable him to frame the charges against the respondents, it is not possible to say that there was no evidence in support of the Prosecution case. The application for stay of the proceeding made before the committing Magistrate cannot also be said to falsify the prosecution case. If the prosecuting agency brings before the court sufficient material to indicate that the prosecution was based on false evidence, the court would be justified in consenting to the withdrawal of the prosecution, but on the record of the case, as it is, we do not find any such justification....."

14. In **Balwant Singh and others Versus State of Bihar (1977) 4 SCC 448,** the Supreme Court, while considering the role of the Public Prosecutor while moving an application for withdrawal from prosecution, has dealt upon the consideration which must weigh for moving such an application. The Public Prosecutor must keep in mind the administration of justice inasmuch as he is discharging the statutory responsibility and while discharging the statutory responsibility the only factor, which should be considered, is administration of justice and nothing else.

Relevant portion of paragraph-2 is reproduced hereinbelow:-

"2. .....The statutory responsibility for deciding upon withdrawal

squarely vests on the public prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side. The Criminal Procedure Code is the only matter of the public prosecutor and he has to guide himself with reference to Criminal Procedure Code only. So guided, the consideration which must weigh with him is, whether the broader cause of public justice will be advanced or retarded by the withdrawal or continuance of the prosecution. As we have already explained, public justice may be a much wider conception than the justice in a particular case. Here, the Public Prosecutor is ordered to move for withdrawal....."

15. In **Sheonandan Paswan Versus State of Bihar and others (1983) 1 SCC 438,** the Supreme Court has held that before an application is moved under Section 321 Cr.P.C., the Public Prosecutor needs to apply his mind to the facts of the case independently, without being influenced by outside factors. Relevant paragraphs, on reproduction, read as under:-

"85. In our opinion, the object of Section 321 Cr.P.C. appears to be to reserve power to the Executive Government to withdraw any criminal case on larger grounds of public policy such as inexpediency of prosecutions for reasons of State; broader public interest like maintenance of law and order; maintenance of public peace and harmony, social, economic and political; changed social and political situation; avoidance of destabilization of a stable government and the like. And such powers have been, in our opinion, rightly reserved for the Government; for, who but the Government is in the know of such conditions and situations prevailing in a State or in the country? The Court is not in a position to know such situations."

.....

134. The statutory responsibility for deciding upon withdrawal squarely rests upon the Public Prosecutor. It is non-negotiable and cannot be bartered away. The court's duty in dealing with the application under Section 321 is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent un-influenced by irrelevant and extraneous or oblique considerations as the court has a special duty in this regard inasmuch as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from prosecution. The court's duty is to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice."

16. The Supreme Court has also dealt with in a catena of decisions the manner in which an application for withdrawal from prosecution moved by the Public Prosecutor needs to be considered by the Court.

17. In **State of Punjab Versus Union of India and others (1986) 4 SCC 335**, the Supreme Court has held that while granting permission to the Public Prosecutor for withdrawal from prosecution, the Court needs to be satisfied itself that the Public Prosecutor has properly exercised statutory function and has not attempted to interfere with the normal course of justice for ulterior purposes. The administration of criminal justice should be the touchstone on which the application under Section 321

Cr.P.C. needs to be decided. Relevant portion of paragraph-1, on reproduction, reads as under:-

"1. ..... The ultimate guiding consideration while granting a permission to withdraw from the prosecution must always be the interest of administration of justice and that is the touchstone on which the question must be determined whether the prosecution should be allowed to withdraw. The Public Prosecutor may withdraw from the prosecution of a case not merely on the ground of paucity of evidence but also in order to further the broad ends of public justice, and such broad ends of public justice may well include appropriate social, economic and political purposes."

18. Similar views have been reiterated in **Sheonandan Paswan Versus State of Bihar and others (1987) 1 SCC 288** by the Supreme Court. Paragraph-73, on reproduction, reads as under:-

"73. Section 321 gives the Public Prosecutor the power for withdrawal of any case at any stage before judgment is pronounced. This presupposes the fact that the entire evidence may have been adduced in the case, before the application is made. When an application under Section 32I Cr.P.C. is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. To contend that the court when it exercises its limited power of giving consent under Section 32I has to assess the evidence and find out whether the case would end in acquittal or conviction, would be to rewrite Section 321 Cr.P.C. and would be to concede to the court a power which the scheme of Section 321 does not contemplate. The acquittal or discharge order under Section 321 are not the same as the normal final orders in criminal cases. The conclusion will not be backed by a detailed discussion of the evidence in the case of acquittal or absence of prima facie case or groundlessness in the case of discharge. All that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The court, after considering these facets of the case, will have to see whether the application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given. In this case, on a reading of the application for withdrawal, the order of consent and the other attendant circumstances, I have no hesitation to hold that the application for withdrawal and the order giving consent were proper and strictly within the confines of Section 321 Cr.P.C."

19. In S.K. Shukla and others Versus State of U.P. and others (2006) 1 SCC 314, the Supreme Court has held that the Public Prosecutor cannot work like a post box. He needs to act objectively being an officer of the Court and it is always open to the Court to reject the prayer if it is not guided in the interest of administration of justice. Relevant portion of paragraph-32, on reproduction, reads as under:-

"32. .....The Public Prosecutor cannot act like a postbox or act on the dictates of the State Government. He has to act objectively as he is also an officer of the court. At the same time the court is also not bound by that. The courts are also free to assess whether a prima face case is made or not. The court, if satisfied, can also reject the prayer."

20. In **Vijaykumar Baldev Mishra alias Sharma Versus State of**

Maharashtra (2007) 12 SCC 687 the Supreme Court has held as under:-

"12. Section 321 of the Criminal Procedure Code, 1973 provides for withdrawal from prosecution at the instance of the public prosecutor or Assistant public prosecutor. Indisputably therefor the consent of the Court is necessary. Application of mind on the part of the Court, therefore, is necessary in regard to the grounds for withdrawal from the prosecution in respect of any one or more of the offences for which the appellant is tried. The provisions of TADA could be attracted only in the event of one or the other of the four 'things' specified in Nalini (supra) is found applicable and not otherwise. The Review Committee made recommendations upon consideration of all relevant facts. It came to its opinion upon considering the materials on record. Its recommendations were based also upon the legality of the charges under TADA in the fact situation obtaining in each case. It came to the conclusion that in committing the purported offence, the appellant inter alia had no intention to strike terror in people or any section of the people and in fact the murder has been committed only in view of group rivalry and because the parties intended to take revenge, the provisions of the TADA should not have been invoked.

13. The Public Prosecutor in terms of the statutory scheme laid down under the Code of Criminal Procedure plays an important role. He is supposed to be an independent person. While filing such an application, the public prosecutor also is required to apply his own mind and the effect thereof on the society in the event such permission is granted."

21. In **Rahul Agarwal Versus Rakesh Jain and another (2005) 2 SCC 377**, the Supreme Court has held that while considering an application moved under Section 321 Cr.P.C., the Court should consider all relevant circumstances and find out whether the withdrawal from prosecution advances the cause of justice. The withdrawal can be permitted only when the case is likely to end in an acquittal and continuance of the case would only cause severe harassment to the accused. Relevant para-10 is extracted hereunder:-

"10. From these decisions as well as other decisions on the same question, the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal of prosecution. The discretion under Section 321, Code of Criminal Procedure is to be carefully exercised by the court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the State for redressing their grievance. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished. Punishing the person who perpetrated the crime is an essential requirement for the maintenance

of law and order and peace in the society. Therefore, the withdrawal of the prosecution shall be permitted only when valid reasons are made out for the same."

22. This Court vide judgment and order dated 12th December, 2013 passed in writ petition bearing Writ Petition No. 4683 (M/B) of 2013 "Ms. Ranjana Agnihotri and others Versus Union of India' while dealing the scope, power and ambit under Section 321 Cr.P.C. has held in paras-116 and 117 which, on reproduction, read as under :-

"116. In view of above, the Public Prosecutor is the final authority to apply mind and take a decision whether an application for withdrawal of a criminal case is to be moved or not. For that, option is open to him to receive necessary instructions or information from the Government to make up mind on the basis of material made available. The Public Prosecutor cannot act like post box or at the dictate of the State Government. He has to act objectively as he is also an officer of the court. It is also open for the appropriate Government to issue appropriate instruction to him but he has to act objectively with regard to the withdrawal of cases. But the instruction sent by the government shall not be binding and it is the Public Prosecutor who has to take a decision independently without any political favour or party pressure or like concerns. The sole object of the Public Prosecutor is the interest of administration of justice. Power conferred on Public Prosecutor to take independent decision for the interest of administration of justice is not negotiable and cannot be bartered away in favour of those who may be above him on administrative side. He is stood to be guided by letter and spirit of Code of Criminal Procedure only and not otherwise. Neither the Public Prosecutor nor the Magistrate can surrender their discretion while exercising power at their end.

117. Similarly, the Court has duty to protect the administration of criminal justice against possible abuse or misuse by the executive by resort of the provisions contained in Section 321 Cr.P.C. The court has to record a finding that the application moved by Public Prosecutor is in the interest of administration of justice and there is no abuse or misuse of power by the Public Prosecutor or the Government. In case an application is allowed, it must be recorded by the Court that the application has been moved in good faith to secure the ends of justice and not in political or vested interest. The court has final say in the matter and the decision should be free and fair with independent exercise of mind in the interest of public policy and justice. It must ensure that the application is not moved to thwart or stifle the process of law or suffers from such improprieties or illegalities as to cause manifest injustice if consent is given."

23. In the present case, from reading of the application, it appears that Public Prosecutor had filed the application under Section 321 Cr.P.C. in good faith after careful consideration of the material available on record. The FIR got registered because of political rivalry. The complainant himself has submitted an application before the learned trial Court that he would have no objection, if the application is allowed, and his earlier objection on application under Section 321 Cr.P.C. for withdrawal from prosecution be ignored.

24. The Court is required to consider whether withdrawal from prosecution would further cause of justice or not and

whether it would be in public interest to allow the withdrawal from prosecution. When the complainant himself is not supporting the prosecution case, this Court is of the view that there is no chance of conviction of the accused in the case. The case has been remained pending since 2007 and continuance of trial would be nothing but a futile exercise and Court's precious time would get wasted for futile exercise, if the application for withdrawal from prosecution is not allowed.

25. Considering the stand of the complainant, this Court is of the view that withdrawal from prosecution would be in the interest of justice. It would be appropriate to allow the application for withdrawal from prosecution. In view thereof, this Court finds that view taken by the learned Special Judge does not appear to be correct view. The revision is allowed. Impugned order dated 14.10.2020 passed by learned Special Judge/M.P./M.L.A./ VI-Additional Sessions Judge, Raebareli is hereby set aside. The application for withdrawal from prosecution is also allowed.

(2022)07ILR A825
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.07.2022

BEFORE

THE HON'BLE RAJEEV MISRA, J.

Criminal Revision No. 614 of 2021

Vishal Singh @ Pitarsan @ Vishal Kumar Singh ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Kirtikar Pandey

Counsel for the Opposite Parties:
G.A.

Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 9 & 94 - Presumption and determination of age - Juvenile Justice (Care and Protection of Children) Rules, 2007 - by virtue of S. 9 of Act of 2015, Court, before whom the matter is pending & the claim of juvenility is raised by an accused, then such Court is competent to make an enquiry, take such evidence as may be necessary excluding an affidavit and thereafter record a finding stating the age of person as nearly as may be - For making a claim with regard to juvenility the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary - Initial burden has to be discharged by the person who claims juvenility - As to what materials would prima facie satisfy the court cannot be catalogued - documents mentioned in Sub-section (2) of Section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court (Para 33, 51)

Incident occurred on 4.11.2017, a prompt F.I.R. lodged, revisionist named as accused - charge-sheet against accused submitted - Magistrate took cognizance - matter pending in the court - revisionist filed an application u/s 9 Juvenile Justice (Care and Protection of Children) Act, 2015 to be declared a Juvenile on the date of occurrence i.e. 4.11.2017 - on the ground that date of birth recorded in the certificate-cummark-sheet issued by U.P. Board is 17.12.2000, as such, revisionist was aged about 17 years 8 months and 16 days on the date of occurrence - on the other hand first informant stated that the Revisionist date of birth recorded in the mark-sheet, is 9.1.199, as such, on the date of occurrence revisionist was aged about 18 years 10 months and 3 days - Trial court held that since it was revisionist who was claiming juvenility the burden to prove and establish the same was upon revisionist himself and revisionist having failed to do so, Court below rejected the application filed by revisionist claiming juvenility - Criminal Revision filed

before High Court - Held - Revisionist failed to discharge the initial burden - claim of revisionist does not appear to be bona fide either - revision dismissed.

Dismissed. (E-5)

List of Cases cited:

1. Sanjeev Kumar Gupta Vs St. of U.P. & anr., (2019) 12 SCC 370

2. Ashwani Kumar Saxena Vs St. of M.P. (2012) 9 SCC 750

3. Abuzar Hossain @ Ghulam Hossasin Vs St. of W.B. (2012) 10 SCC 489

4. Prag Bhati Vs St. of U.P. (2016) 12 SCC 744

5. Babloo Pasi Vs St. of Jharkhand & anr., 2008 (13) SCC 133

6. Birad Mal Singhvi Vs Anand Purohit, AIR 1988 SC 1796

7. Manoj @ Monu @ Vishal Chaudhary Vs St. of Har. & anr., 2022 SCC Online SC 185

8. Rishipal Singh Solanki Vs St. of U.P. & ors., 2021 SCC Online SC 1079

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

1. Heard Mr. Kirtikar pandey, learned counsel for revisionist and learned A.G.A. for State.

2. Perused the record.

3. This criminal revision has been filed challenging judgement and order dated 27.1.2021, passed by Additional Sessions Judge/F.T.C II, Ballia, in Misc. Application Criminal No. Nil of 2019, dated 29.3.2019 (Paper No.3 Kha), whereby aforesaid application filed by accused Vishal Sigh @ Pitarsan @ Vishal Kumar Singh, claiming therein that he be declared juvenile on the date of occurrence i.e. 4.11.2017 has been rejected.

4. Present Criminal Revision came up for admission on 19.3.2021 and this Court passed the following order:

"Heard learned counsel for the revisionist and learned AGA for the State.

The present revision under Section 397/401 Cr.P.C. has been preferred by the revisionist against the order dated 27.1.2021, passed by A.S.J./F.T.C.-II, Ballia, in S.T. No. 54 of 2018 (State vs. Vishal) arising out of Case Crime No. 745 of 2017 under sections 147, 148, 149, 323, 504, 506, 304 IPC, Police Station Dokati, District Ballia whereby the application of the revisionist declaring himself to be juvenile, has been rejected.

The submission of counsel for the revisionist is that the procedure as prescribed under section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 has not been followed. He further argues that there is nothing on record to demonstrate that the matriculation certificate filed by the revisionist is forged one, in the alternative, even if the Court came to the said conclusion, the subsequent procedure as prescribed under section 94 should have been resorted which have not been done. Thus, the order suffers from material irregularity.

Matter requires consideration.

Issue notice to the opposite party no. 2 returnable at an early date.

Steps be taken to serve the opposite party no. 2 within two weeks.

The opposite party no. 2 shall file counter affidavit within four weeks. Rejoinder affidavit may be filed within two weeks thereafter.

Put up this matter as fresh on 28.4.2021.

Till the next date of listing, further proceedings in S.T. No. 54 of 2018 (State vs. Vishal) arising out of Case Crime No. 745 of 2017 under sections 147, 148, 149, 323, 504, 506, 304 IPC, Police Station Dokati, District Ballia shall remain stayed as against the revisionist only. "

5. Pursuant to above order dated 19.3.2021, office has submitted a report dated 16.6.2021, stating therein that as per report received from C.J.M, Ballia notice has been served upon opposite party-2, personally.

6. However, inspite of service of notice, no one has put in appearance on behalf of opposite party-2. Learned A.G.A. has filed a counter affidavit to which a rejoinder affidavit has also been filed by revisionist.

7. Counsel for the parties agreed that instant revision be decided finally at the stage of admission without calling for the record. Accordingly, with the consent of counsel for the parties and as provided under Rules of the Court, present criminal revision was heard and is now being disposed of finally at the admission stage, itself.

8. Record shows that in respect of an incident which is alleged to have occurred on 4.11.2017, a prompt F.I.R. dated 4.11.2017 was lodged by first informant/opposite party-2 Surya Dev Pandey and was registered as Case Crime No. 0745 of 2017 under sections 147, 148, 149, 324, 308, 323, 504, 506 IPC and section 7 Criminal Law Amendment Act, P.S. Dokati, District Ballia. In the aforesaid F.I.R, 12 persons namely, Vishal Singh @ Pitarsan, Vishal Singh @ Bua, Sonu Singh, Pawan Singh, Krishna Singh, Bhola Singh, Chandan Singh, Monu, Chotu, Ajeet Singh, Shivjogit Singh, Dharmendra Singh have been nominated as named accused.

9. Investigating Officer upon completion of investigation of concerned case crime number submitted the charge-sheet against accused including applicant. Concerned Magistrate took cognizance upon same. As offence complained of is triable by Court of Sessions, concerned Magistrate committed the case to the Court of Sessions. Resultantly, S.T. No. 54 of 2018 (State vs. Vishal), arising out of Case Crime No. 0745 of 2017, under sections 147, 148, 149, 324, 308, 323, 504, 506 IPC and section 7 Criminal Law Amendment Act, P.S. Dokati, District Ballia came to be registered, and now pending in the court of Additional Sessions Judge/F.T.C. II, Ballia.

10. Subsequently, revisionist filed an application dated 29.3.2019 (paper no. 3-kha) before Court below in terms of Section 9 Juvenile Justice (Care and Protection of Children) Act, 2015 (herein after referred to as act, 2015) praying therein that revisionist be declared a Juvenile as he was below 18 years of age on the date of occurrence i.e. 4.11.2017.

11. Aforesaid application was filed by revisionist on the ground that revisionist has passed his High School Examination, conducted by U.P. Board of High School and Intermediate Education from Kesari Balika Higher Secondary School, Shobha Chapra, District-Ballia in the year 2014. The date of birth of revisionist recorded in the certificate-cum-mark-sheet issued on 30.5.2014 by U.P. Board of High School and Intermediate Education in respect of aforesaid examination undertaken by revisionist is 17.12.2000. As such,

revisionist was aged about 17 years 8 months and 16 days on the date of occurrence, which is 4.11.2017.

12. Claim of juvenility raised by revisionist was opposed by prosecution/first informant-opposite party-2. According to first informant-opposite party-2, revisionist was major on the date of occurrence i.e. 4.11.2017 as he was more than 18 years of age. Revisionist has passed his High School Examination conducted by U.P. Board of High School and Intermediate Education in the year 2016 with Roll No. 2312942. The date of birth of revisionist recorded in the mark-sheet, pertaining to above noted examination is 9.1.1999. As such, on the date of occurrence which is 4.11.2017 revisionist was aged about 18 years 10 months and 3 days.

13. In view of above noted two certificates/marksheets of revisionist, regarding his High School Examination before Court below, the Additional Sessions Judge/F.T.C. II, Ballia passed an order dated 22.9.2020, which reads as under:

"1. To declare this accused Vishal Singh alias Peterson this present application has been filed on his behalf but without assigning any particular provision of the Juvenile Justice Act, 2000 or Juvenile Justice Act, 2015.

2. This Court has heard the submissions of both the rival sides on this application. As it appeared from the case file that during the proceeding of this particular application my learned Predecessor has conducted almost the entire proceeding. This Court is not in position to hold that either it was right or wrong but considering the law laid down in Ashwani Kumar Saxena Vs. State of Madhya Pradesh (2012) 9 SCC 750, in which it has been emphatically instructed to the Subordinate Courts to conduct inquiry regarding the determination of age of the person claiming minor and has said in a very strong words that in the process of such inquiry the process of trial by recording the testimonies of applicant/witness(s) etc., is prohibited. More or less very similar approach has been shown by the three Judges Bench of Hon'ble Supreme Court in Abuzar Hossain alias Ghulam Hossain Vs. State of Bengal (2012) 10 SCC 489 and also in Prag Bhati Vs. State of U.P. (2016) 12 SCC 744 the Hon'ble Supreme Court has held in similar manner. However, while deciding this aforesaid two cases the Hon'ble Supreme Court has held that there should be no strict pattern or manner to conduct inquiry to determine the age of a person claiming minor and in a very recent judgment in Criminal Appeal No. 108/19 Sanjeev Kumar Gupta Vs. State of U.P. and another the Hon'ble Supreme Court has again dealt with this aspect in a very detailed manner and has time and again referred the Ashwani Kumar Saxena case(supra).

3. Considering the above in a situation as it appears from the records that the entire focus of this Court presided over my learned Predecessor was to extract truth circumfenced with a particular certificate claiming as of matriculation by calling witnesses and for recording their evidence in respect of the said certificate. Keeping in mind the guiding light transmitted by the Hon'ble Supreme Court in Ashwani Kumar Saxena case, this Court is not ready to go along with the process opted by his learned predecessor. This is on record that the matriculation certificate filed by the applicant is very aggressively opposed by

the prosecution accompanied with victim's Advocate and the prosecution has vehemently raised question over the veracity of this certificate. Although the prosecution has filed a photocopy of a certificate of a person named as Peterson Ram and has claimed that this is very same person as of the accused claiming his name as Vishal Kumar Singh alias Peterson here this is very pertinent to note that everywhere in the case record Vishal Singh alias Peterson has been mentioned and nowhere in the record Vishal Kumar Singh alias Peterson noted and this is very well settled in Criminal Jurisprudence System name of the accused has utmost important value and even difference of one word in the name of the accused can create a very big difference as well as consequence. However, this Court has no intention to give place the photocopy of the alleged certificate of a person namely Peterson Ram on the record to consider further but this is also truth this has already created serious doubt in the mind of this Court regarding veracity of the alleged matriculation certificate which was allegedly produced for establishing the accused as minor.

4. In aforesaid all the referred cases as well as in the Juvenile Justice Act, 2000(S.94) for determining the aged matriculation certificate has been given priority over other alternatives. 5. It has been held in Ashwani Kumar Saxena case(Supra) by the Hon'ble Supreme Court that in case the Court finds any such fabrication or has any sort of suspect over/in the matriculation certificate the Court may very much conduct an inquiry in this regard but scope of the inquiry as well as manner of the inquiry has not been given anywhere regarding checking the veracity of such certificate.

6. On the aforesaid analysis this Court keeps pending the application filed for declaration of the accused Juvenile pending and meanwhile this Court deems it fit to provide both the rival copies of the matriculation certificate as one in the name of Vishal Kumar Singh alias Peterson and other in the name of Vishal Ram alias Peterson for their verification and in this regard the SHO of the concerned Police Station i.e. Police Station Dokati, Ballia is directed to submit the report within a week. Further, this Court directs the Director U.P. Secondary Board, Lucknow to provide the records on that basis age of this alleged Vishal Kumar Singh was noted in the matriculation certificate as well as other ancillary papers to show this particular person has appeared in the matriculation examination on that stipulated date conducted by the U.P. Secondary Board, Lucknow within a week to this Court.

Ordered accordingly.

Notice be issued for the aforesaid purposes to the S.H.O. of the Police Station Dokati, Ballia related with this Sessions Trial No. 54/2018 (Case Crime No. 745/2017) and to the Director, U.P. Secondary Board, Lucknow."

14. Pursuant to above order dated 22.9.2020, no information/report was submitted by U.P. Secondary Education Board Lucknow, regarding the sanctity or genuineness of aforementioned certificates-cum-marksheet pertaining to the High School examinations undertaken by revisionist. However, two Police reports (other than a report contemplated under section 173 (2) Cr.P.C.) were submitted by Police of concerned Police Station. The first report was submitted on 15.10.2020, whereas the second report was submitted on 28.12.2020. In both the reports, it was reiterated that the date of birth of revisionist as mentioned in the High School Certificate is 17.2.2000. No

conclusion was drawn by the Police regarding the authenticity/genuineness of the two certificates-cum-mark sheets of High School Examination undertaken by the revisionist in the year 2014 and 2016 respectively or on the date of birth of revisionist recorded therein.

15. In the light of above, Court below itself proceeded to hold an enquiry / to adjudicate the claim of juvenility raised by revisionist.

16. On behalf of revisionist, reliance was placed upon three documents i.e. letter dated 5.4.2020, of Principal, Keshri Balika Intermediate College Shobha Chapra, Ballia (Ext.Ka-1), photo copy of **Sarniyan Panjika (Table Register)**, page no.0887368, verified by Principal, Kesari Balika Intermediate College, Sobha Chapra (Ext. Ka-2) and photo copy of **Chhatra Patrawali Tatha Asttanantaran Praman Patra (Scholar Register & Transfer Certificate),** Register No. 26384 verified by Principal (Ext. Ka-3). Apart from above mentioned documentary evidence, revisionist also adduced oral evidence by producing A.P.W.1 Arjun Yadav (Record Keeper of Kesari Balika Higher Secondary School, Shobha Chapra, District-Ballia) and A.P.W.2 Rita Devi (mother of revisionist).

17. In the light of above, as well as the two Police reports, Court below proceeded to evaluate the claim of juvenility raised by revisionist. Court below disbelieved the Police reports submitted by Police of Police Station Dokati, District Ballia as according to court below the two reports dated 15.10.2020 and 28.12.2020 are contradictory to each other. It shall be apt to reproduce the observations made by Court below itself in this regard, which is contained in the penultimate part of paragraph 18, and reads as under:

the concerned police has brazenly taken two stances in their two reports that in report dated 15.10.2020 the police speaks that it talked with the said Naveen Singh on telephone whereas in report dated 28.12.2020 the police says that Naveen Singh's old number is running switched off.

18. A.P.W.1 Arjun Yadav was disbelieved by Court below by observing as under:

" hence this person can only prove the fact of presence of such records in the school but cannot prove the contents therein noted in the documents which he brought before the Court"

19. A.P.W.2 Rita Devi, mother of revisionist was also disbelieved by Court below vide following observations contained in paragraph 16 of the impugned order:

"From the aforesaid testimonies of this APW2, mother of the applicant this only can be drawn out that this witness, however she was mother of the applicant was not able to tell the exact date of birth of her son because at the one hand she deposed that the applicant's date of birth was11 17.2.2000 but on the other hand she has admitted that she was an illiterate and she had memorized the age of (not the date of birth) the applicant through Pandit Ji. "

20. Having recorded aforesaid findings coupled with the fact that since it was revisionist who was claiming juvenility

the burden to prove and establish the same was upon revisionist himself and revisionist having failed to do so, Court below by means of impugned judgement and order dated 27.1.2021 rejected the application (paper no.3ka) filed by revisionist claiming juvenility.

21. Thus feeling aggrieved by above judgement and order, revisionist has now approached this Court by means of present criminal revision.

22. Mr. Kirtikar Pandey, learned counsel for revisionist in challenge to the impugned order dated 27.1.2021 submits that order impugned in present criminal revision is manifestly illegal and without jurisdiction. He then submits that juvenility of an accused has to be decided as per section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015. Aforesaid section is procedural in nature and contains four sub-sections i.e. a,b,c,d which are preferential in nature. In case the first preference is not available, the Court can rely upon second preference and so on as the case may be. In the present case, revisionist has passed his High School Examination in the year 2014 and his date of birth recorded therein is 17.12.2000. The occurrence in question occurred on 4.11.2017. As such, applicant was aged about 17 years 8 months and 16 days on the date of alleged occurrence and therefore a juvenile. There is nothing on record to show that the certificate/mark-sheet of the High School Examination undertaken by revisionist in the year 2014 is forged or fictious. As such, Court below has erred in law in not relying upon the same. Case of revisionist is squarely covered under section 94(1) of the Juvenile Justice (Care and Protection of Children) Act, 2015.

23. It is also contended that claim of juvenility raised by revisionist was disputed by prosecution/first informant-opposite party-2. Reliance was placed upon certificate/mark-sheet of High School Examination of revisionist alleged to have been undertaken by revisionist in the year 2016 with Roll NO. 2312942 wherein name of revisionist was shown as Peterson Ram S/o Manoj Ram and the name of mother has been shown as Rita Devi and the date of birth of revisionist recorded therein is 1.1.1999. Except for this document, no other evidence was adduced by first informant-opposite party-2 to dispute the claim of juvenility raised by revisionist.

24. In the aforesaid circumstance, burden was upon first informant/opposite party-2 to establish the fact that date of birth of revisionist is 1.1.1999. Once revisionist had already passed his High School Examination in the year 2014, wherein his date of birth was recorded as 17.12.2000, there was no occassion before revisionist to retake the High School Examination showing his date of birth as 1.1.1999 which admittedly is to his disadvantage. In view of aforesaid facts and circumstance, court below ought to have accepted the claim of juvenility raised by revisionist. Even otherwise, Court below has disbelieved A.P.W.1 Arjun Yadav and A.P.W.2 Ritu Devi on wholly trivial grounds. As such, order impugned in present criminal revision is liable to be set-aside by this Court, and the application dated 29.3.2019 (Paper No. 3 Kha) filed by revisionist for declaring him a juvenile on the date of occurrence is liable to be allowed.

25. Per contra, the learned A.G.A. has opposed this revision. He submits that impugned order passed by Court below is

perfectly just and legal. Findings recorded by Court below are definite and cogent findings. Same cannot be classified as illegal, perverse or erroneous. As such, same are not liable to be interfered with by this Court. Court below has exercised its jurisdiction with due diligence and not in casual and caviliar manner. Once two contradictory High School Certificates-cum-mark-sheets of revisionist were brought on record, court below rightly passed the order dated 22.9.2020, whereby the Police of Police Station-Dokati was directed to conduct an enquiry in the matter and further directions were issued to U.P. Secondary Education Board to submit a report regarding above. However, no report was submitted by U.P. Secondary Education Board in respect of certificate/marksheet of High School Examination undertaken by revisionist in the years 2014 and 2016, respectively. The Police reports submitted on 15.10.2020 and 28.12.2020 by Police of Police Station Dokati were rightly disbelieved as no attempt was made to verify the genuineness of the two certificate-cum-marksheet of High School examination undertaken by revisionist in the year 2014 and 2016 respectively or the date of birth of revisionist.

26. As such, exercise undertaken by Court below to adjudicate upon the claim of juvenility of revisionist is perfectly just and legal. Since revisionist was major on the date of occurrence, as such, no indulgence be granted by this Court in favour of revisionist.

27. Before proceeding to evaluate the rival submissions urged on behalf of the parties, it would be appropriate to refer the relevant provisions of Juvenile Justice (Care and Protection of Children) Act, 2015, as well as Juvenile Justice (Care and Protection of Children) Rules, 2007.

28. Section 9 of Act 2015 provides for the procedure to be followed by a Magistrate who has not been empowered under this act. Same reads as under:

9. Procedure to be followed by a Magistrate who has not been empowered under this Act.-

(1) When a Magistrate, not empowered to exercise the powers of the Board under this Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.

(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:

(3) Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act.

(3) If the court finds that a person has committed an offence and was

a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

(4) In case a person under this section is required to be kept in protective custody, while the person's claim of being a child is being inquired into, such person may be placed, in the intervening period in a place of safety.

29. Section 94 of Act, 2015 provides for the procedure for determining the age of a Juvenile. Same is extracted herein under:

"Presumption and Determination of Age- (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining -

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

30. Rule 12 of the 2007 Rules provides the procedure to be followed in determining the age of a child in conflict with law. For ready reference same is reproduced herein under:

"Procedure to be followed in determination of Age. (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of he age as regards such child or Ihe juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

31. What shall be the procedure to be followed by Court upon an application filed by an accused claiming himself to be a juvenile came up for consideration in **Sanjeev Kumar Gupta Vs. State of U.P. and another, (2019) 12 SCC 370.** The Court observed as follows in paragraph 11:

" 11. Upon a claim being raised that an accused was a juvenile on the date of the commission of the offence, the court is required to make an enquiry, take evidence and to determine the age of the person. The court has to record a finding whether the person is a juvenile or a child, stating the age as nearly as may be. Rule 12(3) of the 2007 Rules contains a

procedural provision governing the determination of age by the court or by the Board. Rule 12(3) stipulates thus:

32. The issue whether an enquiry can be conducted by the Court for declaring the age of an accused as well as the nature of such enquiry came up for consideration in **Ashwani Kumar Saxena Vs. State of Madhya Pradesh (2012) 9 SCC 750.** Following was observed by the Court in paragraphs 32 and 34:

"32. "Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

34. Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination."

33. Subsequently, a three judges Bench in **Abuzar Hossain @ Ghulam Hossasin Vs. State of West Bengal (2012) 10 SCC 489** also considered the aforesaid issue and concluded as follows in paragraphs 39 and 48:

" 39. Now, we summarise the position which is as under:

39.1. A claim of juvenility may be raised at any stage even after the final disposal of the case. It may be raised for the first time before this Court as well after the final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in the appeal court.

39.2. For making a claim with regard to juvenility after conviction, the claimant must produce some material

which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

39.3. As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rules 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard-and-fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh [(2009) 7 SCC 415 : (2009) 3 SCC (Cri) 431] and Pawan [(2009) 15 SCC 259 : (2010) 2 SCC (Cri) 522] these documents were not found prima facie credible while in Jitendra Singh [(2010) 13 SCC 523 : (2011) 1 SCC (Cri) 857] the documents viz. school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the delinquent.

39.4. An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of the age of the delinquent.

39.5. The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in the 2000 Act are not defeated by the hypertechnical approach and the persons who are entitled to get benefits of the 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

39.6. Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at the threshold whenever raised.

34. Aforesaid judgements came to be considered in **Prag Bhati Vs. State of U.P. (2016) 12 SCC 744** wherein a Bench of two judges concluded as follows in paragraph 36:

"36. It is settled position of law that if the matriculation or equivalent certificates are available and there is no

other material to prove the correctness of date of birth, the date of birth mentioned in the matriculation certificate has to be treated as a conclusive proof of the date of birth of the accused. However, if there is any doubt or a contradictory stand is being taken by the accused which raises a doubt on the correctness of the date of birth then as laid down by this Court in Abuzar Hossain[Abuzar Hossainv.State of W.B., (2012) 10 SCC 489 : (2013) 1 SCC (Cri) 83] , an enquiry for determination of the age of the accused is permissible which has been done in the present case."

35. In **Sanjeev Kumar Gupta Vs. State of U.P. and another (2019) 12 SCC 370,** the Bench took notice of above mentioned judgements and delianted its view in paragraph 15 in following words:

" 15. The above decision in Abuzar Hossain [Abuzar Hossain v. State of W.B., (2012) 10 SCC 489 : (2013) 1 SCC (Cri) 83] was rendered on 10-10-2012. Though the earlier decision in Ashwani Kumar Saxena [Ashwani Kumar Saxena v. State of M.P., (2012) 9 SCC 750 : (2013) 1 SCC (Cri) 594] was not cited before the Court, it appears from the above extract that the three-Judge Bench observed that the credibility and acceptability of the documents, including the school leaving certificate, would depend on the facts and circumstances of each case and no hard-and-fast rule as such could be laid down. Concurring with the judgment of R.M. Lodha, J., T.S. Thakur, J. (as the learned Chief Justice then was) observed that directing an inquiry is not the same thing as declaring the accused to be a juvenile. In the former the court simply records a prima facie conclusion while in the latter a declaration is made on the basis of evidence. Hence the approach at the stage of directing the inquiry has to be more liberal : (Abuzar Hossain case[Abuzar Hossain v. State of W.B., (2012) 10 SCC 489 : (2013) 1 SCC (Cri) 83] , SCC pp. 513-14, para 48)

36. It is thus apparent that the scheme provided for in Section 94 of Act, 2015 contemplates preferential provisions on the basis of which the age of an accused who is in conflict with law is to be determined by the Court or the Board as the case may be. It may further be noted that the enquiry undertaken in pursuit of aforesaid exercise is different from declaring the accused as a juvenile. Observations contained in paragraph 15 of the judgement in Sanjeev Kumar Gupta (Supra) leave no room of doubt or ambiguity, in this regard.

37. When the case in hand is examined in the light of the provisions contained in Juvenile Justice (Care and Protection of Children) Act, 2015, the Juvenile Justice (Care and Protection of Children) Rules, 2007 and the case law noted above, the inescapable conclusion is that by virtue of section 9 of Juvenile Justice (Care and Protection of Children) Act, 2015, the Court before whom the matter is pending and the claim of juvenility is raised by an accused then such Court is competent to make an enquiry, take such evidence as may be necessary excluding an affidavit and thereafter record a finding on the matter stating the age of person as nearly as may be. As such, the order impugned in present criminal revision cannot be faulted on the ground that Court below had no jurisdiction in the matter.

38. This leads to the second issue involved in this case i.e. whether in the

facts and circumstances of the case the enquiry undertaken to determine the date of birth of revisionist is judicious or is arbitrary i.e. in ignorance of the law and material on record. It is established from record that claim of juvenility raised by revisionist was based upon the Certificate-cum-marksheet of High School Examination undertaken by revisionist in the year 2014. The date of birth of revisionist recorded therein is 17.12.2000. Since the occurrence took place on 4.11.2017, the age of revisionist on the date of occurrence as per aforesaid document was 17 years 8 months and 16 days.

39. However, aforesaid claim raised by revisionist was opposed by first informant-opposite party-2. Reliance was placed upon another certificate-cum mark-sheet of High School Examination undertaken by revisionist in the year 2016 with Roll No. 2312942, wherein the name of father of revisionist was mentioned as Manoj Ram and that of the mother as Rita Devi. As per aforesaid document, the date of birth of revisionist was 1.1.1999 and therefore, revisionist was aged about 18 years 10 months and 3 days on the date of occurrence.

40. Since there were two conflicting certificates cum mark-sheets of High School Examination undertaken by petitioner in the year 2014 and 2016 respectively, court below rightly passed the order dated 22.9.2020, whereby a direction was issued to the U.P. Board of Secondary Education Lucknow to submit a report regarding above. Direction was also issued to the Police of Police Station Dokati to submit a report regarding date of birth of revisionist.

41. However, in compliance of aforesaid order, no report was submitted by U.P. Secondary Education Board Lucknow. Police of Police Station Dokati, submitted two reports on 15.10.2020 and 28.12.2020 respectively, wherein it was reiterated that the date of birth of revisionist is 17.12.2000.

42. In view of above, the enquiry undertaken by Court below to determine the age of revisionist cannot be faulted with. Court below was well within its jurisdiction to itself enquire about the age of revisionist, itself.

43. This leads to the last issue involved in present case i.e. whether inspite of the High School Certificate of revisionist available on record, Court below could have proceeded to undertake an enquiry to adjudicate upon the age of revisionist and secondly whether the conclusion drawn by Court below is illegal, perverse or erroneous.

44. A similar issue came up for consideration before the Supreme Court in **Sanjeev Kumar Gupta (Supra)** wherein inspite of the High School Certificate of accused being available yet Court proceeded to determine the age of accused as per the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000. Court referred to the earlier judgement of Supreme Court on the issue. Strong reliance was placed upon the two judges Bench judgement in **Parag Bhati (Supra)** and on basis thereof Court proceeded to evaluate the claim of juvenility raised by accused therein. It is thus apparent that irrespective of the fact that High School Certificate of an accused being available on record, yet in a given set of facts and circumstances particularly, when a doubt is raised regarding the date of birth recorded therein, Court shall be well within its jurisdiction to undertake an

enquiry for deciding the age of an accused. In the light of above, the submission urged by learned counsel for revisionist that since the Certificate-cum-mark-sheet of High School Examination undertaken by revisionist was available on record, which was not found to be forged or fictitious then Court below had no jurisdiction to undertake an enquiry for adjudicating the date of birth of revisionist, is wholly misconceived.

45. From the record it is apparent that what is in dispute is the date of birth recorded in the certificate cum mark-sheet of the High School Examination undertaken by revisionist in the year 2014 and 2016, respectively and not the fact as to whether revisionist has passed the High School Examination or not. Therefore, by virtue of aforesaid judgement, court below was well within its jurisdiction to hold an enquiry for adjudicating the age of revisionist to find out whether revisionist was a juvenile on the date of occurrence or not.

46. As already noted above, oral evidence adduced by revisionist in support of his claim was disbelieved by Court below. This Court has itself examined the deposition of the two witnesses namely, A.P.W.1 Arjun Yadav and A.P.W.2 Ritu Devi and does not find any error in the conclusion drawn by court below for disbelieving aforesaid witnesses.

47. With regard to the documentary evidence adduced on behalf of revisionist in proof of his juvenility, the Court finds that no connecting evidence was laid by revisionist in support of his claim. Since the Certificate-cum-mark-sheet of High School Examination undertaken by revisionist in the year 2014 was disputed, burden fell upon revisionist himself to lead cogent and reliable connecting evidence in support of his claim. No attempt was made by revisionist to establish that consistently his date of birth has been recorded as 17.12.2000. On what basis, aforesaid date was mentioned in the High School Certificate has also not been disclosed nor any evidence has been led in this regard. Resultantly, no illegality has been committed by Court below in rejecting the claim of juvenility raised by revisionist.

48. There is another aspect of the matter which also needs to be noticed. In the present case, parties knew each others case and led evidence. No attempt was made by revisionist to adduce such evidence, which would establish his date of birth as 17.12.2000. The mark-sheet/High School certificate of revisionist relied upon by the prosecution wherein the date of birth of revisionist is mentioned as 09.01.1999, could not be disputed in the light of evidence, if any, adduced by revisionist. There is one more aspect of the matter. The principal of the Institution was not discarded as there was no such evidence adduced by revisionist. No evidence was led by revisionist to corroborate the entry regarding his date of birth as 17.12.2000 occurring in the High School certificate. At this stage, the observations made by the Apex Court in paragraph-28 of the judgement in **Babloo Pasi vs. State of Jharkhand and Another, 2008 (13) SCC 133** become relevant. Accordingly, same is extracted herein under:-

"28. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry

stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

49. Way back in the year 1988, the Apex Court dealt with the issue as to how an entry occurring in school record is to be proved. Following was observed in paragraph-14 of the judgement in **Birad Mal Singhvi vs. Anand Purohit, AIR 1988 SC 1796.**

"14. We would now consider the evidence produced by the respondent on the question of age of Hukmi Chand and Suraj Prakash Joshi. The respondent examined Anantram Sharma PW 3 and Kailash Chandra Taparia PW5. Anantram sharma PW 3 has been the Principal of New Government Higher Secondary School, Jodhpur since 1984. On the basis of the scholar's register he stated before the High Court that Hukmi Chand joined school on 24.6. 1972 in 9th class and his date of birth as mentioned in scholar's register was 13.6.1956. He made this statement on the basis of the entries contained in the scholar's register Ex. 8. He admitted that entries in the scholar's register are made on the basis of the entries contained in the admission form. He could not produce the admission form in original or its copy. He stated that Hukmi Chand was admitted in 9th class on the basis of transfer certificate issued by the Government Middle School, Palasni from where he had passed 8th standard. He proved the signature of Satya Narain Mathur the then Principal who had issued the copy of the scholar's register Ex. 8. Satya Narain Mathur was admittedly alive but he was not examined to show as to on what basis he had mentioned the date of birth of Hukmi Chand in Ex. 8. The evidence of Anantram Sharma merely proved that Ex. 8 was a copy of entries in scholar's register. His testimony does not show as to on what basis the entry relating to date of birth of Hukmi Chand was made in the scholar's register. Kailash Chandra Taparia PW 5 was Deputy Director (Examination) Board of Secondary Education, Rajasthan, he produced the counter foil of Secondary Education Certificate of Hukmi Chand Bhandari. a copy of which has been filed as Ex. 9. He also proved the tabulation record of the Secondary School Examination 1974, a copy of which has been filed as Ex. 10. In both these documents Hukmi Chand's date of birth was recorded as 13.6.1956. Kailash Chandra Taparia further proved Ex. 11 which is the copy of the tabulation record of Secondary School Examination of 1977 relating to SuraJ Prakash Joshi. In that document the date of birth of Suraj Prakash Joshi was recorded 11.3.1959 Kailash Chandra Taparia stated that date of birth as mentioned in the counter foil of the certificates and in the tabulation form Ex. 12 was recorded on the basis of the date of birth mentioned by the candidate in the examination form. But the examination form or its copy was not produced before Court. In substance the statement of the aforesaid two witnesses merely prove that in the scholar's register as well as in the Secondary School examination records the date of birth of a certain Hukmi Chand was mentioned as

13.6.1956 and in the tabulation record of Secondary School Examination a certain suraj Prakash Joshi's date of birth was mentioned as 11.3.1959. No evidence was produced by the respondent to prove that the aforesaid documents related to Hukmi Chand and Suraj Prakash Joshi who had filed nomination nation papers. Neither the admission form nor the examination form on the basis of which the aforesaid entries relating to the date of birth of Hukmi Chand and Suraj Prakash Joshi were recorded was produced before the High Court. "No doubt, Exs. 8, 9. 10. 11 and 12 are relevant and admissible but these documents have no evidentiary value for purpose of proof of date of birth of Hukmi Chand and Suraj Prakash Joshi as the vital piece of evidence is missing, because no evidence was placed before the Court to show on whose information the date of birth of Hukmi Chand and the date of birth of Suraj Prakash Joshi were recorded in the aforesaid document. As already stated neither of the parents of the two candidates nor any other person having special knowledge about their date of birth was examined by the respondent to prove the date of birth as mentioned in the aforesaid documents. Parents or near relations having special knowledge are the best person to depose about the date of birth of a person. If entry regarding date of birth in the scholars register is made on the information given by parents or some one having special knowledge of the fact, the same would have probative value. The testimony of Anantram Sharma and Kailash Chandra Taparia merely prove the documents but the contents of those documents were not proved. The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made in the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value." Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouch safe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts. namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted."

50. This Court cannot loose site of the views expressed in **Manoj @ Monu @**

Vishal Chaudhary vs. State of Haryana and Another, 2022 SCC Online SC 185, wherein the Court delineated its views with regard to section 35 of the Evidence Act in paragraph-32 and 38 of the report, which reads as under:-

"32. Section 35 of the Evidence Act, 1872 is attracted both in civil and criminal proceedings. It contemplates that a register maintained in the ordinary course of business by a public servant in discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which such register is kept would be a relevant fact. This Court in a judgement reported as Ravinder Singh Gorkhi v. State of U.P. held as under:-

'23. Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of Section 35 of the Evidence Act, the register maintained in the ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which, inter alia, such register is kept 18 (2006) 5 SCC 584 would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible thereunder: (i) it should be in the nature of the entry in any public or official register; (ii) it must state a fact in issue or relevant fact; (iii) entry must be made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of the country; and (iv) all persons concerned indisputably must have an access thereto.'

38. The appellant sought to rely upon juvenility only on the basis of school leaving record in his application filed under Section 7A of the 2000 Act. Such school record is not reliable and seems to be procured only to support the plea of juvenility. The appellant has not referred to date of birth certificate in his application as it was obtained subsequently. Needless to say, the plea of juvenility has to be raised in a bonafide and truthful manner. If the reliance is on a document to seek juvenility which is not reliable or dubious in nature, the appellant cannot be treated to be juvenile keeping in view that the Act is a beneficial legislation. As also held in Babloo Pasi, the provisions of the statute are to be interpreted liberally but the benefit cannot be granted to the appellant who has approached the Court with untruthful statement."

51. This Court is not unmindful of the fact that while adjudicating the claim of juvenility a liberal approach should be adopted and the benefit of doubt if any should be granted in favour of accused. At this stage, reference may also be made to the judgement of Apex Court in **Rishipal Singh Solanki Vs. State of U.P. and Ors., 2021 SCC Online SC 1079 ,** wherein Court considered the entire gamut of case law on the point and ultimately delineated its views in paragraph 29, which reads as under:

"29. What emerges on a cumulative consideration of the aforesaid catena of judgments is as follows:

(i) A claim of juvenility may be raised at any stage of a criminal proceeding, even after a final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection

of such claim. It can also be raised for the first time before this Court.

(ii) An application claiming juvenility could be made either before the Court or the JJ Board.

(iia) When the issue of juvenility arises before a Court, it would be Under Sub- section (2) and (3) of Section 9 of the JJ Act, 2015 but when a person is brought before a Committee or JJ Board, Section 94 of the JJ Act, 2015 applies.

(iib) If an application is filed before the Court claiming juvenility, the provision of Sub-section (2) of Section 94 of the JJ Act, 2015 would have to be applied or read along with Sub-section (2) of Section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

(iic) When an application claiming juvenility is made Under Section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a Court, then the procedure contemplated Under Section 94 of the JJ Act, 2015 would apply. Under the said provision if the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall, for the purpose of the JJ Act, 2015, be deemed to be true age of that person. Hence the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim of juvenility when the trial is before the concerned criminal court, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending (vide Section 9 of the JJ Act, 2015).

(iii) That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or Sub-section (2) of Section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

(iv) The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

(v) That the procedure of an inquiry by a Court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the concerned criminal court. In case of an inquiry, the Court records a prima facie conclusion but when there is a determination of age as per Sub-section (2) of Section 94 of 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.

(vi) That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

(vii) This Court has observed that a hyper-technical approach should not be adopted when evidence is adduced

on behalf of the Accused in support of the plea that he was a juvenile.

(viii) If two views are possible on the same evidence, the court should lean in favour of holding the Accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the Court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

(ix) That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

(x) Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the Court or the JJ Board provided such public document is credible and authentic as per the provisions of the Indian Evidence Act viz., Section 35 and other provisions.

(xi) Ossification Test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015."

52. When the case in hand is examined in the light of aforesaid principles laid down regarding the parameters, in accordance with which the claim regarding juvenility has to be adjudicated the object and nature of the claim of juvenility raised by an accused, this Court does not find any good ground to interfere in this criminal revision. Revisionist has failed to discharge the initial burden as observed in **Abuzar Hossain (Supra),** and noted in sub-paragraph 39.2 of paragraph 28 in **Rishipal Singh Solanki (Supra).** The claim of revisionist does not appear to be bona fide either.

53. In view of above, revision fails and is liable to be dismissed.

54. It is accordingly dismissed.

55. Cost made easy.

(2022)07ILR A844
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Criminal Revision No. 2278 of 2022

Jailendra Singh & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Praveen Kumar Singh, Sri Syed Imran Ibrahim, Sri Manish Tiwary (Senior Adv.)

Counsel for the Opposite Parties:
G.A., Sri Ravish Kumar Singh, Sri Satyendra Kumar Tripathi

Criminal Law - Code Of Criminal Procedure, 1973 - Section 319 - Power to proceed against other persons appearing to be guilty of offence - doctrine "judex damnatur cum nocens absolvitur" (Judge

is condemned when guilty is acquitted)- A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided during trial some evidence surfaces against the proposed accused - Section 319 of the Cr.P.C. is meant to rope in even those persons who were not implicated when the charge sheet was filed but during the trial the Court finds that sufficient evidence has come on record to summon them and face the trial (Para 12, 15)

Criminal Law - Code Of Criminal Procedure, 1973 - Section 319 - Evidence - apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. - 'evidence' is thus, limited to the evidence recorded during trial." - though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity - Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner (Para 10)

Revisionists named in the FIR & were also assigned role in the incident but absolved by the Investigating Officer - In the St.ment of the first informant/O.P. No.2 u/s 161 Cr.P.C. names of the revisionists appeared - first informant/O.P. No.2 in her St.ment recorded before the Court named the revisionists who were St.d to be present with fire arms on the date of the incident and incessantly fired upon the car of the first informant and injured both the first informant and her driver - St.ment of the first informant/injured/O.P. No.2 naming the revisionists establishes the complicity of the revisionists and unrebutted evidence can lead to the conviction of the revisionists - ingredients of exercise of power under Section 319 Cr.P.C. made out (Para 17)

Dismissed. (E-5)

List of Cases cited :

1. Mohammad Ispahani Vs Yogendra Chandak & ors. 2017 (16) SCC 226

2. Nahar Singh Vs The St. of U.P. & anr. 2022 Live Law (SC) 291

3. Hardeep Singh Vs St. of Pun. & ors. reported in 2014 (3) SCC 92

4. Rajesh & ors. Vs St. of Har. [2019 (6) SCC 368]

5. Ramesh Chandra Srivastava Vs The St. of U.P. & anr. [Cri. Appeal No. 990 of 2021, arising out of SLP (Crl.) No. 6381 of 2020 decided on 13.9.2021

6. Saeeda Khatoon Arshi Vs St. of U.P. & anr. reported in 2020 (2) SCC 323

7. Rampal Singh & ors. Vs St. of U.P. & anr. 2009(4) SCC 423

(Delivered by Hon'ble Ashutosh Srivastava, J.)

1. Heard Sri Manish Tiwary, learned Senior Advocate assisted by Sri Syed Imran Ibrahim, learned counsel for the revisionists, the learned A.G.A. and perused the record.

2. The present criminal revision has been filed assailing the order dated 21.5.2022 passed by the learned Additional Sessions Judge, Court No.6, Varanasi in S.T. No. 1164 of 2021 *(State vs. Srinivas and others)* arising out of Case Crime No. 985 of 2018, under Sections 307, 504, 506 and 120-B I.P.C., P.S. Lanka, District Varanasi whereby the application under Section 319 Cr.P.C. moved by the O.P. No.2 has been allowed and the revisionists

have been summoned to face trial of Case Crime No. 985 of 2018, under Sections 307, 504, 506 and 120-B I.P.C., P.S. Lanka, District Varanasi.

3. It has been vehemently contended by Sri Manish Tiwary, learned Senior Counsel that the order impugned is patently illegal and has been passed against the settled principles of law and as such is not sustainable. The learned Court below has erred in law in omitting to consider the settled position of law to the effect that to summon an accused under Section 319 Cr.P.C. the evidence which has already been tested once during the course of investigation should not be the same and there needs to be something more to enable the Court to exercise the power under Section 319 Cr.P.C. The revisionists are lawyers by profession and practicing in the District Court Varanasi and have been implicated only in their professional capacity. A dispute exists between the O.P. No.2/first informant and one Kripa Shankar Rai and the revisionists have been impleaded as accused only pre-emptively. It is also contended that the exercise of power under Section 319 Cr.P.C. by the Court below is contrary to the law laid down by the Apex Court in the case of **S. Mohammad Ispahani vs. Yogendra Chandak and others** reported in **2017 (16) SCC 226.** Reliance is further placed on the decisions of the Apex Court reported in **2019 (7) SCC 806; 2019 (4) SCC 342 and 2017 (7) SCC 706.** It is accordingly prayed that the revision be allowed and the order dated 21.5.2022 be set aside.

4. Learned counsel for the O.P. No.2 has opposed the revision by submitting that the order dated 21.5.2022 is just and proper and warrants no interference by this Court. Reliance is placed on the decision of the Apex Court in the case of **Nahar Singh vs. The State of U.P. and another reported in 2022 Live Law (SC) 291.**

5. In order to appreciate the rival contentions it would be apt to briefly state the facts of the case leading up to filing of the application under Section 319 Cr.P.C. by the opposite party and the exercise of power under Section 319 Cr.P.C. by the learned Court below. The genesis of the case between the parties arises out of an F.I.R. dated 20.9.2018 lodged by the O.P. No.2 at 4:42 hours in respect of an incident stated to have taken place on 19.9.2018 at 23:00 hours wherein it has been alleged that while she was coming back to her house from work 8 persons apprehended her in her car being driven by her driver. The eight persons incessantly fired at her vehicle in which both she and her driver sustained injuries. The O.P. No.2 has stated to have identified four persons (including the revisionist herein) out of the eight persons. The Investigating Officer on 20.9.2018 (i.e. the date of lodging the F.I.R.) recorded the statement of the first informant/Opposite Party No.2 in which the names of the revisionists were mentioned. On 24.9.2018 the statements of son, husband and elder brother-in-law were got recorded and none of the witnesses mentioned the names of the revisionists. The factum of the existence of long standing enmity with one Srinivas Singh (co-accused) was stated by the witnesses. On 21.10.2018 the statement of the injured driver of the O.P. No.2 was also got recorded under Section 161 Cr.P.C. in which he also stated the names of the revisionists. On 21.12.2018 the Investigating Officer, on the basis of CCTV footage and mobile location etc., concluded that the complicity of the revisionists in the alleged incident was not true and removed

their names after confronting the O.P. No.2 of the alibi of the revisionists. On 14.1.2019 the second statement of the O.P. No.2 was also got recorded wherein she reiterated her earlier statement. The Investigating Officer on 04.11.2019 submitted charge sheet against three persons, the names of the revisionists did not find place in the charge sheet dated 04.11.2019. On 5.5.2022 the examination in chief commenced and the O.P. No.2 in her depositions as PW-1, merely repeated her version as stated in the FIR, on 10.5.2022 the O.P. No.2 moved an application under Section 319 Cr.P.C. before the Court below with a prayer to summon the revisionists and co-accused Kripa Shankar Rai. The said application has been allowed by the impugned order dated 21.5.2022 and the revisionists have been summoned to face trial.

6. I have heard the learned counsels for the parties and have perused the record.

7. The principles for exercise of power under Section 319 Cr.P.C. by Criminal Courts are well settled. The Constitution Bench of the Apex Court in **Hardeep Singh vs. State of Punjab and others** reported in **2014 (3) SCC 92** has elaborately considered all contours of Section 319 Cr.P.C. The Apex court held that power under Section 319 Cr.P.C. is a discretionary and extra-ordinary power which has to be exercised sparingly. The Court further held that the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the judgement their Lordships held as under:-

"105. Power under Section 319 Cr.P.C. is a discretionary and an extra-rdinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be 6 Page 65exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if ''it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not ''for which such person could be convicted'. There, is therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused."

8. A two judge Bench of the Apex Court again reiterated the same ratio in **Rajesh and others vs. State of Haryana [2019 (6) SCC 368]; Ramesh Chandra Srivastava vs. The State of U.P. and**

another [Cri. Appeal No. 990 of 2021, arising out of SLP (Crl.) No. 6381 of 2020 decided on 13.9.2021.

9. The question as to in what situations the power under the section can be exercised in respect of persons not named in the FIR or named in the FIR but not charge-sheeted or discharged (as in the case at hand) was also considered and it was held that a person whose name does not appear in the FIR or in the charge sheet or whose name appears in the FIR and not in the charge-sheet can still be summoned by the Court provided the conditions under the section stand fulfilled. The Apex Court in the case **Hardeep Singh (Supra)** observed as under:-

"111. Even the Constitution Bench in Dharam Pal (CB) has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the chargesheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the chargesheet or whose name appears in the FIR and not in the main part of the chargesheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193 Cr.P.C. can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

117.6. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of Sections 300 and 398Cr.P.C. has to be complied with before he can be summoned afresh."

10. The word "evidence' as used under Section 319(1) of Cr.P.C. was also considered in Hardeep Singh (Supra) and the Court observed as under:-

"84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Cr.P.C. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The "evidence' is thus, limited to the evidence recorded during trial."

11. The principles with regard to exercise of power by the Court to summon an accused under Section 319 Cr.P.C. were reiterated in **S. Mohammed Ispahani** (supra) and it was held that the power under Section 319 Cr.P.C. to summon even those persons who are not named in the

charge-sheet to appear and face trial is unquestionable. The Court observed as under:-

"28. Insofar as power of the Court under Section 319 of the Cr.P.C. to summon even those persons who are not named in the charge sheet to appear and face trial is concerned, the same is unquestionable. Section 319 of the Cr.P.C. is meant to rope in even those persons who were not implicated when the charge sheet was filed but during the trial the Court finds that sufficient evidence has come on record to summon them and face the trial. In Hardeep Singh's case, the Constitution Bench of this Court has settled the law in this behalf with authoritative pronouncement, thereby removing the cobweb which had been created while interpreting this provision earlier. As far as object behind Section 319 of the Cr.P.C. is concerned, the Court had highlighted the same as under:

"19. The court is sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

12. The power to proceed against persons named in FIR with specific allegations against them, but not charge-sheeted was reiterated in **Rajesh and others vs. State of Haryana** reported in **2019 (6) SCC 368** and it was held that persons named in the FIR but not implicated in the charge-sheet can be summoned to face trial, provided during trial some evidence surfaces against the proposed accused.

13. In **Saeeda Khatoon Arshi vs. State of U.P. and another** reported in **2020 (2) SCC 323** it was held that it is the duty of the Court to give full effect to the words used by the legislature so as to encompass any situation which the Court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot-free by being not arraigned in the trial in spite of the possibility of his complicity which can be gathered from the documents presented by the prosecution.

14. The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty. Alternatively, certain statutory presumptions in relation to certain class of offences have been raised against the accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. The entire effort is not to allow the real perpetrator of an offence to get away unpunished. The provision of Section 319 Cr.P.C. has been incorporated in the Code of Criminal Procedure in furtherance of the said objective.

15. Section 319 Cr.P.C. springs out of the doctrine *"judex damnatur cum nocens absolvitur"* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a Beacon Light while understanding the ambit and spirit underlying the enactment of Section 319 Cr.P.C. It is the duty of the Court to do justice by punishing the real culprit, where

the investigating agency for any reason does not array one of the real culprits as an accused, the Court is not powerless in calling the said accused to face trial. Section 319 Cr.P.C. allows the Court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers has to be necessarily not be an accused already facing trial. He can either be a person named in the column 2 of the charge-sheet filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material before the Court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

16. The Court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and therefore, it will be inappropriate to deny the existence of such powers with the Courts in our criminal justice system where it is not uncommon that the real accused at times, get away by manipulating the investigation and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or enquiry even though he may be connected with the commission of the offence.

17. Now applying the ratio of the various decisions discussed above to the case at hand, the Court finds that the learned Additional Sessions Judge, Court No.6, Varanasi while exercising the powers under Section 319 Cr.P.C. to summon the revisionists who though were named in the FIR but absolved by the Investigating Officer has taken note of the fact that the revisionists were named in the FIR dated 20.9.2018 and were also assigned a role in the incident. In the statement of the first informant/O.P. No.2 recorded under Section 161 Cr.P.C. on 20.9.2018 and 14.1.2019 the names of the revisionists has appeared. In the statement of driver of the first informant/O.P. No.2, who was also injured in the incident, the name of the revisionists has surfaced. The first informant/O.P. No.2 in her statement recorded before the Court in the capacity of PW-1 has named the revisionists who were stated to be present with fire arms on the date of the incident and incessantly fired upon the car of the first informant and injured both the first informant and her driver. The Court below has opined that the statement of the first informant/injured/O.P. No.2 naming the revisionists establishes the complicity of the revisionists and unrebutted evidence can lead to the conviction of the revisionists. Thus, the ingredients of exercise of power under Section 319 Cr.P.C. in the case at hand are made out. Accordingly, the Court below upon considering the settled legal position regarding the exercise of powers under Section 319 Cr.P.C. has formed the view on the basis of the statement of the PW-1/Informant/injured Opposite Party No.2 that the revisionists be tried together with the other accused and for the said purpose has summoned the revisionists.

18. The Apex Court in the case of ***Rampal Singh and others Vs. State of U.P. and another*** reported in ***2009(4) SCC 423*** while dealing with similar circumstances observed as under:-

"17. The ingredients of Section 319 are unambiguous and indicate that where in the course of inquiry into, or trial of, an offence, it appears from the evidence

that any person not being the accused has committed any offence, for which such person could be tried together with the accused, the Court may proceed against such person for the offence he has committed.

18. All that is required by the Court for invoking its powers under Section 319 Cr.P.C.is to be satisfied that from the evidence adduced before it, a person against whom no charge had been framed, but whose complicity appears to be clear, should be tried together with the accused. It is also clear that the discretion is left to the Court to take a decision on the matter.

19. In the instant case, although, the appellants were named in the F.I.R., they were not named as accused in the charge-sheet during the trial. However, P.W.1 in his evidence, has named the appellants as persons who were involved in the incident causing the death of Brijesh Kumar Singh and injuries to Manvender Singh. Despite the above, the trial Court, on two separate occasions, rejected the prayer made by the Respondent No.2 for summoning the appellants herein under Section 319 Cr.P.C. The High Court, after considering the evidence of P.W.1, Kamlesh Singh, thought it necessary for the appellants to be summoned."

19. In view of the above, I do not find any error in the order dated 21.5.2022 of the learned Additional Sessions Judge, Court No.6, Varanasi, allowing the application of the O.P. No.2 under Section 319 Cr.P.C.and summoning the revisionists to face the trial along with other accused.

20. The criminal revision has no merit and is, accordingly, **dismissed** leaving it open for the revisionists to avail remedy available to them under the law.

(2022)07ILR A851
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.07.2022

BEFORE

THE HON'BLE SAMEER JAIN, J.

Criminal Revision No. 2638 of 2022

Pankaj Kumar Yadav ...Revisionist
Versus
State of U.P. ...Respondent

Counsel for the Revisionist:
Sri Ramesh Kumar Saxena, Sri Dashrath Lal

Counsel for the Opposite Parties:
G.A., Sri Hari Bans Singh

Criminal Law - Criminal Procedure Code, 1973 - Section 167(2) (a)(ii) - Statutory Bail - if charge-sheet against the accused is not filed within stipulated period of time and before filing the charge-sheet if accused applied for statutory bail under Section 167(2) Cr.P.C. then, he has to be released on bail irrespective of the fact that whether his bail application pending at the time of subsequent filing of the chargesheet - The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding subsequent filing of the chargesheet or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court - for availing the benefit u/s 167(2) CrP.C., it is necessary to apply bail before submission of charge-sheet - if accused fails to apply bail before submission of charge-sheet then he cannot be benefited under Section 167(2) CrP.C. (Para 12, 14)

Revisionist arrested on 16.04.2022 for offence u/s 308, 323, 504, 452 IPC - none of the offence punishable for more than seven years - sixty days from the date of arrest expired on 15.06.2022 (after excluding first date of remand

i.e. 16.04.2022) - an application u/s 167(2) Cr.P.C. moved by the revisionist on 17.06.2022 - charge-sheet filed on same day i.e. on 17.06.2022 but at 4.00 PM - as before deciding the bail application charge-sheet was submitted therefore bail application of the revisionist u/s 167(2) Cr.P.C. was dismissed by trial court – Held - although, charge-sheet was submitted on same day i.e on 17.06.2022 but at about 4.00 P.M. i.e. after the bail application moved by the revisionist under Section 167(2) Cr.P.C. - indisputably, charge-sheet did not file before filing the bail application of the revisionist u/s 167(2) Cr.P.C. within stipulated period of sixty days, which was expiring on 15.06.2022 and before submission of charge-sheet revisionist applied for default bail u/s 167(2) Cr.P.C., therefore revisionist has to be released on statutory bail under Section 167(2) Cr.P.C.

Allowed. (E-5)

List of Cases cited:

1 Sanjay Dutt Vs St. through C.B.I., Bombay (II) (1994) 5 SCC 410

2. Bikramjit Singh Vs St. of Pun. (2020) 10 SCC 616.

3. Pragyna Singh Thakur Vs St. of Mah. (2011) 10 SCC 445

4. Uday Mohanlal Acharya Vs St. of 3 of 11 Maharashtra AIR 2001 SC 1910

5. M. Ravindran Vs Intelligence Officer, Director of Revenue Intelligence (2021) 2 SCC 485

(Delivered by Hon'ble Sameer Jain, J.)

1. Heard Sri Ramesh Kumar Saxena, learned counsel for the revisionist, Sri Hari Bans Singh, learned counsel for the informant, Sri Arvind Kumar, learned AGA for the State and perused the record of the case.

2. The instant revision has been moved by the revisionist against the order dated 17.06.2022 passed by Additional Chief Judicial Magistrate, Court No.5, Allahabad in Case Crime No. 167 of 2022, under Sections 308, 323, 504, 506, 452 IPC, Police Station Jhunsi, District Prayagraj by which, Additional Chief Judicial Magistrate dismissed the bail application moved by the revisionist under Section 167(2) Cr.P.C.

3. Filtering out unnecessary details, the basic facts, which are relevant for the purpose of present revision is that FIR of the present case was lodged on 16.04.2022 against the revisionist and one another under Sections 308, 323, 504, 452 IPC at Police Station Jhunsi, District Prayagraj. Pursuant to the FIR dated 16.04.2022 revisionist was arrested on 16.04.2022 and since then he is in custody in the present matter. As, the matter relates to Sections 308, 323, 504, 452 IPC and none of the offence is punishable for more than seven years and as charge-sheet did not submit in the court within sixty days from the date of arrest of revisionist, therefore, an application under Section 167(2) Cr.P.C. was moved by the revisionist on 17.06.2022 praying that as sixty days have already been lapsed since his arrest and till date no charge-sheet has been submitted, therefore, revisionist is entitled to be released on statutory bail provided under Section 167(2) Cr.P.C. but court below on same day i.e. 17.06.2022 dismissed his bail application moved under Section 167(2) Cr.P.C. Revisionist challenged the order dated 17.06.2022 passed by the court below in the instant revision.

4. Learned counsel for the revisionist submitted that admittedly in the present matter, revisionist is in custody in the present case since 16.04.2022 and none of the offence are having punishment of more

than seven years, therefore, as per section 167(2) Cr.P.C. within sixty days from the date of arrest of revisionist, investigation must have been completed and charge-sheet must have been filed within sixty days i.e. latest by 15.06.2022 but as, till 17.06.2022, charge-sheet in the present matter did not file, therefore, on 17.06.2022 an indefeasible right to release the revisionist on bail under Section 167(2) Cr.P.C. accrued, therefore, revisionist on 17.06.2022 filed bail application before the court concerned under Section 167(2) Cr.P.C. but his bail application was wrongly dismissed by the court below, therefore, order dated 17.06.2022 is illegal and liable to be set aside and revisionist should be released on statutory bail under Section 167(2) Cr.P.C.

5. Learned counsel for the revisionist submitted that the law is settled that if within stipulated period of time, charge-sheet has not been submitted and before submission of charge-sheet, if accused applied for bail then, he has to be released on bail by virtue of Section 167(2) Cr.P.C. Learned counsel for the revisionist placed reliance on the judgment of the constitution Bench of the Apex Court in the case of **Sanjay Dutt Vs. State through C.B.I., Bombay (II) (1994) 5 SCC 410** and three judge Bench of the Apex Court in the case of **Bikramjit Singh Vs. State of Punjab (2020) 10 SCC 616**. Learned counsel for the revisionist further submitted that the court below after placing the reliance in the case of **Pragyna Singh Thakur Vs. State of Maharashtra (2011) 10 SCC 445** dismissed the bail application of revisionist moved under Section 167(2) Cr.P.C., therefore, committed an illegality of law as Pragyna Singh Thakur case (supra) has been held per incurium by three judge Bench of the Apex Court in case of Bikramjit Singh (supra). Learned counsel for the revisionist next submitted that as revisionist has applied for bail even before filing of the charge-sheet, therefore, his bail application under Section 167(2) Cr.P.C. cannot be dismissed on the ground that before filing of the charge-sheet his bail application could not be decided, therefore, order dated 17.06.2022 is illegal and is liable to be set aside and revisionist is entitled to be released on statutory bail under Section 167(2) Cr.P.C.

6. Per contra, learned counsel for the informant and learned AGA opposed the prayer and submitted that there is no illegality in the order dated 17.06.2022 passed by the court below and as before deciding the bail application of the revisionist, charge-sheet was submitted in the court concerned, therefore, bail application of the revisionist moved under Section 167(2) Cr.P.C. was rightly dismissed by the court below.

7. Learned counsel for the informant placed reliance on the judgment of Pragyna Singh Thakur case (supra). He further placed reliance on the judgment of **Uday Mohanlal Acharya Vs. State of Maharashtra AIR 2001 SC 1910.** Learned counsel for the informant vehemently argued that as on the same day when bail application was moved, charge-sheet has been submitted and till the submission of charge-sheet, bail application of the revisionist moved under Section 167(2) Cr.P.C. was pending, therefore, after submission of the charge-sheet revisionist could not be released on statutory bail under Section 167(2) Cr.P.C. and there is no illegality in the order dated 17.06.2022 passed by the court below. He further submitted that the order dated 17.06.2022 is based on Pragyna Singh Thakur case

(supra) of the Apex Court and law laid down in that case was binding upon the Magistrate, therefore, if Magistrate after relying upon the judgment of Pragyna Singh Thakur case (supra) dismissed the bail application of the revisionist moved under Section 167(2) Cr.P.C. then, Magistrate did not commit any illegality and order dated 17.06.2022 cannot be held to be illegal.

8. I have given anxious consideration on the rival submission and perused the record of the case.

9. Admitted facts of the case is that against revisionist, FIR was lodged on 16.04.2022 under Sections 308, 323, 504, 452 IPC at Police Station Jhunsi, District Prayagraj at Case Crime No. 167 of 2022 and revisionist is in jail since 16.04.2022 pursuant to the FIR dated 16.04.2022 and none of the offence is punishable with more than seven years. Therefore, as per Section 167(2) Cr.P.C., the charge-sheet of the present case should have been filed within sixty days from the date of arrest of revisionist and the sixty days was expiring on 15.06.2022 (after excluding first date of remand i.e. 16.04.2022) [See M. Ravindran Vs. Intelligence Officer, Director of Revenue Intelligence (2021) 2 SCC 485]. Therefore, after 15.06.2022, the indefeasible right in favour of the accused accrued under Section 167(2) Cr.P.C. to release him on default bail and revisionist moved statutory bail under Section 167(2) Cr.P.C. on 17.06.2022 and till then no charge-sheet was submitted. Although, charge-sheet was submitted on same day i.e on 17.06.2022 but at about 4.00 PM i.e. after the bail application moved by the revisionist under Section 167(2) Cr.P.C.

10. To decide the present dispute, it is necessary to visit Section 167 Cr.P.C., which runs as follows:-

"167. Procedure when investigation cannot be completed in twenty four hours.

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty- four hours fixed by section 57, and there are grounds for believing that the accusation or information is well- founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub- inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) *ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;*

(ii) *sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]*

(b) *no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;]*

(c) *no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.*

Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;].

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.]

[Provided further that in case of a women under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognise social institution].

(2A) Notwithstanding anything contained in sub- section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub- inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub- section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2);

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the record of the case together with a copy of the entries in the

diary relating to the case which was transmitted to him by the office in charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months for the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify."

11. The constitution Bench of the Apex Court in Sanjay Dutt case (supra) observed in paragraph no. 53(2)(b) as:-

"(2)(b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to-the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage."

12. Thus, from the perusal of the Constitution Bench judgement of Sanjay Dutt case (supra) if charge-sheet within stipulated period of time is not submitted then indefeasible right of accused to release him on bail under Section 167(2) CrP.C. accrues but this will remain effective only till submission of charge-sheet and if accused failed to apply bail before submission of charge-sheet then he cannot be benefited under Section 167(2) CrP.C. and for availing the benefit under Section 167(2) CrP.C., it is necessary for the accused to apply bail before submission of charge-sheet.

13. Recently, three judge Bench of the Apex Court in case of **M. Ravindran Vs. Intelligence Officer, Director of Revenue Intelligence (2021) 2 SCC 485** after

discussing the matter in detail observed in paragraph no. 25 as:-

"25.1 Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have "availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2), CrPC read with Section 36A (4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigating agency.

25.2 The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the Court; or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court.

25.3 However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

25.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid."

14. Therefore, the issue is not res-integra and it has been settled by firstly Constitution Bench of the Apex Court in Sanjay Dutt case (supra) and thereafter three judges Bench of Apex Court in the case of M. Ravindran (supra). The three judges Bench in case of M. Ravindran (supra) followed the decision of Constitution Bench and held that if charge-sheet against the accused is not filed within stipulated period of time and before filing the charge-sheet if accused applied for statutory bail under Section 167(2) Cr.P.C. then, he has to be released on bail irrespective of the fact that whether his bail application pending at the time of subsequent filing of the charge-sheet.

15. In case at hand, the court below relied upon the decision of the Apex Court in Pragyna Singh Thakur case (supra) and held that as before taking decision on the bail application moved by the revisionist under Section 167(2) Cr.P.C., charge-sheet has been filed, therefore, he cannot be released on default bail under Section 167(2) Cr.P.C., but while observing this, court below failed to consider the fact that the case of Pragyna Singh Thakur (supra) has been held per incurium by three judge Bench of the Apex Court in case of Bikramjit Singh (supra) on which reliance was placed by the learned counsel for the revisionist. In Bikramjit Singh case (supra)

three judge Bench of the Apex Court after discussing the matter in detail observed as:-

"On a careful reading of the aforesaid two paragraphs, we think, the two-Judge Bench in Pragyna Singh Thakur case (2011) 10 SCC 445 has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is a binding precedent. That apart, it has been followed by a three- Judge Bench in Sayed Mohd. Ahmad Kazmi case (2012) 12 SCC 1. Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi case(2012) 12 SCC 1 which is based on three-Judge Bench decision in Uday Mohanlal Acharya case (2001) 5 SCC 453, we are obliged to conclude and hold that the principle laid down in paras 54 and 58 of Pragyna Singh Thakur case (2011) 10 SCC 445 (which has been emphasised by us: see paras 42 and 43 above) does not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be good law. Our view finds support from the decision in Union of India v. Arviva Industries India Ltd (2014) 3 SCC 159."

16. Therefore, law laid down in the case of Pragyna Singh Thakur (supra), has already been declared per incurium by three judges Bench in the case of Bikramjit Singh (supra), therefore, no reliance can be placed on Pragyna Singh Thakur case (supra) while deciding the default bail application of the revisionist moved under Section 167(2) Cr.P.C., therefore, court below committed error of law while placing reliance on Pragyna Singh Thakur case (supra).

17. Record of the present case clearly suggest that charge-sheet in the present matter was filed on 17.06.2022 i.e. on same day when mandatory bail application was moved by the revisionist under Section 167(2) Cr.P.C. and impugned order shows that charge-sheet was filed at 4.00 PM. Thus, indisputably, charge-sheet did not file before filing the bail application of the revisionist under Section 167(2) Cr.P.C.

18. As, in the present case within stipulated period of sixty days, which was expiring on 15.06.2022, charge-sheet did not file and before submission of charge-sheet revisionist applied for default bail under Section 167(2) Cr.P.C., therefore in view of the law laid down by the Constitution Bench of the Apex Court in case of Sanjay Dutt (supra), three judges Bench in the case of Bikramjit Singh (supra) and three judge Bench in case of M. Ravindran (supra) revisionist has to be released on statutory bail under Section 167(2) Cr.P.C.

19. Therefore, from the above discussion, in my view, order dated 17.06.2022 is illegal and is liable to be set aside and revisionist is entitled to be released on default bail under Section 167(2) Cr.P.C.

20. Accordingly, the present revision is **allowed.** The order dated 17.06.2022 is hereby set-aside and revisionist is directed to be released on statutory bail under Section 167(2) Cr.P.C. in the aforesaid case.

(2022)07ILR A858
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 328 of 2022

State of U.P. ...Appellant

Versus

Chandraveer ...Respondent

Counsel for the Appellant:
Shiv Kumar Pal, Sri Ratan Singh, A.G.A.

Counsel for the Respondent:

Criminal Law - Criminal Procedure Code, 1973 - Barring extra-judicial confession-there is nothing to link the accused while committing crime-acquittal order based on ocular testimony and supporting evidence-no perversity in Trial Court's order.

Appeal dismissed. (E-9)

List of Cases cited:

1. Tota Singh & anr. Vs St. of Pun., (1987) 2 SCC 529

2. Ramesh Babulal Doshi Vs St. of Guj., (1996) 9 SCC 225

3. St. of Rajesthan Vs St. of Guj., (2003) 8 SCC 180

4. St. of Goa Vs Sanjay Thakran, (2007) 3 SCC 755

5. Chandrappa & ors. Vs St. of Karn., (2007) 4 S.C.C. 415,

6. Ghurey Lal Vs St. of U.P., (2008) 10 SCC 450

7. Siddharth Vashishtha @ Manu Sharma Vs St. (NCT of Delhi), (2010) 6 SCC 1

8. Babu Vs St. of Kerala, (2010) 9 SCC 189

9. Ganpat Vs St. of Haryana, (2010) 12 SCC 59,

10. Sunil Kumar Sambhudayal Gupta (Dr.) & ors. Vs St. of Mah., (2010) 13 SCC 657

11. St. of U.P. Vs Naresh, (2011) 4 SCC 324, St. of M.P. Vs Ramesh, (2011) 4 SCC 786, and Jayaswamy Vs St. of Karnataka, (2018) 7 SCC 219.

12. Apren Joseph Alias Current Kunjukunju & ors. Vs The St. of Kerala, (1973) 3 SCC 114

13. Tara Singh & ors. Vs St. of Pun. 1991 Supp (1) SCC 536

14. Meharaj Singh Vs St. of U.P., (1994) 5 SCC 188

15. Thanedar Singh Vs St. of M.P., (2002) 1 SCC 487

16. P. Rajagopal & ors. Vs St. of T.N. (2019) 5 SCC 403

17. Criminal Appeals No. 333-334 of 2017, Shailendra Rajdeo Paswan Vs St. of Guj.

18. Mohd. Azad @ Samin Vs St. of West Bengal, 2008 (15) SCC 449

19. Sansar Chand Vs St. of Raj. 2010 (10) SCC 604

20. Sahadevan & anr. Vs St. of T.N. 2012 (6) SCC 403

21. Ram Lal Vs St. of H.P. 2019 (17) SCC 411

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal under Section 378(3) of Criminal Procedure Code, 1973 (in short 'Cr.P.C.'), has been instituted at the behest of State of U.P. seeking to challenge the judgment dated 30.11.2021 passed by Addl. Sessions Judge, Court No. 10, District Budaun in S.T. No. 31 of 2018 (State Vs. Chandraveer Singh S/o Pachhu Jatav), arising out of Case Crime No. 163 of 2010 purported to be under Sections 302/34, 201, 506 IPC, Police Station Wazeerganj, District Budaun.

2. Brief facts of the case shorn off unnecessary details as portrayed by the prosecution is to the effect that two days prior to lodging of the FIR 17.2.2010, father of the informant had gone to the agricultural field for watering the same and after returning to the house, he received a phone call from the accused, who happens to be husband of the informant and son in law of the deceased, to come to a particular

place. When the said fact was apprised to the informant as well as the family member, then resistance was sought to be made by the informant and the family member that the deceased should the accused. However the deceased proceeded while honouring the phone call so made by the accused at 2:00 P.M, however he did not come back till 4:00 P.M, though as per the written report, he had taken the jewellery of the informant for pledging the same. Search was sought to be made by the deceased, however the whereabouts of the deceased were missing. As per the written complaint dated 17.2.2010, so sought to be lodged before the S.H.O, P.S. Wazeerganj, District Budaun, an information was acceeded to the informant and the family member that the dead body was found in a hole near Hathara Road. Accordingly, a request was made to lodge the FIR. On the basis of the written complaint so sought to be made by the informant, a first information report got registered being Case Crime no.163 of 2010 on 17.2.2010 at 17:30 hours against the accused purported to be under Sections 302/201 IPC. Consequent to lodging of the FIR, S.I. Mahesh Prasad was nominated as the Investigating Officer, who according to the prosecution version prepared the site plan, panchnama and sent the body for post mortem and also recorded the statements of the witnesses. On 26.2.2010, investigation was concluded by the I.O, and charge sheet in Case Crime no. 163 of 2010 was submitted against the accused under section 302/34, 201, 506 IPC. It has come on record that allegations referable to commission of crime were also made against the co-accused Iliyas and Karan Singh, charge sheet was also submitted against them under Section 302/34, 201, 506 IPC, however, they were acquitted in Sessions Trial No. 687 of 2010 on 11.3.2014 by the learned Trial Court. Meaning thereby, it is only the accused herein against whom, criminal proceedings so sought to be initiated by accused herein culminated into filing of the present appeal. The case was committed for trial before the Sessions Court on 7.7.2017 and the charges under Sections 302/34, 201, 506 IPC were read over to the accused. The accused denied the charges and claimed to be tried.

3. To bring home the charges, the prosecution produced following witnesses, namely:

1.	Smt. Anita	PW1
2.	Rupendra	PW2
3.	Smt. Premwati	PW3
4.	S.I. Raj Rishi Sharma	PW4
5.	Nand Ram	PW5
6.	Dr. Harish Chandra	PW6

4. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	Written complaint	Ex.ka1
2.	Chik FIR	Ex.ka2
3.	Copy of G.D.	Ex.ka3
4.	Post mortem Report	Ex.ka4

5. We have heard Sri Ratan Singh, learned A.G.A, for the State-appellant.

6. Before driving in the proceedings initiated at the behest of State appellant while filing the present appeal under Section 378(3) CrPC against the judgment of acquittal, this Court has to consider the law on the subject.

7. This Court has to bear in mind the judicial verdict and the mandate so envisaged by the Hon'ble Apex Court wherein the courts of law have been cautioned while exercising jurisdiction under Section 378(3) of the Cr.P.C. when the courts of law have been occasioned to deal with the Government Appeal against the acquittal.

8. The Hon'ble Apex Court in the series of decisions have been consistently mandating that it is well settled principle of law that appellate courts hearing the appeal filed against the judgment and the order of the acquittal should not overrule or otherwise disturb the judgment of acquittal, if the appellate court does not find substantive and compelling reasons for doing so.

9. Nonetheless if the trial courts conclusion with regard to the facts is palpably wrong if the trial court decision was based on erroneous view of law and the judgment is likely result in grave miscarriage of justice and the approach proceeds towards wrong direction or the trial court has ignored the evidence or misread the material evidence which should have determining the factor in the lis of the matter then obviously the appellate court is right in interfering with the order acquitting the accused. However, Hon'ble Apex Court has further held that in case two views are possible and the view so taken by the trial court while acquitting the accused is a plausible view then in the backdrop of the fact that there is double presumption of innocence available to the accused then obviously the appellate court should not interfere with the order of acquittal.

10. *The above noted proposition of law is clearly spelt out in umpty number of decisions, some of them are as under namely:-**Tota Singh and another vs. State of Punjab, (1987) 2 SCC 529, Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225, State of Rajesthan vs. State of Gujarat, (2003) 8 SCC 180, State of Goa vs. Sanjay Thakran, (2007) 3 SCC 755, Chandrappa and others vs. State of Karnataka, (2007) 4 S.C.C. 415, Ghurey Lal vs. State of U.P., (2008) 10 SCC 450, Siddharth Vashishtha Alias Manu Sharma vs. State (NCT of Delhi), (2010) 6 SCC 1, Babu vs. State of Kerala, (2010) 9 SCC 189, Ganpat vs. State of Haryana, (2010) 12 SCC 59, Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra, (2010) 13 SCC 657, State of U.P. vs. Naresh, (2011) 4 SCC 324, State of M.P. vs. Ramesh, (2011) 4 SCC 786, and Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219.***

11. In the background of the proposition of law so mandated by the Hon'ble Apex Court in the above noted decisions, the judgment of the Trial Court is to be scrutinized.

12. To begin with this Court, while determining the fact as to whether any illegality or perversity has been committed by the learned Trial Court while acquitting the accused herein, the stand so taken by the prosecution as claimed to be supported by the depositions of the prosecution witnesses are to be first analyzed.

13. Smt. Anita appeared in the witness box as PW-1, while claiming that she is the informant and the daughter of the deceased and the wife of the accused herein. As per her deposition, she got married with the accused herein 13 years back and was blessed with a female child. According to her, when her daughter was about 5-6 days then the accused

while torturing and administrating beating threw her out of his house and despite her father being the deceased requested the accused to keep her daughter and also anticipated that good sense will prevail, the informat was not given entry in her inlaw's place. In her deposition PW-1 Smt Anita came up with the stand that two days prior to the lodging of the FIR on 17.2.2010, the deceased had gone to the agricultural farm for watering the same and at 2:00 in the noon, he came back and apprised that he received a call from the accused, who happens to be his son-in-law calling him at Bisauli and despite given a red signal by the informant and his mother / PW-2, the deceased proceeded while saying that his son in law has called and took jewellery with him. According to deposition of PW-1, the deceased did not return till 4:00 P.M, in the evening and when call was made on the mobile phone of the accused, same was discovered to be switched off and on 17.2.2010 the dead body of the deceased was found. In her statement, PW-1 has come up with further stand that her father had been disposed of by the accused herein along with his maternal cousin and she had got written the FIR with the aid and the assistance of one Sri Dinesh Kumar son of Sukh Lal and she had also put her signature and thumb impression thereon. According to PW-1, even in the cremation ceremony of his father, the accused was not present and thus by all eventualities, she is sure that his father has been disposed of by the accused. It has been further stated in the deposition that 10 days post demise of the father of the informant the accused met him when she was going to get medicine for her daughter and accused came near a temple and stopped the movement of the informant while making a confession that he had committed a wrong that he had strangulated her father.

14. PW-2, Rupendra who happens to be the son of the deceased appeared in the witness box and according to him, on the fateful day, the deceased had on the request so made through mobile phone, gone to meet with the jewellery and after two days, his dead body was found. In his deposition, PW-2 has further deposed that consequent to the lodging of the FIR, constant search was being made of the accused then the deceased along with two persons came in the village and proceeded to his house and at that point of time, he, his mother and one Nand Ram were present and a confession was made by the accused that he had committed wrong and as he had strangulated his father. As per PW-2, the accused also admitted the fact that he had disposed of the deceased, as he repeatedly asked the deceased to give money, as he was not being given the same and the PW-1 Smt. Anita was again married to a third person, which became the cause of commission of crime.

15. Premwati appeared as PW-3, who happens to be the widow of the deceased and according to her statement, when she was in her house along with his son being PW-2, then the accused came and admitted his guilt showing the motive that he had not paid the money, which was received by the deceased as a sale receipt of the property being sought to be sold.

16. S.I. Raj Rishi Sharma appeared as PW-4 being a formal witness and proved the lodging of the FIR.

17. PW-5 was produced as Nand Ram. He in his statement came up with a stand that he has never given his statement under Section 161 CrPC and he is the neighbour of the deceased and he had further deposed that in his presence the accused did not confess the commission of crime.

18. Dr. Harish Chandra appeared as PW-6, who examined the injuries of the

deceased and according to him, there were ligature mark on both the side on the neck which could not come in the case of hanging is done by suicide.

19. Admittedly, as per the prosecution case, there was no eye-witness testimony, rather to the contrary, the case if to be taken as per the prosecution theory is of circumstantial evidence. In order to hold the accused herein guilty, based on circumstantial evidence, then two ingredients have to mark their presence, i.e, (a) every link in the chain of circumstances, necessary to establish the guilt of the accused must be established by the prosecution beyond all reasonable doubts; (b) all the circumstances must be consistently pointing only towards the guilt of the accused.

20. Here in the present case, the deceased as per the prosecution version, received a phone call two days prior to 17.2.2010, when he returned after watering the agricultural filed to his house and at that point of time, the prosecution witnesses, PW-1, PW-2 & PW-3 are stated to be in the house and the deceased after receiving the phone call apprised the prosecution witnesses PW's-1, 2 and 3 that he has received a phone call from the accused, who happens to be his son-in-law calling him at Bisauli and despite being resisted not to proceed, the deceased after taking the jewllery proceeded at 2 in the noon and when his whereabouts were not found till 4 in the non, then constant search was made and on 17.2.2010, the body of the deceased was found. As a matter of fact, barring the receipt of the call requiring the deceased to be present in Bisauli at the instance of accused, there is no other evidence. Moreso, this Court finds that the first information report was lodged on 17.2.2010 after two days and there has been no attempt on the part of the family members, who obviously are PW's 1, 2 and 3 regarding lodging of the FIR after missing of the deceased. Even otherwise, no recovery of any offending material was found so as to link the accused for commission of the crime.

21. None the less, only a cloth (in the shape of gamchha) was found on the neck of the deceased accompanied by ligature marks on the neck. Another aspect which needs to be noticed at this juncture is with regard to the fact that when the deceased did not return on Monday, as stated in the FIR being 15.2.2010, then why the FIR was lodged after two days on 17.2.2010. The said issue also assumes significance, when the deceased was being resisted by the informant and the family members not to honour the phone call while proceeding to the accused with whom, there was certain differences in that regard. There has been no explanation worth consideration or plausible as to why there was delay of two days, particularly when the deceased had gone with jewellery and he did not return back. Even in fact, there is no explanation in delay in lodging of the FIR, which is one of the factors, which is to be considered along with other factors in order to determine as to whether the judgment and order acquitting the accused was passed in the right perspective and as per the four-corners of law.

22. The Hon'ble Apex Court on the question of delay in lodging the FIR and its impact upon the prosecution theory has observed in the case of ***Thulia Kali Vs. The State of Tamil Nadu, (1972) 3 SCC 393***, has observed as under:-

"The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the

circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story As a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained."

23. In the case of ***Apren Joseph Alias Current Kunjukunju and others Vs. The State of Kerala,*** **(1973) 3 SCC 114** the Hon'ble Apex Court has observed as under:

"11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr. P. C. As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue unreasonable delay in lodging the F. I. R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case."

24. In the case of ***Tara Singh and others Vs. State of Punjab*** **1991 Supp (1) SCC 536,** the Hon'ble Apex Court in paragraph 4 has observed as under:-

"4. It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In

order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case."

24. In the case of ***Meharaj Singh Vs. State of U.P.,* (1994) 5 SCC 188**, the Hon'ble Apex Court has observed as under:-

"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been 'ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8."

25. In the case of ***Thanedar Singh Vs. State of M.P.,* (2002) 1 SCC 487**, the Hon'ble Apex Court has observed as under:-

"6. The High Court was of the view that the judgment of the Trial Court was perverse and its approach was unreasonable. The first comment made by the High Court was that the Trial Court did not assign any

reason for disbelieving the FIR. The High Court found no infirmity in the FIR having regard to the fact that the part played by the accused appellant was specifically mentioned in the FIR. But, the High Court missed to note the crucial facts adverted to in Para 5.2 (supra) which cast a serious doubt on the correctness of the FIR, especially the time and date of its recording. The learned Sessions Judge particularly adverted to the fact that the prosecution did not produce the original record of police station relating to the receipt and despatch of FIR inspite of an order passed to that effect. Though the Trial Judge was not careful enough in recording a specific finding that the prosecution failed to clear the doubt regarding the date and time of recording the FIR, in sum and substance, that is what the learned Trial Judge purported to say. The observations of the Trial court were not properly understood by the High Court when it proceeded on the basis at paragraph 12 that the Trial court found fault with the delay in lodging the complaint at 9 A.M. on the next morning. But, it is to be noted that nowhere in the judgment, the trial court observed that the complaint having been lodged and recorded at 9A.M. next morning, that itself would tantamount to delay."

23. Yet, in the case of ***P. Rajagopal and others Vs. State of Tamil Nadu*** **(2019) 5 SCC 403,** the Hon'ble Apex Court in paragraph 12 has held as under:-

"12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely."

24. It is well settled that the prosecution has to prove beyond doubt that every link in the chain of the circumstances establishes the guilt of the accused beyond reasonable doubt and all circumstances are constantly pointing out towards the guilt of the accused. However, in the present case in hand, this Court finds that barring the extra-judicial confession, there is nothing either pleaded or proved in order to link the accused while committing crime. As per prosecution witnesses, motive for commission of the crime by the accused was attributed to the fact that the accused was not given the money, which was with regard to the sale proceeds of the property in question. Barring making such allegations there is nothing on record as to what was the total amount of the sale receipts and which was the property, which was disposed of, as the entire prosecution theory, sans details broadly also. In so far as, the allegations with regard to a criminal case of murder, so stated to be pending against the accused herein, PW-1 has though deposed, but neither any detail nor any document was produced before the learned Trial Court in that regard. Even otherwise, the element of motive, also stands unproved by the prosecution, which also assumes significance.

25. In **Criminal Appeals No. 333-334 of 2017, *Shailendra Rajdeo Paswan vs. State of Gujarat*** dated 13.12.2019, in paragraph-13 has observed as under: -

"13. This court in the case of Sharad Birdichand Sharda v/s State of Maharashtra, reported in 1984(4) SCC has

enunciated the aforesaid principle as under:-

"The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the Accused and inconsistent with his innocence"."

26. Now another facet, which needs to be discussed is the stand taken by the prosecution based upon extra-judicial confession. According to the prosecution, the accused had admitted his guilt and made an extra-judicial confession that he had committed the said crime, while strangulating the deceased, which ultimately resulted into death. According to PW-1 after 10 days of the death of the deceased, the accused met PW-1 being the informant and his wife when the informant was going with her child for getting medicines and near the temple, the accused confessed his guilt. PW-1 has further deposed that on the road, there was other persons also there, but when she asked them to catch hold the deceased, then they did not do so. PW-2 Rupendra, who happens to be the brother of the informant and the son of the deceased has come up with a stand that when the police was making constant search of the accused, then the accused came to his house and at that point of time, he along with his mother (PW-3) and Nand Ram (PW-5) were present, wherein the accused made extra-judicial confession regarding commission of the crime.

27. PW-3 being the widow of the deceased, Premwati in her statement has deposed that the accused made an extra-judicial confession regarding commission of the crime, while coming with a stand that at that point of time, PW-2 Rupendra, her son, PW-5 Nand Ram, her son, Naresh and Suresh were present. So far as Nand Ram PW-5 is concerned, he turned hostile and made a statement that no extra-judicial confession was made by the accused in his present. So far as Naresh and Suresh are concerned, they were not brought in the witness box and no statement whatsoever was made or taken, which itself shows that the entire story so sought to be build up by the prosecution is erected on weak foundation. PW-2 and PW-3 are the interested witnesses, as they are the son and the widow of the deceased.

28. The Hon'ble Apex Court in the case of ***Mohd. Azad @ Samin vs. State of West Bengal,*** **2008 (15) SCC 449,** in paragraphs 21 and 22 observed as under:-

"21. A similar view was also taken in ***Jaswant Gir v. State of Punjab, 2005 (12) SCC 438 and Kusuma Ankama Rao's case, 2008 (13) SCC 257.***

22. "18. Confessions may be divided into two classes i.e. judicial and extra- judicial. Judicial confessions are those which are made before a Magistrate or a court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or court. Extra-judicial confessions are generally those that are made by a party to or before a private individual which

includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code of Criminal Procedure, 1973 (for short the `Code') or a Magistrate so empowered but receiving the confession at a stage when Section 164 of the Code does not apply. As to extra-judicial confessions, two questions arise: (i) were they made voluntarily? and (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person; or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24 of the Indian Evidence Act, 1872 (in short 'Evidence Act'). The law is clear that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the court has to be satisfied with is, whether when the accused made the confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the court is satisfied that in its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt. (See R. v. Warickshall) It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of harassment

and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of a threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See Woodroffe's Evidence, 9th Edn., p. 284.) A promise is always attached to the confession alternative while a threat is always attached to the silence alternative; thus, in one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words "appear to him" in the last part of the section refer to the mentality of the accused.

19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

29. In the case of ***Sansar Chand vs. State of Rajasthan*** **2010 (10) SCC 604,** Hon'ble Apex Court in paragraph 29 observed as under:-

"29. There is no absolute rule that an extra judicial confession can never be the basis of a conviction, although ordinarily an extra judicial confession

should be corroborated by some other material vide Thimma vs. The State of Mysore - AIR 1971 SC 1871, Mulk Raj vs. The State of U.P. - AIR 1959 SC 902, Sivakumar vs. State by Inspector of Police - AIR 206 SC 563 (para 41 & 42), Shiva Karam Payaswami Tewar vs. State of Maharashtra - AIR 2009 SC 1692, Mohd. Azad vs. State of West Bengal - AIR 2009 SC 1307."

30. Further, in the case of ***Sahadevan and another vs. State of Tamilnadu*** **2012 (6) SCC 403,** Hon'ble Apex Court in paragraphs 14 to 16 observed as under:-

"14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra- judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra- judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

15. Now, we may examine some judgments of this Court dealing with this aspect.

15.1. In Balwinder Singh v. State of Punjab [1995 Supp. (4) SCC 259], this Court stated the principle that an extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

15.2. In Pakkirisamy v. State of T.N. [(1997) 8 SCC 158], the Court held that:

"8. .... It is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession."

15.3. Again in Kavita v. State of T.N. [(1998) 6 SCC 108], the Court stated the dictum that:

"4. There is no doubt that conviction can be based on extrajudicial confession, but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses to whom it is made."

15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in the case of State of Rajasthan v. Raja Ram [(2003) 8 SCC 180] stated the principle that:

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made.

The Court, further expressed the view that:

"19. .... Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may

tend to indicate that he may have a motive of attributing an untruthful statement to the accused....."

15.5. In the case of Aloke Nath Dutta v. State of W.B. [(2007) 12 SCC 230], the Court, while holding the placing of reliance on extra-judicial confession by the lower courts in absence of other corroborating material, as unjustified, observed:

"87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.

X

89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof."

15.6. Accepting the admissibility of the extra-judicial confession, the Court in the case of Sansar Chand v. State of Rajasthan [(2010) 10 SCC 604] held that :-

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju v. State of Mysore, Mulk Raj v. State of U.P., Sivakumar v. State (SCC paras 40 and 41 : AIR paras 41 & 42), Shiva Karam Payaswami Tewari v. State of Mahasrashtra and Mohd. Azad v. State of W.B.]

30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872."

15.7. Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in the case of Rameshbhai Chandubhai Rathod v. State of Gujarat [(2009) 5 SCC 740], held as under :

"53. It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true."

15.8. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Ref. S.K. Yusuf v. State of W.B. [(2011) 11 SCC 754] and Pancho v. State of Haryana [(2011) 10 SCC 165].

16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra- judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:

The Principles

i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

ii) It should be made voluntarily and should be truthful.

iii) It should inspire confidence.

iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

vi) Such statement essentially has to be proved like any other fact and in accordance with law."

31. Further, in the case of ***Ram Lal vs. State of Himachal Pradesh*** **2019 (17) SCC 411,** Hon'ble Apex Court in paragraphs 13 to 15 observed as under:-

"13. Extra-judicial confession is a weak piece of evidence and the court must ensure that the same inspires confidence and is corroborated by other prosecution evidence. In order to accept extra-judicial confession, it must be voluntary and must inspire confidence. If the court is satisfied that the extra-judicial confession is voluntary, it can be acted upon to base the conviction. Considering the admissibility and evidentiary value of extra-judicial confession, after referring to various judgments, in Sahadevn and another vs. State of Tamilnadu (2012) 6 SCC 403, this court held as under:-

"15.1. In Balwinder Singh v. State of Punjab 1995 Supp (4) SCC 259 this Court stated the principle that:

"10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution.Where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance."

15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in State of Rajasthan v. Raja Ram (2003) 8 SCC 180 stated the principle that:

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made." The Court further expressed the view that:

"19. ... Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused...."

15.6. Accepting the admissibility of the extra-judicial confession, the Court

*in **Sansar Chand v. State of Rajasthan (2010) 10 SCC 604** held that:*

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimaa Raju v. State of Mysore (1970) 2 SCC 105, Mulk Raj v. State of U.P. AIR 1959 SC 902, Sivakumar v. State of Inspector of Police (2006) 1 SCC 714 (SCC paras 40 and 41 : AIR paras 41 and 42), Shiva Karam Pavaswami Tewari v. State of Maharashtra (2009) 11 SCC 262 and Mohd. Azad alias Shamin v. State of W.B. (2008) 15 SCC 449]"."

32. Net analysis of the facts of the case while applying the ratio so culled out by the Hon'ble Apex Court as referred to herein above shows that inescapable conclusion stands drawn that the prosecution has miserably failed to link the accused with the commission of crime on the count of delay in lodging of the FIR, absence of motive, weak extra-judicial confession, as well as non-linking of the circumstances so as to even put the case under parameters of circumstantial evidence.

33. This Court further finds that the view taken by the learned Trial Court is a possible view and there is no justification in adopting any other view. The considerations, which weighed the learned Trial Court while acquitting the accused itself are based on the ocular testimony and the evidence so adduced in support thereof and in absence of any perversity was committed by the learned Trial Court, this Court finds its inability to hold the judgment as perverse.

34. Hence, in any view of the matter applying the principles of law so culled out by the Hon'ble Apex Court in the facts of the present case, we have no option but to concur with the view taken by the learned Sessions Judge.

35. We find that it is not a case worth granting leave to appeal. The application for granting leave to appeal is rejected.

36. Since the application for granting leave to appeal has not been granted, consequently, present government appeal also stands **dismissed.**

37. Records of the present case be sent back to the concerned court below.

(2022)07ILR A873
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.07.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 379 of 2019

State of U.P. ...Appellant
Versus
Bachchan Khan ...Respondent

Counsel for the Appellant:
G.A.

Counsel for the Respondent:
Sri Ashok Kumar Singh Bais, Sri Anil Kumar, Sri Ashok Kumar Singh Bais, Sri Mashaluddin Shah

Medical negligence - Deceased was father of the informant-payment for medication was made and two injections were administered to the deceased and he succumbed to it-negligence alleged-accused alleged to be quack and unqualified doctor-chain of evidence adduced by the prosecution is very weak-no

explanation for not lodging the FIR on the day of incidence-Police Station was 50 steps from the dispensary-there is a double presumption in favor of accused-no sufficient ground to reverse trial court judgment.

Appeal dismissed. (E-9)

List of Cases cited:

1. Tota Singh & anr. Vs St. of Pun., reported in (1987) 2 SCC 529

2. Ramesh Babulal Doshi Vs St. of Guj., reported in (1996) 9 SCC 225

3. St. of Rajesthan Vs St. of Guj., reported in (2003) 8 SCC 180

4. St. of Goa Vs Sanjay Thakran, reported in (2007) 3 SCC 755

5. Chandrappa & ors. Vs St. of Karn., reported in (2007) 4 S.C.C. 415

6. Ghurey Lal Vs St. of U.P., reported in (2008) 10 SCC 45

7. Siddharth Vashishtha Alias Manu Sharma Vs St. (NCT of Delhi), reported in (2010) 6 SCC 1

8. Babu Vs St. of Kerala, reported in (2010) 9 SCC 189

9. Ganpat Vs St. of Har., reported in (2010) 12 SCC 59

10. Sunil Kumar Sambhudayal Gupta (Dr.) & ors. Vs St. of Maharashtra, reported in (2010) 13 SCC 657

11. St. of U.P. Vs Naresh, reported in (2011) 4 SCC 324

12. St. of M.P. Vs Ramesh, reported in (2011) 4 SCC 786

13. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219

14. Jafarudheen & ors. Vs St. of Kerala, JT 2022(4) SC 445

15. Apren Joseph Alias Current Kunjukunju & ors. Vs The St. of Kerala, (1973) 3 SCC 114

16. Tara Singh & ors. Vs St. of Pun. 1991 Supp (1) SCC 536

17. P. Rajagopal & ors. Vs St. of T.N. (2019) 5 SCC 403

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal under Section 378(3) of Criminal Procedure Code, 1973 (in short 'Cr.P.C.'), has been instituted at the behest of State of U.P. against the judgment and order dated 20.2.2019, passed by Additional District & Session Judge, Fast Track Court No. 1, Kasganj, in S.T. No. 310 of 2013 (State of U.P. Vs. Bachchan Khan), under Section 304 I.P.C. arising out of Case Crime No. 107 of 2013, Police Station. Amanpur, District Kasganj, acquitting the accused respondent.

2. The factual matrix of the case as worded in the present appeal purported to be under Section 378(3) of the Cr.P.C. are that on 27.2.2013 an FIR was lodged by the informant/complainant being Brij Kishore son of Attar Singh resident Makthara, Police Station. Amanpur, District Kasganj with an allegation that the complainant/informant along with his mother Smt. Kamlesh wife of Atar Singh as well as Chandrabhan son of Kali Charan are the resident of Police Station Sidpura, District Kasganj and on unfateful day i.e. 26.2.2013 at 4 p.m. the deceased being Atar Singh son of Deshraj witnessed stomach ache.

3. Resultantly the informant along with his mother being Smt. Kamlesh and Chandrabhan son of Kali Charan proceeded for getting the deceased treated and approached the accused Dr. Bachchan

Khan son of Achchan Khan resident of Rajeev Nagar Amanpur, District Kasganj and got themselves physically present in the dispensary/shop of the accused at 5.p.m. on 26.2.2013.

4. It has been further alleged in the first information report that the accused demanded an amount of Rs.5,000/- for providing medication and treatment which was accordingly offered to the accused and thereafter the accused pierced two injections. It has further been alleged in the first information report that after administrating two injections Atar Singh son of Deshraj succumbed.

5. As per the prosecution case, the accused thereafter pushed the informant/complainant his mother and Chandrabhan out of the dispensary and along with the dead-body of the deceased, they proceeded to their village. Allegation has also been levelled that due to the negligence of the accused coupled with the fact that the accused was a quack and unqualified doctor the deceased died.

6. Consequently, the first information report was lodged as discussed above on 27.2.2013 before the Police Station, Amanpur, District Kasganj being Case Crime No.107 of 2013, under Section 302 IPC. Investigation was thereafter conducted and the criminal case was transformed into Section 304 IPC, resultantly charge sheet was also submitted under Section 304 IPC on 18.7.2013. The case was committed before sessions, the charges were read over to him, the accused pleaded innocent not guilty and claimed to be tried.

7. In order to bring home the charges, the prosecution produced the following witnesses, namely:

1.	Brij Kishore	PW1
2.	Smt. Kamlesh	PW2
3.	Chandrabhan	PW3
4.	Satyadev Singh	PW4
5.	S.I. Rajkumar Singh	PW5
6.	Om Prakash Singh	PW6
7.	Khem Karan	PW7
8.	Dr. Pradeep Kumar	PW8
9.	Ratibhan Singh	PW9
10.	Ratibhan Singh	PW10

8. We have heard Ms. Nand Prabha Shukla, learned A.G.A. for the State-appellant and Sri Anil Kumar, learned counsel for the sole respondent.

9. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would be required to be discussed.

10. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***Tota Singh and another vs. State of Punjab,*** reported in ***(1987) 2 SCC 529***, the Hon'ble Apex Court in paragraph-6 has observed as under: -

"6. The High Court has not found in its judgment that the reasons given by the learned Sessions Judge for discarding the testimony of PW 2 and PW 6 were either unreasonable or perverse. What the High Court has done is to make an independent reappraisal of the evidence on its own and to set aside the acquittal merely on the ground that as a result of such

reappreciation, the High Court was inclined to reach a conclusion different from the one recorded by the learned Sessions Judge. This Court has repeatedly pointed out that the mere fact that the appellate court is inclined on a reappreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous."

11. Further, in the case of ***Ramesh Babulal Doshi vs. State of Gujarat,*** reported in ***(1996) 9 SCC 225***, in ***paragraph 7,*** the Hon'ble Apex Court observed as under:

"7. Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above-quoted conclusions. 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 constitute 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 conclusions 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 palpably wrong, *manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to 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 conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not."*

12. In the case of ***State of Rajesthan vs. State of Gujarat,*** reported in ***(2003) 8 SCC 180, in paragraph 7***, the Hon'ble Apex Court observed as under:

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be

interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.[1]) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra[2], Ramesh Babulal Doshi v. State of Gujarat[3] and Jaswant Singh v. State of Haryana."

13. In the case of ***State of Goa vs. Sanjay Thakran,*** reported in ***(2007) 3 SCC 755,*** in **paragraph 15**, the Hon'ble Apex Court observed as under:

"15. Further, this Court has observed in Ramesh Babulal Doshi v. State of Gujarat: (SCC p. 229, para 7)

"7.... 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 constitute 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 conclusions 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 palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to 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 conclusions." and in State of Rajasthan v. Raja Ram8: (SCC pp. 186-87, para 7) -

"7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible

evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh v. State of M.P.) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra 10, Ramesh Babulal Doshi v. State of Gujarat and Jaswant Singh v. State of Haryana11"."

14. Further in the case of ***Chandrappa and others vs. State of Karnataka,*** reported in *(2007) 4 S.C.C. 415,* the Apex Court has observed as under:

"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, re-appreciate 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 curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate 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 finding of acquittal recorded by the trial Court.

15. In the case of ***Ghurey Lal vs. State of U.P.,*** reported in ***(2008) 10 SCC 450,*** in **paragraph 43 and 75,** the Hon'ble Apex Court observed as under:

"43. The earliest case that dealt with the controversy in issue was Sheo Swarup v. King Emperor. In this case, the ambit and scope of the powers of the appellate court in dealing with an appeal against acquittal has been aptly a elucidated by the Privy Council. Lord Russell writing the judgment has observed as under (at AIR p. 230): (IA p. 404)

"... the High Court should and will always give proper weight and

consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he b has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

The law succinctly crystallised in this case has been consistently followed by this Court. On proper analysis of the ratio and findings of this case, it is revealed that the findings of the trial court are based on the fundamental principles of the criminal jurisprudence. Presumption of innocence in favour of the accused further gets reinforced and strengthened by the acquittal of the trial court. The appellate court undoubtedly has wide powers of reappreciating and re-evaluating the entire evidence but it would be justified in interfering with the judgment of acquittal only when the judgment of the d trial court is palpably wrong, totally ill-founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse.

...

75. On careful analysis of the entire evidence on record, we are of the view that the reasons given by the High Court for reversing the judgment of acquittal is unsustainable and contrary to settled principles of law. The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable."

16. In the case of ***Siddharth Vashishtha Alias Manu Sharma vs. State (NCT of Delhi),*** reported in ***(2010) 6 SCC 1,*** *in* ***paragraph 303(1),*** the Hon'ble Apex Court observed as under:

"303. Summary of our conclusions:

(1) The appellate court has all the necessary powers to re-evaluate the evidence let in before the trial court as well as the conclusions reached. It has a duty to specify the compelling and substantial reasons in case it reverses the order of acquittal passed by the trial court. In the case on hand, the High Court by adhering to all the ingredients and by giving b cogent and adequate reasons reversed the order of acquittal. ..."

17. In the case of ***Babu vs. State of Kerala, reported in (2010) 9 SCC 189,*** *in* ***paragraph 12 and 19***, the Hon'ble Apex Court observed as under:

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law.

Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P.¹, Shambhoo Missir v. State of Bihar2, Shailendra Pratap v. State of U.P.3, Narendra Singh v. State of M.P.4, Budh Singh v. State of U.P.5, State of U.P. v. Ram Veer Singh6, S. Rama Krishna v. S. Rami Reddy7, Arulvelu v. State8, Perla Somasekhara Reddy v. State of A.P.9 and Ram Singh v. State of H.P.10).

...

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

18. In the case of ***Ganpat vs. State of Haryana, reported in (2010) 12 SCC 59,*** *in* ***paragraph 14 and 15,*** the Hon'ble Apex Court observed as under:

"14. The only point for consideration in these appeals is whether there is any ground for interference against the order of acquittal by the High Court. This Court has repeatedly laid down that the first appellate court and the High Court while dealing with an appeal is entitled and obliged as well to scan through and if need be reappreciate the entire evidence and arrive at a conclusion one way or the other.

15. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal: (i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) 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 interference.

(v) 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 trial court depending on the materials placed. (Vide Madan Lal v. State of J&K¹, Ghurey Lal v. State of U.P.2, Chandra Mohan Tiwari v. State of M.P.3 and Jaswant Singh v. State of Haryana4.)"

19. In the case of ***Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra,*** reported in ***(2010) 13 SCC 657***, in ***paragraph 38, 39 and 40***, the Hon'ble Apex Court observed as under:

"38. It is a well-established principle of law, consistently reiterated and followed by this Court that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were

perverse or otherwise unsustainable. Even though the appellate court is entitled to consider, whether in arriving at a finding of fact, the trial court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanour of the witnesses is the best judge of the credibility of the witnesses.

39. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its seriousness and gravity has to be taken into consideration. The appellate court should bear in mind the presumption of innocence of the accused, and further, that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference.

40. In exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding material or by taking into consideration irrelevant/inadmissible material. A finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (See Balak Ram v. State of U.P.9, Shailendra Pratap v. State of U.P.10, Budh Singh v. State of U.P.11, S. Rama Krishna v. S. Rami Reddy¹2, Arulvelu v. State 13, Ram Singh v. State of H.P.14 and Babu v. State of Kerala¹5.))"

20. In the case of ***State of U.P. vs. Naresh***, reported in ***(2011) 4 SCC 324***, in paragraph 33 and 34, the Hon'ble Apex Court observed as under:

"33. We are fully aware of the fact that we are entertaining the appeal against the order of acquittal. Thus, the Court has to scrutinise the facts of the case cautiously and knowing the parameters fixed by this Court in this regard.

34. Every accused is presumed to be innocent unless his The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of criminal jurisprudence in India. The law in this regard is well settled that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. An appellate court must also consider whether the court below has placed the burden of proof incorrectly or failed to take into consideration any admissible evidence or had taken into consideration evidence brought on record contrary to law? In exceptional cases, whether there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of acquittal. So, in order to warrant interference by the appellate court, a finding of fact recorded by the court below

must be outweighed evidence or to suffer from the vice of guilt is proved. such finding if outrageously defies logic as irrationality. [Vide Babu v. State of Keralall and Sunil Kumar Sambhudayal Gupta (Dr.)8.]"

21. In the case of ***State of M.P. vs. Ramesh***, reported in ***(2011) 4 SCC 786***, in paragraph 15, the Hon'ble Apex Court observed as under:

"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, interference 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 reappreciate, 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."

22. The Apex Court recently in ***Jayaswamy vs. State of Karnataka,*** (2018) 7 SCC 219, has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"13. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

14. It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not

be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

23. The Apex Court recently in Jafarudheen & Ors. vs. ***State of Kerala, JT 2022(4) SC 445*** has observed as under:-

"DISCUSSION Scope of Appeal filed against the Acquittal:

25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. Precedents:

Mohan @Srinivas @Seena @Tailor Seena v. State of Karnataka, [2021 SCC OnLine SC 1233] as hereunder: -

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a

particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under Section 378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali v. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under : (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179]) "20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality.

(Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501], Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

14.3. In the recent decision of Vijay Mohan Singh [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586], this Court again had an occasion to consider the scope of Section 378 CrPC and the interference by the High Court [State of Karnataka v. Vijay Mohan Singh, 2013 SCC OnLine Kar 10732] in an appeal against acquittal. This Court considered a catena of decisions of

this Court right from 1952 onwards. In para 31, it is observed and held as under:

"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai [Umedbhai Jadavbhai v. State of Gujarat, (1978) 1 SCC 228 : 1978 SCC (Cri) 108]. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under:

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence.

This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case.'

31.1. In Sambasivan [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320], the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on reappreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable.

Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under:

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Doshi case [Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225 : 1996 SCC (Cri) 972] viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial

court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case.' 31.2. In K. Ramakrishnan Unnithan [K. Ramakrishnan Unnithan v. State of Kerala, (1999) 3 SCC 309: 1999 SCC (Cri) 410], after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley [Atley v. State of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653], in para 5, this Court observed and held as under:

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order. It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well-established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very

cases cited at the Bar, namely, Surajpal Singh v. State [Surajpal Singh v. State, 1951 SCC 1207 : AIR 1952 SC 52]; Wilayat Khan v. State of U.P. [Wilayat Khan v. State of U.P., 1951 SCC 898 : AIR 1953 SC 122]) In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.' 31.4. In K. Gopal Reddy [K. Gopal Reddy v. State of A.P., (1979) 1 SCC 355 : 1979 SCC (Cri) 305], this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule."

N. Vijayakumar v. State of T.N., [(2021) 3 SCC 687] as hereunder: - "20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a "possible view", having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325 has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432) "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 "flourishes of language" to emphasise the reluctance of an appellate 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 finding of acquittal recorded by the trial court."

21. Further in the judgment in Murugesan [Murugesan v. State, (2012) 10

SCC 383: (2013) 1 SCC (Cri) 69] relied on by the learned Senior Counsel for the appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction.

xxx xxx xxx

23. Further, in Hakeem Khan v. State of M.P., (2017) 5 SCC 719 : (2017) 2 SCC (Cri) 653 this court has considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of the trial court cannot be interdicted and the High Court cannot supplant over the view of the trial court. Para 9 of the judgment reads as under: (SCC pp. 722-23) "9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Penal Code. The most important reason of the trial court, as has been stated above, was that, given the time of 6.30 p.m. to 7.00 p.m. of a winter evening, it would be dark, and, therefore, identification of seventeen persons would be extremely difficult. This reason, coupled with the fact that the only independent witness turned hostile, and two other eyewitnesses who were independent were not examined, would certainly create a large hole in the prosecution story. Apart from this, the very fact that there were injuries on three of the accused party, two of them being deep injuries in the skull, would lead to the conclusion that nothing was premeditated and there was, in all probability, a scuffle that led to injuries on both sides. While the learned counsel for the respondent may be right in stating that the trial court went overboard in stating that the complainant party was the aggressor, but the trial court's ultimate conclusion leading to an acquittal is certainly a possible view on the facts of this case. This is coupled with the fact that the presence of the kingpin Sarpanch is itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place."

24. By applying the abovesaid principles and the evidence on record in the case on hand, we are of the considered view that having regard to material contradictions which we have already noticed above and also as referred to in the trial court judgment, it can be said that acquittal is a "possible view". By applying the ratio as laid down by this Court in the judgments which are stated supra, even assuming another view is possible, same is no ground to interfere with the judgment of acquittal and to convict the appellant for the offence alleged. From the evidence, it is clear that when the Inspecting Officer and other witnesses who are examined on

behalf of the prosecution, went to the office of the appellant-accused, the appellant was not there in the office and office was open and people were moving out and in from the office of the appellant. It is also clear from the evidence of PWs 3, 5 and 11 that the currency and cellphone were taken out from the drawer of the table by the appellant at their instance. There is also no reason, when the tainted notes and the cellphone were given to the appellant at 5.45 p.m. no recordings were made and the appellant was not tested by PW 11 till 7.00 p.m."

24. This Court had the occasion to consider the scope and the extent of interference in the cases, wherein this Court had to delve into the issues, which gets encompassed in the proceedings, where the judgment and the order under challenge is of acquittal and this Court in Government Appeal no. 3804 of 2010, *State of U.P. vs. Subedar and others,* has held that it is a settled principle of law that while exercising powers even if at two reasonable views/conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial Court.

25. Undisputedly, as per the prosecution case, the deceased suffered stomach ache at 4 p.m. on 26.2.2013 and he was taken for medication on same day on 26.2.2013 by the informant/complainant, his mother and one Chandrabhan and was administered two injections on 26.2.2013 at 5.00 p.m. and thereafter he died. It has also come on record that the first information report was lodged on 27.2.2013. In order to bring home the charges, the prosecution presented as many as 10 witnesses.

26. In order to link the chain of events and sequence so as to decide as to whether the accused is guilty or not the ocular testimony is to be first analysed. According to the testimony of PW1 being the informant/complainant, who happens to be Brij Kishore son of deceased, he had taken his father on 26.2.2013 at 4.00 p.m. in the cycle which the complainant was riding. To be more specific, the deceased was sitting in the carrier of the cycle in question and further the fact that though the deceased was witnessing stomach ache but he was not screaming on account of the lesser magnitude of the stomach ache.

27. As per the PW1 Brij Kishore, he never knew the accused and till reaching the clinic of the accused PW1 Brij Kishore did not find any clinic over there. It has been further deposed that the concerned police station is just 50 steps from the clinic of the accused. In the cross-examination the PW1 Brij Kishore has further deposed that he did not lodge FIR in the concerned police station which was 50 steps from the clinic of the accused as his mother instructed him to go to the village. PW1 in the statement has also come up with the stand that in the Panchnama so prepared, he had signed the same and about 6 to 7 persons had also signed and their names are Chandrabhan, Bantu, Ratibhan, Padam Singh, Bharatveer Singh, Nekram Singh.

28. PW2 being Kamlesh, who happens to be wife of the deceased in her statement has deposed that she had gone at 4.00 p.m. on 26.2.2013 along with his son, Chandrabhan and Kunwarpal, who happens to be the resident of the said village and the they reached the dispensary of the accused at 5.00 p.m. It has further been deposed in cross-examination that the deceased had gone to accused dispensary while sitting in a motorcycle which Chandrabhan was riding.

29. PW3, who happens to be the Chandrabhan son of Kalicharan in his statement has deposed that on 26.2.2013 at 5.00 p.m., they had reached the accused dispensary and the FIR was lodged on 27.2.2013.

30. PW4, who happens to be S.H.O. Police Station Amanpur, being Satyadev Singh he in his statement has come up with a stand that the proceedings for obtaining Viscera report was undertaken and as per the Viscera report no poison was found in the body of the deceased.

31. As PW5, S.I. Rajkumar Singh got himself presented wherein in paragraph 3 of the same, it has been deposed that after 10-12 hours of the death of the deceased, the first information report was lodged.

32. PW6 being Om Prakash S.O. got himself examined.

33. PW7 Khemkaran S.O. also got himself examined. Dr. Pradeep Kumar Senior Consultant B.B.D., District Hospital, Bulandshahr got himself examined and he stated that there was no chemical/poison found in the body of the deceased.

34. PW9 being Ratibhan Singh son of Surajpal Singh, he in his cross-examination has stated that he had not witnessed the alleged commission of crime and he was in his house.

35. PW10 S.I. Multan Singh in his statement has deposed that no visible injury was found in the body of the deceased.

36. In the light of the depositions of the prosecution witness coupled with the medico legal report and the proposition of law so culled out by the Hon. Apex Court, the present case is to be decided.

37. To start with the material contradictions in the statements of the prosecution witnesses is to be first analysed. In the statement of the PW1 being son of the deceased Brij Kishore, this much has come that he had taken his father to the accused dispensary in his cycle and the deceased was sitting in the carrier of the cycle of the PW1 Brij Kishore, as well as so far as the statement of the PW2 being Smt. Kamlesh widow of the deceased, she in the cross-examination has come up with a stand that the deceased was siting in the motorcycle of Chandrabhan.

38. A remarkable thing which is noticed at this stage is this that PW1 and PW2 are those witnesses, who have taken the deceased and thus the material contradiction itself shows that the prosecution case proceeded on a very weak evidence.

39. So much so another aspect which needs to be further noticed is the delay in lodging of the FIR. It is come on record that the dispensary of the accused was just 50 steps from the police station however, as stated in the cross-examination on a question being put up to the PW1 Brij Kishore, has deposed that he did not lodged FIR on 26.2.2013 on the instructions of his mother as the mother of PW1 wanted that the dead body of the deceased be taken to the village and consequently on 27.2.2013 FIR was lodged.

40. It is quiet paradoxical and amazing that when as per the prosecution case the deceased was suffering from mild stomach ache and he was not screaming and after injecting two doses of injection, the deceased died and the police station is just 50 steps from the dispensary of the accused then how and why the FIR was not lodged on the same day and it was lodged on the next day. The said conduct of the informant/complainant being PW1 and the mother/widow of the deceased PW2 itself shows that the entire criminal case has been engineered just to falsely implicate the accused.

41. Hon'ble Apex Court on the question of delay in lodging the FIR and its impact upon the prosecution theory has observed in the case of **(1973) 3 SCC 114 Apren Joseph Alias Current Kunjukunju and others Vs. The State of Kerala** wherein para 11 following was mandated:

11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr. P. C. As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue unreasonable delay in lodging the F. I. R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.

42. In the case of **Tara Singh and others Vs. State of Punjab 1991 Supp (1) SCC 536**, the Hon'ble Apex Court in paragraph 4 has observed as under:-

4. It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions

there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case.

43. Yet, in the case of **P. Rajagopal and others Vs. State of Tamil Nadu (2019) 5 SCC 403**, the Hon'ble Apex Court in paragraph 12 has held as under:-

12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely.

44. As per proposition of law so culled out by the Hon'ble Apex Court in the above noted decisions and in series of decision, it has been mandated that the delay in lodging of the FIR by itself cannot be a ground to doubt the prosecution case. However, the courts have to determine as to whether the delay has been satisfactorily explained or not and deciding the matters on merits without giving much importance to such delay.

45. Here in the present case, the Court finds that no plausible explanation has been offered by the prosecution in not lodging the FIR on 26.2.2013 particularly when the police station was 50 steps from the dispensary/shop of the accused. This Court has also discussed the determining of the witnesses and had also considered the case from the four corners of law while applying the same in the facts of the case.

46. Now another question arises as to at what time the body of the deceased was reached in the village in question. As per PW7 Khemkaran son of Ram Singh the deceased body reached the village at 4.00 p.m. on 26.2.2013 when he was in the village itself and he got himself physically present at 6.00 p.m. in this regard. However, as per the prosecution case at 4.00 p.m. on 26.2.2013 the deceased proceeded for treatment and the treatment was administered at 5.00 p.m. on the same day i.e. 26.2.2013 then how could the body of the deceased reached the village at 4.00 p.m. The said aspect of the matter has already been discussed by the learned trial court while according to acquittal to the accused.

47. As per the prosecution case PW1 being Brij Kishore has stated that the Panchnama was signd 6-7 people whose names are (a) Chandrabhan (b) Bantu (c) Ratiram (d) Padam Singh (e) Bharatveer Singh (f) Nekram Singh. However in the Panchnama itself the signatures were found

of Khemkaran, Om Prakash, Suresh and Charan Singh and Munna.

48. Learned Trial Court has meticulously analysed the said aspect of the matter and has proceeded to record a finding that no explanation worth consideration has been tendered by the prosecution with respect to the signatures so finding its presence in the Panchanama itself vis the differ in the statement of PW1.

49. This Court is of the opinion that the entire basis of the prosecution case itself shows that the same had been manufactured so as to lay foundation whose substratum has eroded.

50. Nonetheless the medical report which obviously includes Viscera report also does not support the case of the prosecution as the Viscera report itself shows that there was no chemical/poison found in the body of the deceased. It has also come on record that the heart of the deceased was also not put to examination which could place the things on a platform wherein it could be determined as to whether the deceased died on account of heart-attack or not. It has also come on record that PW2 being the widow of the deceased has herself stated in page 3 of her statement that Chandrabhan and PW1 who happens to be the son have not seeing shop/clinic of the accused. Moreover this Court further finds that no proceedings purported to be under either Medical Council Act or the Rule framed therein under or any other Special Act has been lodged or undertaken against the accused herein for practicing medical provision as a quake. In the absence of the same, this Court is not in a position to bestow any consideration on the said aspect also.

51. The chain of the events do not link the accused with respect to the commission of the crime and further the evidence so adduced by the prosecution is very weak. This Court also finds that there are insufficient grounds making it possible to convict the accused. The chain of the events as discussed herein-above are not complete in order to rope in and hold the accused guilty.

52. The facts of the present case are to be seen in the light that there is a double presumption in favour of the accused and until and unless there are sufficient ground and material available before the Appellate Court to reverse the judgment of the trial court this Court will not initiate. This Court while deciding the case in which adorning the chair of appellate authority cannot reverse the judgment of acquittal even in those cases where another view is possible.

53. Nonetheless, this Court finds that the prosecution as miserably failed to link the chain of events and sequence so as to hold that the accused was guilty in commission of the crime in question. The Court further finds that there is no perversity or illegality committed by the court below while acquitting the accused.

54. Hence in any view of the matter while applying the principles of law so culled out by the Hon. Apex Court in the facts of the present case, we have no option but to concur with the view taken by the learned Sessions Judge.

55. We find that it is not a case worth granting leave to appeal. The application for granting leave to appeal is rejected.

56. Since the application for granting leave to appeal has not been granted, consequently, present criminal appeal also stands dismissed.

57. All the applications stand disposed of.

58. The records be sent back to the court-below.

(2022)07ILR A894
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.03.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE VIKRAM D. CHAUHAN, J.

Government Appeal No. 463 of 2021

State of U.P. ...Appellant
Versus
Bhola & Ors. ...Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:
Sri Vijay Bahadur Shivhare, Sri Vijay Bahadur Shivhare

Victim used to talk to accused -alleged kidnapping and rape by the accused and 3 others-Victim is 15 years old-conclusion and narration of events by victim does not match with the call details-accused's presence not proved by the prosecution.

Appeal dismissed. (E-9)

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard Sri Nagendra Srivastava, learned AGA for the State and perused the record.

2. The instant appeal has been filed against the judgment and order dated 21 December, 2019 passed by learned Special Judge (POCSO Act)/Additional Sessions Judge, Court No.1, Hamirpur in Special Case No. 17 of 2015 (State Vs. Bhola alias Pramod and others) arising out of Case Crime No. 403 of 2014, under Sections 363, 366, 376D, 342 and 504 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012, Police Station Sisolar, District Hamirpur, whereby the accused-respondents were acquitted.

3. As per the prosecution case, informant - Ramcharan lodged one report that his daughter (victim) who is aged about 15 years; studying in Class-VII at Meerut; residing with his brother-in-law Shyamlal; victim three months prior to occurance went to her uncle's (Mama) - Shayamlal residence at Meerut; Bhola alias Pramod, son of Shrichandra Kori used to talk from mobile no. 73XXXXX755 with informant's daughter having mobile no. 80XXXXX493; information was given by brother-in-law of the informant namely Shyamlal to the informant; informant contacted father of Bhola alias Pramod namely Shrichandra and his brother Santosh with the request to ask accused Bhola alias Pramod to desist from talking to his daughter; however, aforesaid person abused the informant; thereafter Bhola alias Pramod on 2 November, 2014 has abducted the daughter of the informant and the informant is afraid that some untoward incident may happen with the aforesaid girl.

4. On the basis of the aforesaid, report dated 9 November, 2014 at 14:20 hours was lodged under Sections 363 and 366 Indian Penal Code at Police Station Sisolar, District Hamirpur against Bhola alias Pramod and Santosh, both sons of Shrichandra Kori and Shrichandra Kori, son of not known, all resident of Gram Panchayat Bhamai, Police Station Sisolar,

District Hamirpur. The aforesaid report was registered as Case Crime No. 403 of 2014.

5. On 4 December, 2014, statement of the victim under Section 164 of the Criminal Procedure Code was recorded. She has stated that on 22 July, 2014 she was travelling along with her uncle Shyamlal to Meerut by train; Santosh and Bhola who are resident of same village have come following the victim to Meerut; for two days the aforesaid persons were harassing and following the victim; Santosh and Bhola went back to the village from Meerut; victim was residing with her Mama; on 2 November, 2014 when the victim was going to school, Santosh, Bhola, Ramsewak and Shrichandra were present along with their vehicle Marshall and when the victim came close to the aforesaid vehicle, Ramsewak abused and shouted to catch the victim and thereafter Shrichandra opened the gate of the vehicle and Ramsewak, Santosh and Bhola caught hold and forcefully took her into the vehicle and gagged the mouth of the victim; thereafter the victim was locked in room at Ghaziabad; Ramsewak and Shrichandra left; Santosh and Bhola residing along with the victim at Ghaziabad; Bhola under intoxication used to come in the night and Santosh would stay outside the room; Bhola committed rape in the night; for five days Bhola committed rape with the victim; on 7 November, 2014 in the afternoon Santosh also committed rape of the victim; on 7 November, 2014 both the accused took the victim from the room at Ghaziabad to the railway station and brought her to Kanpur. The victim thereafter by catching passenger train came back; Santosh and Bhola stayed at Kanpur; when the victim came to Maudaha then she called her father on mobile phone and thereafter her father brought her on 8 November, 2014 to her house.

6. During investigation, investigating Officer received copy of the admission register from Principal, Uchh Prathmik Vidyalaya, Bhamai, Hamirpur wherein the date of birth of the victim was recorded as 20 April, 1999.

7. Victim was medically examined on 22 November, 2014 at District Women Hospital, Hamirpur. The doctor who has examined the victim has recorded in the medical report dated 22 November, 2014 that the victim has informed that one boy with his friend has taken her to Ghaziabad and has locked her in a room and committed rape. No external injury was found on the body of the victim. The hymen was ruptured, old and healed. No internal injuries were found on the body of the victim. There was no bleeding from the private parts. The vaginal smear was taken from the private part of the victim and X-ray was advised.

8. The Investigating Officer has also prepared memo of recovery of the victim on 22 November, 2014. The recovery memo is marked as Exhibit Ka - 7A and proved by Prosecution Witness No. 8. According to the recovery memo, the victim was brought by her father to the police station on 22 November, 2014 and was sent for medical examination and X-ray along with her father.

9. The Investigating Officer thereafter prepared the site plan of the incident on 21 February, 2015. The site plan was marked as Exhibit Ka-6 and was duly proved by Prosecution Witness No. 7.

10. After the completion of the investigation, charge sheet was submitted by the Investigating Officer against Bhola alias Pramod under Sections 363, 366 and

376 IPC and Sections 5/16 and 5-8/6 of the Protection of Children from Sexual Offences Act, 2012. The Charge Sheet was submitted before the Court concerned on 22 February, 2015. The investigating officer after investigation submitted charge sheet against accused Bhola alias Pramod.

11. The Court below by order dated 29 July, 2017 summoned under Section 319 Cr.P.C, accused namely Santosh, Shrichandra, Ramsewak under Section 376D, 342, 504, 363, 366, 120B IPC and Section 4 POCSO Act.

12. On 4 December, 2017 the court concerned has framed charges against Bhola alias Pramod under Sections 363, 366, 376D and Section 6 POCSO Act and against Santosh under Sections 363, 366, 342, 504 and 376D IPC and Section 6 of the POCSO Act. The trial court on 4 December, 2017 has also framed charges against Shrichandra and Ramsewak under Sections 363, 366, 342, 504, 376D and 120B IPC and Section 6 of the POCSO Act. Accused persons denied the charges and claimed to be tried.

13. The prosecution in support of the case testified eight witnesses, namely, (PW-1) Ramcharan, (PW-2) victim, (PW-3) Constable Himanshu Gautam, (PW-4) Dhirendra Singh, Principal, (PW-5) Dr. Asha Sachan, (PW-6) Inspector Abdul Haleem (I.O.), (PW-7) Inspector Nandlal Bharti (I.O.) and (PW-8) Inspector Incharge Bhagwati Prasad Misra (I.O.).

14. The prosecution in support of the case produced the documentary evidence i.e. Complaint Exhibit Ka-1, Statement under Section 164 Cr.P.C. Exhibit Ka-2, FIR Exhibit Ka-3, General Diary Exhibit Ka-4, Admission Register Exhibit Ka-5, Medical Report Exhibit Ka-5A, Site Plan Exhibit Ka-6, Charge Sheet Exhibit Ka-7 and Fard Baramadgi Exhibit Ka-7A.

15. The statement of accused person under Section 313 of Cr.P.C. was recorded. The accused person denied the charges as false and concocted. The accused person claimed that they have been falsely implicated on account of prior enmity. The accused persons did not produce any defence witness.

16. As per the prosecution case, the informant (PW-1) was known to accused Bhola alias Pramod, Santosh and Shrichandra. The daughter of the informant prior to 3 months of the alleged occurrence was living with her uncle Shyamlal at Meerut. Shyamlal informed that informant's daughter used to talk on phone with accused Bhola alias Pramod; Informant thereafter made complaint to the father of accused Bhola alias Pramod namely, Shrichandra that his son is harassing his daughter on phone. On the aforesaid complaint, Shrichandra and both his sons namely Bhola alias Pramod and Santosh started abusing and ran towards the informant for beating him. Thereafter on 2 November, 2014, Shyamlal informed Ramcharan - informant that his daughter went to the school to pick up the children however has not come back. Report about the aforesaid incident was lodged at Police Station - Sisolar, District Hamirpur. On 8 November, 2014, daughter/Victim informed Ramcharan that she was at Kanpur; Informant went to the railway station Maudaha; Daughter of the informant was found at railway station - Maudaha; she informed that on 2 November, 2014 when she went to bring children from the school then accused Bhola alias Pramod, Santosh, Shrichandra and Ramsewak met her with

four wheel vehicle and forcefully took in the aforesaid vehicle and locked her in the room; Ramsewak and Shrichandra went back; In the room Bhola alias Pramod and Santosh forcefully raped the victim and kept her in the aforesaid room for 5 to 6 days; thereafter, the victim on getting the chance ran away and reached railway station Maudaha. Informant met his daughter at railway station. The daughter of the informant was aged about 15 years at the time of occurrence.

17. The prosecution further produced Prosecution Witness No. 2 - victim who has stated that she knew Santosh, Bhola alias Pramod, Ramsewak and Shrichandra who belong to her village; she was going along with her uncle Shyamlal by train to Meerut; on the same train accused Santosh and Bhola alias Pramod were following her and reached Meerut. Accused for two days was harassing the victim; on 2 November, 2014, victim went to pick up children from school; near the school, Santosh, Bhola alias Pramod, Ramsewak and Shrichandra were present along with four wheel vehicle namely, Marshall; after abusing victim forcefully took her in the aforesaid vehicle; Shrichandra opened the door of the vehicle and Ramsewak, Santosh and Bhola alias Pramod caught the victim. When victim shouted they gagged the mouth of the victim. They took the victim to Ghaziabad; locked her in one room; Bhola alias Pramod and Santosh were also staying there. Ramsewak and Shrichandra went back; at night Bhola alias Pramod used to come intoxicated in her room and Santosh used to stay outside the room; Bhola alias Pramod raped the victim; Bhola alias Pramod raped victim for five days; on 7 November, 2014 in the afternoon Santosh raped the victim; thereafter they took the victim to the railway station Ghaziabad and went to Kanpur; when Santosh and Bhola alias Pramod were having tea, she boarded the passenger train and came to railway station - Maudaha. Thereafter, she called her father who took her home. She has stated that her date of birth is 20 April, 1999; she has also stated that she had given statement to the Investigating Officer and she was also medically examined. She has also testified that her statement under Section 164 Cr.P.C. was recorded before the Magistrate. The victim has proved the statement made before the Magistrate under Section 164 Cr.P.C and the same was marked as Exhibit Ka-2.

18. The prosecution has further examined Constable Himanshu Gautam as Prosecution Witness No. 3 who has stated that on 9 November, 2014, he was posted at Police Station Sisolar on the post of Constable Moharir. On the said date on the report lodged by the informant he had lodged the First Information Report against Bhola alias Pramod and others under Sections 363 and 366 of the Indian Penal Code. The aforesaid witness has proved the First Information Report and the General Diary and the same are marked as Exhibits Ka-3 and Ka-4 before the trial court.

19. Prosecution in support of the case has further examined Shri Dhirendra Singh as Prosecution Witness No. 4. The said witness was on the relevant date posted as Principal, Poorv Madhyamik Vidyalaya, Bhamai, District Hamirpur for two years and from 1999 was posted as teacher in the aforesaid institution. He has stated that according to the records of the institution the date of birth of the victim is 20 April, 1999. The admission register with the relevant entry being S.R. No. 3002 was filed before the trial court and was marked as Exhibit Ka - 5.

20. Prosecution has further examined Dr. Smt. Asha Sachan as Prosecution Witness No. 5. She has stated that on 22 November, 2014 she was posted at District Women Hospital, Hamirpur as Medical Officer. She had conducted the medical examination of the victim on the said date; victim had informed her that one neighbourhood boy with another person had forcefully taken her; they took her to Ghaziabad in the room and thereafter committed rape; hymen was ruptured, old and healed. Vaginal Smear was sent for pathological examination. She has proved the medical examination report and the same was marked as Exhibit Ka - 5 before the trial court.

21. The prosecution has further examined retired Inspector Sri Abdul Haleem as Prosecution Witness No. 6. The said witness has stated that on 9 November, 2014 he was posted as Incharge Inspector at Police Station Sisolar. In his presence, on the basis of written application of informant First Information Report was lodged under Sections 363 and 366 IPC. Investigation of the aforesaid crime was entrusted to Sub Inspector Purshottam Narayan Tiwari. The First Information Report was also entered in the General Diary and thereafter abovenamed Sub Inspector was transferred and the investigation was handed over to then Police Station Incharge Bhagwati Prasad Mishra. He has stated that on 22 November, 2014 he had recorded the statement of the victim under Section 161 Cr.P.C. On 28 November, 2014 he has recorded the statement of the accused Bhola alias Pramod in the Case Diary. During investigation Section 376D IPC and Section 5 (6/6) of the POCSO Act was added; on 4 December, 2014 statement of the victim under Section 164 Cr.P.C. was recorded. On 16 December, 2014 statement of Smt. Sushila was recorded.

22. Thereafter prosecution has testified retired Inspector Nand Lal Bharti as Prosecution Witness No. 7. The said witness has stated that on 27 January, 2015 he was posted as Prabhari Nirikshak at the Police Station and he had taken the charge of the investigation of Case Crime No. 403 of 2014; on 5 February, 2015, the accused was taken on remand; on 21 February, 2015 after reaching Meerut on the pointing out of Shyamlal, who is the brother-in-law of the informant, the site map was prepared of the place of occurrence and the same was marked as Exhibit Ka-6. On 22 February, 2015 charge sheet was filed against accused Bhola alias Pramod under Sections 363, 366, 376 (2) IPC and 5(1/6) and 5/11 POCSO Act and the same was marked as Exhibit Ka-7.

23. Further the prosecution has examined Prabhari Nirikshak Bhagwati Prasad Mishra as Prosecution Witness No. 8. The said witness has stated that when he was posted on 22 November, 2014 at the concerned police station, the informant - Ramcharan came with his daughter to the police station. He had prepared the recovery memo of the victim and the same was marked as Exhibit Ka-7A.

24. As per the prosecution case, the accused persons have abducted the victim while she was going to school to pick up the children and thereafter committed rape. The accused Bhola alias Pramod is prosecuted under Sections 363, 366 and 376(D) IPC and Section 6 of the POCSO Act. Similarly, accused Santosh is prosecuted under Sections 363, 366, 342, 504 and 376D IPC and Section 6 of the POCSO Act. Further, Shrichandra and

Ramsewak were prosecuted under Sections 363, 366, 342, 504, 376D and 120B IPC and Section 6 of the POCSO Act.

25. Objection was raised on behalf of the accused before trial court that as per FIR, the occurrence took place on 2 November, 2014 and FIR has been registered on 9 November, 2014 after the coming back of the victim and prosecution has failed to give any reason regarding delay in lodging of the FIR. Accused had also raised objection that the recovery of the victim on 22 November, 2014 is false and concocted.

26. In this respect, it is to be noted that as per the FIR (Exhibit Ka-3) the informant has stated that his daughter use to talk to accused Bhola alias Pramod on mobile phone; his daughter/victim was staying with her uncle Shyamlal at Meerut; on 2 November, 2014, the accused has taken away her daughter and the informant was under fear that some untoward incident may happen with his daughter. The FIR was lodged on 9 November, 2014 at Entry No. 13/14 at 20:00 hours at the G.D. and the same was marked as Exhibit Ka-4. From the aforesaid, it is evident that the First Information Report was given on 9 November, 2014 and on the aforesaid basis, the Chik FIR was lodged being Exhibit Ka-3 at 14:20 hours. The First Information Report was lodged after 7 days of the occurrence and no reason has been given by the prosecution for the delay. PW-1 - informant has testified before the Court in which he has stated that on 2 November, 2014 his brother-in-law Shyamlal had informed that his daughter went to the school to pick up the children, however, she had not come back. On 3 November, 2014 he had given the information to the Police Station Sisolar by means of an application which is Exhibit Ka-1. The Chik FIR being Exhibit Ka-3. The report was lodged on 9 November, 2014 and the G.D. Entry No. 13/14 at 20:00 hours was lodged. The Prosecution Witness No. 3 - Constable Himanshu Gautam has also in his statement before the trial court has stated that the informant - Ramcharan on 9 November, 2014 had written complaint and on the aforesaid basis Chik FIR being Exhibit Ka-3 was lodged and the GD Entry being Exhibit Ka-4 was prepared. The Prosecution Witness No. 1 in his statement has stated that on 8 November, 2014 he had received information from his daughter that she is at Kanpur and when he had reached the railway station Maudaha at 11:00 hours and thereafter on the next date he had taken the daughter to the police station and after lodging the report he had brought his daughter back. He has also stated that he had brought his daughter to his house on 8 November, 2014. On the aforesaid basis, it is evident that the PW-1 - informant went to the police station along with his daughter and lodged the FIR on 9 November, 2014. PW-1 has further stated that before coming to the police station his daughter had informed all the facts to the informant and the report was lodged on the basis of the information received from his daughter. He has also stated that the Inspector Incharge had enquired from the informant and the victim prior to lodging of the FIR and he had signed the FIR after reading the same. He has also stated that the place where the application was prepared his daughter and his brother-in-law were also present. On the aforesaid basis, the trial court came to the conclusion that the FIR was lodged after the victim was recovered and after receiving the information from the victim about the alleged incident and on account of the aforesaid fact in respect of the alleged occurrence on 2 November, 2014

the FIR was lodged on 9 November, 2014 without explaining the delay. The victim - PW-2 was also examined before the trial court who has stated that after reaching the home she had given all information to her father and mother and on the information provided by her, the informant had lodged the FIR on 9 November, 2014 at Police Station Sisolar; on the aforesaid date she did not went to the police station. On the basis of the statement of the victim, it is evident that the FIR was lodged after she had come back to her home and on the information received from the victim on 9 November, 2014 the FIR was lodged.

27. The Investigating Officer has also prepared the recovery memo showing recovery of the victim on 22 November, 2014 despite the fact that the informant who is the father of the victim and the victim herself has stated that she has reached the house on 8 November, 2014. On the aforesaid basis, the trial court came to the conclusion that the recovery of the victim on 22 November, 2014 is suspicious and cannot be relied upon. The trial court has also recorded that the recovery memo and the statement of the PW-1 and PW-2 are contrary and if the recovery memo is treated to be correct then the statement of PW-1 and PW-2 that the victim was recovered on 8 November, 2014 was false.

28. The prosecution has further examined Inspector Nandlal Bharti (PW-7) who has stated that on 22 November, 2014 he had reached Meerut and had contacted Shyamlal who is brother-in-law of the informant - Ramcharan. He has also stated that on the pointing out of the Shyamlal, investigating Officer reached the place of occurrence and has prepared the site plan which is Exhibit Ka-6. The aforesaid witness has further stated that he had not prepared the site plan on the pointing out of the victim or the informant and has stated that he had tried to take the victim and his father to the place of occurrence but they did not come to the place of occurrence. In this respect, it is to be noted that Shyamlal is not the eye witness of the alleged occurrence and the site plan was prepared in the presence of Shyamlal and as per the description given by the Shyamlal. The Prosecution Witness No. 1 in his statement before the trial court has stated that the police had never taken him or his daughter to Meerut. He has also stated that PW-2 had not shown the place of occurrence to the Investigating Officer. The aforesaid witness has further stated that the Investigating Officer never came to take the witness to Meerut. On the aforesaid basis, it is evident that the site plan that has been prepared was prepared on the basis of information and pointing out of the Shyamlal who is not the witness of the alleged occurrence and the site plan was not prepared on the pointing out of the victim. The victim never went to the Meerut along with the Investigating Officer. The Investigating Officer PW-6 Abdul Haleem in his statement has stated that when he asked the informant to come to Meerut for inspection of the place of occurrence then he replied that he will talk to his lawyer and will respond. The actual place of occurrence could have only be identified by the victim. Further the site plan prepared does not disclose the place at Ghaziabad where the alleged rape is said to have been committed nor the prosecution has led any evidence to show the place of occurrence of rape.

29. Prosecution Witness No. 1 - informant has stated that the accused Bhola alias Pramod use to talk on phone with her daughter and the aforesaid fact was informed by Shyamlal and thereafter he

went to the house of the accused Bhola alias Pramod and met with his father Shrichandra. Shrichandra and his two sons, namely, Bhola alias Pramod and Santosh started abusing and beating. Thereafter, his brother-in-law Shyamlal on 2 November, 2014 informed that his daughter went to the school to pick up the children, however, she did not come back and on the aforesaid basis the FIR was lodged. The aforesaid witness has further stated that on 8 November, 2014 daughter/victim had called him and informed that she was in Kanpur. Victim was recovered at Railway Station - Maudaha. The said witness has further stated that after recovery of the daughter, she had informed about the alleged occurrence. On the aforesaid basis, the Prosecution Witness No. 1 came to know about the alleged incident. The Prosecution Witness No. 1 is not the eyewitness of the alleged occurrence. The said witness has given statement on the basis of the information given by Shyamlal and victim. In the cross-examination the said witness has stated that prior to the information received from his daughter, no person had informed him about the alleged occurrence. The said witness has further stated that his brother-in-law - Shayamlal did not come to his house and that, as per as informant, his daughter did not have any mobile phone prior to alleged incident. The mobile number being 80XXXXX493 was written in the FIR on the basis of the information given by Shyamlal. It is to be noted that the aforesaid witness on one hand has stated that his brother-in-law Shyamlal did not visit his house and on the other hand he has stated that he had given the mobile number in the FIR on the basis of the information given by Shyamlal. It is further to be noted that the witness has further stated that his daughter did not have any phone prior to the alleged incident. The witness has further testified that he does not keep any mobile phone and has not given any mobile number of his daughter in the FIR. He has further stated that the mobile number given in the FIR has not been given by the informant but the same has been inserted by some other person or his brother-in-law.

30. PW-1 - informant has stated that he does not keep mobile phone. The victim in her statement has stated that her father/informant has mobile phone bearing mobile number 96XXXXX314. On the aforesaid basis, it is not known as to why the Prosecution

31. The Prosecution Witness No. 1 further in his statement has stated that the victim did not accompany him to the police station when the FIR was lodged. He has further stated that he never took the victim to the police station; Shyamlal on 2 November, 2014 on phone informed that his daughter went to the school to pick up the children, however, has not returned; on 3 November, 2014, the informant informed the Police Station - Sisolar and the report was marked as Exhibit Ka-1 before the trial court; on the other hand, the Prosecution Witness No. 1 in cross-examination has stated that after the recovery of the victim on 8 November, 2014, the FIR was lodged on the basis of the information received from the victim. The informant has made contradictory statement that the FIR was lodged on 3 November, 2014 on the information received from Shyamlal whereas on the other hand he has stated that the FIR was lodged after the victim was recovered on 8 November, 2014 and on the basis of information received from the victim, the FIR was lodged on 9 November, 2014.

32. The Prosecution Witness No. 1 has further stated that on 8 November,

2014, victim was recovered and thereafter the FIR was lodged, however, the recovery memo in respect of the victim being Exhibit Ka-7A which is prepared by Prosecution Witness No. 8 shows that the victim was brought to the police station by the informant on 22 November, 2014. Thereafter, the statement of the victim under Sections 161 and 164 Cr.P.C. and medical examination was effected. Victim was recovered on 8 November, 2014 and the FIR was lodged on 9 November, 2014, however, the victim was brought to the Police Station on 22 November, 2014. There is no explanation offered by the prosecution with regard to the period from 8 November, 2014 to 22 November, 2014 during which the victim was not produced before the Police/Investigating Officer. On the aforesaid basis, the trial court came to the conclusion that the statement of the Prosecution Witness No. 1 are not reliable and trustworthy.

33. In the present case, the only eyewitness to the alleged occurrence is the victim and on the basis of the statement of the victim, it is to be seen whether the offence alleged is made out against the accused person. It is trite of law that conviction can be founded on the sole testimony of the prosecutrix where the statement of the prosecutrix inspires confidence and is accepted by the court. The conviction can be founded on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which are necessary for the court for corroboration of the statement of the prosecutrix. The corroboration is required as a matter of prudence under the given facts and circumstances of the case. The court while acquitting the accused on the benefit of doubt should be cautious to see that the doubt be a reasonable doubt and it should not reverse the finding on the basis of irrelevant circumstances or mere technicalities.

34. On the aforesaid basis, it is first to be seen whether the statement of the prosecutrix is believable. It is to be noted that the FIR was lodged on 9 November, 2014 at 4:20 pm. The informant was present at the police station at the time of lodging of the FIR and the victim was not present along with the informant. The victim was said to have been recovered on 8 November, 2014. The victim in her statement has stated that she had reached Maudaha at 11:30 AM and had made a phone call to the informant (father of the victim) and thereafter on reaching the home narrated the incident to the informant and her mother. On the basis of the information received from the victim, the FIR was lodged on 9 November, 2014. On the aforesaid date, the victim did not accompany the informant to the police station. The medical examination of the victim was held 10 to 15 days after the FIR was lodged. The statement of the victim before the Chief Judicial Magistrate under Section 164 Cr.P.C. was held on 4 December, 2014. As per the prosecution case, the informant lodged the FIR on 9 November, 2014 after the victim was recovered on 8 November, 2014 with the allegation that on 2 November, 2014, the accused Bhola alias Pramod has enticed his daughter. When the victim was recovered on 8 November, 2014 thereafter the FIR was lodged by the informant after receiving information from the victim. FIR was lodged on 9 November, 2014, however, despite the fact that the details of the alleged occurrence were in the knowledge of the informant on the basis of the information received from the victim.

Informant in the FIR did not submitted any request for search of the victim. Further, as per the recovery memo being Exhibit Ka-7, it is evident that on 22 November, 2014, victim was brought by the informant to the police station and on the basis of the aforesaid, recovery memo was prepared by the Investigating Officer. The prosecution has failed to explain the delay as the victim was recovered on 8 November, 2014 then why she was produced before the Investigating Officer on 22 November, 2014 and why the aforesaid fact was not disclosed to the Investigating Officer. The trial court on the aforesaid basis came to the conclusion that the informant is trying to hide facts and have not brought on record all the facts before the court.

35. As per the FIR, the accused used to call on the mobile number of the victim. The first information report was lodged by the father of the victim. The victim in her statement before the trial court has stated that she did not had any mobile phone at the time of alleged occurrence. She has also stated that when she was at Meerut at her uncle's house she did not personally had any mobile phone. She has also stated that she did not remember the number of the mobile phone which was at the house at Meerut which was being used by all the family members. The Investigating Officer on the basis of the mobile number stated in the FIR has taken call details of the mobile number. The victim is denying having the mobile number as stated in the FIR which is indicative of the fact that the victim is hiding the truth from the court despite the fact that there is material indicating the call details of the mobile number.

36. The prosecution case as per the FIR is that the victim was residing at my right along with her uncle. The accused used to call the victim from mobile number 737XXXXX55 on the mobile number of the victim 805XXXXX93. Shyamlal informed that the victim was talking on phone to the accused. Thereafter, the informant went to the father of the accused asking him to instruct the accused to desist from talking with the victim. In this respect the call details of the victim are to be noted which are detailed in trial court judgment. The details of the call are as under :

"दिनांक 03.07.2014 को अभियुक्त द्वारा पीडिता को दो बार काल किया गया।

दिनांक 03.07.2014 को पीड़िता द्वारा अभियुक्त को एक बार काल किया गया।

दिनांक 03.07.2014 को पुनः अभियुक्त द्वारा पीडिता को एक बार काल किया गया।

दिनांक 04.07.2014 को अभियुक्त द्वारा पीड़िता को सात बार काल किया गया।

दिनांक 05.07.2014 को अभियुक्त द्वारा पीड़िता को तीन बार काल किया गया।

दिनांक 06.07.2014 को अभियुक्त द्वारा पीड़िता को दो बार काल किया गया।

दिनांक 07.07.2014 को अभियुक्त द्वारा पीडिता को आठ बार काल किया गया।

दिनांक 08.07.2014 को अभियुक्त द्वारा पीडिता को पांच बार काल किया गया।

दिनांक 09.07.2014 को अभियुक्त द्वारा पीड़िता को पांच बार काल किया गया।

दिनांक 10.07.2014 को अभियुक्त द्वारा पीड़िता को सात बार काल किया गया।

दिनांक 11.07.2014 को अभियुक्त द्वारा पीड़िता को दस बार काल किया गया।

दिनांक 12.07.2014 को अभियुक्त द्वारा पीडिता को तीन बार काल किया गया।

दिनांक 13.07.2014 को अभियुक्त द्वारा पीडिता को दो बार काल किया गया।

दिनांक 14.07.2014 को अभियुक्त द्वारा पीडिता को ग्यारह बार काल किया गया।

दिनांक 15.07.2014 को अभियुक्त द्वारा पीडिता को छः बार काल किया गया।

दिनांक 17.07.2014 को अभियुक्त द्वारा पीडिता को चौदह बार काल किया गया।

दिनांक 18.07.2014 को अभियुक्त द्वारा पीडिता को सात बार काल किया गया।

दिनांक 19.07.2014 को अभियुक्त द्वारा पीडिता को दस बार काल किया गया।

दिनांक 20.07.2014 को अभियुक्त द्वारा पीडिता को बारह बार काल किया गया।

दिनांक 21.07.2014 को अभियुक्त द्वारा पीडिता को बारह बार काल किया गया।

दिनांक 22.07.2014 को अभियुक्त द्वारा पीडिता को चार बार काल किया गया।

दिनांक 23.07.2014 को अभियुक्त द्वारा पीडिता को चौबीस बार काल किया गया।

दिनांक 24.07.2014 को अभियुक्त द्वारा पीडिता को पांच बार काल किया गया।

दिनांक 25.07.2014 को अभियुक्त द्वारा पीडिता को तीन बार काल किये गये है।

दिनांक 25.07.2014 को पीडिता द्वारा अभियुक्त को एक बार काल किया गया।

दिनांक 25.07.2014 को पनः अभियुक्त द्वारा पीडिता को एक बार काल किया गया।

दिनांक 26.07.2014 को पीडिता द्वारा अभियुक्त को एक बार काल किया गया।

दिनांक 27.07.2014 को पीडिता द्वारा अभियुक्त को छः बार काल किया गया।

दिनांक 28.07.2014 को अभियुक्त द्वारा पीडिता को छः बार काल किया गया।

दिनांक 29.07.2014 को पीडिता द्वारा अभियुक्त को पांच बार काल किया गया।

दिनांक 30.07.2014 को पीडिता द्वारा अभियुक्त को आठ बार काल किया गया।

दिनांक 31.07.2014 को पीडिता द्वारा अभियुक्त को सात बार काल किया गया।

दिनांक 31.07.2014 को अभियुक्त द्वारा पीडिता को एक बार काल किया गया।

दिनांक 31.07.2014 से दि० 10.11.2014 पीडिता के इस मोबाईल पर कोई काल नही आई है , न ही की गयी है। जिससे स्पष्ट है कि दिनांक 31.07.2014 से 10.11.2014 तक पीडिता का मोबाईल स्वीच आफ कर दिया गया है।"

37. On the basis of aforesaid call details, it is evident that between the victim and the accused there were talks going on for a substantial period of time. In case the accused was talking to the victim without her consent then the FIR should have been lodged at the earlier point of time. There was a regular communication between the victim and the accused for a substantial period of time is indicative that the victim was taking interest in talking to the accused and the aforesaid fact was not disclosed by the victim before the trial court which creates doubt on the testimony of the victim.

38. The PW-2 (victim) in her statement has stated that on 22 July, 2014 she went to her uncle's home. When she was proceeding for Meerut then accused Santosh and Bhola alias Pramod were also travelling in the same compartment; on reaching Meerut they met on the next date; when she was going to school to bring the children of her uncle, she met the accused; for the first time when she went to Meerut she had seen the Bhola alias Pramod in the train; accused Bhola alias Pramod did not come to the house of the victim at Meerut; on 22 July, 2014, the mobile location of the victim at 6:12 am was at Village Sisolar Ajay Kumar Oamar Gate 259 Tehsil Maudaha Near Hospital Hamirpur and on 22 July, 2014 at 20:59 hours, the mobile location was at Shivnarayan, son of Late Bhairam Singh, Village Post Chichara, Tehsil Sadar, District Hamirpur.

39. On the aforesaid basis, it can be said that the victim on 22 July, 2014 was in Hamirpur and Mahoba area; on 23 July, 2014, the mobile location at 17:48 hours of the victim was at Poorvi Taraus Mahboob Ahmad Gate No. 2762/2, Village Tehsil Maudaha, Near Masjid Hamirpur; on 23

July, 2014 at 19:8 hours, the mobile location of the victim was Patara Abhinath Singh Kushwaha 2759 Patara Ghatampur Kanpur; on 23 July, 2014 at 21:25 hours, mobile location was at Anil Kumar Gupta Sataghar, Tehsil and District Hamirpur; on 24 July, 2014 at 7:40 hours, the mobile location of the victim was at Aligarh and on 24 July, 2014 at 16:57 hours, the mobile location was at Meerut. The victim on 22 July, 2014 was in Hamirpur area and thereafter on 23 July, 2014 was at Ghatampur Kanpur and thereafter at Aligarh and she reached Meerut at 16:57 hours.

40. On the aforesaid basis, the trial court came to the finding that on 22 July, 2014 the victim was not at Meerut whereas she went to Meerut on 23 July, 2014 and reached Meerut on 24 July, 2014. Thereafter, the mobile location of the victim was at Meerut.

41. So far as on 22 July, 2014, mobile location of accused Bhola alias Pramod was at Sisolar Ajay Kumar Oamar, Tehsil Maudaha Near Hospital Hamirpur; on 23 July, 2014 at 8:51 hours, the accused was in the same location. Thereafter on 23 July, 2014 at 21:25 hours, the location of the accused was at Hamirpur. In the intervening period, the accused had made 50 calls and received the same; out of which 24 calls were made to the victim and all the locations were of Maudaha.

42. On the aforesaid basis when the victim on 23 July, 2014 reached Kanpur via Ghatampur, at that point of time, accused Bhola alias Pramod mobile location was at Maudaha. On 24 July, 2014 the victim reached Meerut and at 16:57 hours SMS was received at Meerut. On 24 July, 2014 the location of mobile phone of accused was at Maudaha and thereafter at Banda and further thereafter at Maudaha at 16:54 hours. Further, in the night at 22:30 hours, the mobile location of the accused was at Maudaha. On 25 July, 2014 the mobile location of the accused was at Maudaha; on 26 July, 2014, 27 July, 2014, 28 July, 2014 and 29 July, 2014, the mobile location of all the accused was at Maudaha.

43. On the aforesaid basis, the trial court came to the conclusion that the accused was not travelling with the victim in the train while she was going to Meerut nor the accused went to the Meerut and as such, the statement of the victim that the accused Bhola alias Pramod came to Meerut along with the victim does not corroborate with the call details.

44. The PW-2 (victim) in her statement has stated that on 2 November, 2014, accused met her between the crossing and the school; accused was sitting in his Marshall car; she (victim) did not know who was driving the car; she (victim) first saw Shrichandra who opened the door of the vehicle; when she came near to the vehicle, Shrichandra shouted to catch hold the victim and thereafter Ramsewak, Bhola alias Pramod and Santosh forcefully caught her and forced her into the vehicle; in the vehicle Bhola alias Pramod and Santosh were sitting with the victim and Ramsewak and Shrichandra were sitting at the back of the vehicle; victim stayed at the room in Ghaziabad; thereafter the victim went from Ghaziabad along with Bhola alias Pramod to Kanpur; on 8 November, 2014 between 6 to 7 a.m. she came to Kanpur; she has stated that she came on Auto to the railway station; she has stated that when she was boarding the train she had shouted for help and also desisted forceful boarding of the train, however, she did not received any

injury; she has stated that she was kept at Ghaziabad for five days.

45. From perusal of the mobile call details of the victim, it is evident that upto 31 July, 2014 the mobile phone of victim was working and thereafter the mobile phone started working on 10 November, 2014. On the aforesaid basis, the trial court came to the conclusion that from 31 July, 2014 to 10 November, 2014, the mobile phone of the victim was switched off. The location of the mobile phone of the victim on 31 July, 2014 was in Meerut area and on 1 November, 2014 the location of the mobile phone of the accused at 21:11 hours was at Sisolar, Tehsil Maudaha, Near Hosptial Hamirpur; on 2 November, 2014, the accused made six calls and received the same and mobile location of the call of the accused was at Sisolar.

46. On the aforesaid basis, the trial court came to the conclusion that the time which the victim alleges that the accused forcefully took her into the vehicle and took her to Ghaziabad, at that point of time, the mobile phone location of the accused was at Kanpur and it is not possible that the accused reached to Meerut on 2 November, 2014 and as such the fact that accused Bhola alias Pramod took the victim forcefully in the vehicle from Meerut is against the call details. From 4 November, 2014 to 7 November, 2014, the mobile phone location of the accused was at Delhi and on 8 November, 2014 at 20:7 hours, the mobile phone location of the accused was at Kanpur and on the aforesaid basis, the trial court came to the conclusion that the narration of events by the victim does not match with the call details and the presence of the accused at the place of occurrence has not been proved by the prosecution.

47. It is further been noted that the victim was medically examined on 22 November, 2014 at District Women Hospital by Dr. Asha Sachan (PW-5). The aforesaid witness has duly proved the medical examination report dated 22 November, 2014. The witness has testified that the victim had informed the aforesaid witness that one neighbourhood boy and others had abducted her and has taken her to Ghaziabad where they have committed rape. The aforesaid witness has stated that the hymen was ruptured, old and healed. The said witness has proved the medical examination report as Exhibit Ka-5A. No external injury was found on the body of the victim during medical examination nor there was any bleeding. The said witness has testified that the victim has not given the name of the accused person. The case of the prosecution is to the effect that the victim was forcefully abducted and thereafter against her consent and forcefully raped. However, the medical evidence does not support the prosecution case.

48. On the aforesaid basis, the trial court came to the conclusion that the victim has not disclose the complete facts and have hidden the actual facts from the court and as such, the statement of the victim is not reliable.

49. Insofar as the allegation with regard to rape of victim is concerned, the victim in her statement has stated that she was taken to Ghaziabad in Marshall vehicle and was kept in one room where the accused Bhola alias Pramod had committed rape. She has stated that the accused use to bring food for victim in the night and use to beat her. She has stated that she did not take bath for six days and use to attend the natural call in the room. She has also stated

that she did not shout for help as the accused Bhola alias Pramod use to threaten her. The statement of the victim is not believable as when the accused forcefully asked the victim to have food then there was no occasion that the victim could have been left without food. On the basis of the statement of the victim alone, it cannot be said that the victim was subjected to rape and the prosecution has failed to prove its case beyond reasonable doubt.

50. Insofar as the other accused persons are concerned, in the FIR only the name of the Bhola alias Pramod was given as the person who has taken away the victim. However, the victim was produced before the court. She has stated that the name of brother of main accused, Santosh, father Shrichandra and Ramsewak. When the statement of the victim in relation to the main accused Bhola alias Pramod is doubtful then it is not open that the same evidence be considered for prosecution of the other accused persons.

51. On the basis of the aforesaid, the trial court came to the conclusion that the prosecution has failed to prove the fact that when the victim was going to Meerut then the accused Bhola alias Pramod and Santosh also went to Meerut along with the victim.

52. The prosecution has also failed to prove that the accused forcefully took the victim in the Marshall vehicle and that she was taken to Ghaziabad by the accused persons. The prosecution has also failed to prove that the victim was subjected to rape. The victim met her father/informant on 8 November, 2014. However, as per the recovery memo dated 22 November, 2014, the victim was brought to the Police Station on 22 November, 2014 and there is no explanation as to why the victim was not produced before the Investigating Officer on 9 November, 2014. There is no evidence with regard to any abuse being made by the accused persons. On the aforesaid basis, the trial court acquitted the accused persons for offence under Sections 363, 366, 376 D, 342 and 504 IPC and Section 6 of the POCSO Act.

53. Considering the overall circumstances and submission of learned A.G.A. and after going through the evidence and lower court record, we are unable to persuade ourselves in taking a different opinion from that of trial court. The trial court was fully justified in acquitting the accused-respondent.

54. Learned AGA failed to point out any illegality, infirmity or perversity in the judgment of the trial court.

55. The leave to appeal application is, accordingly, rejected.

56. The appeal, in consequence, stands dismissed.

57. Let the lower court record be transmitted back to court below along with a copy of this order.

(2022)07ILR A907
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.07.2022

BEFORE

THE HON'BLE OM PRAKASH-VII, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Government Appeal No. 1234 of 2004

State of U.P. ...Appellant
Versus
Ishwar Chandra & Ors. ...Respondents

Counsel for the Appellant:
Govt. Advocate

Counsel for the Respondents:
Sri Rakesh Dubey, Sri Ajatshatru Pandey, Sri Mohit Singh, Sri Ramesh Kumar Shukla, Sri Ran Dhir Singh, Sri G.S. Chaturvedi, (Senior Adv.)

Criminal Law - Criminal Procedure Code, 1973 - View taken by the Trial Court is a possible view-Appellate court to interfere only if strong and compelling reasons-Prosecution case is not supported with medical evidence-manner and style of incident is not believable.

Appeal dismissed. (E-9)

List of Cases cited:

1. Anwar Ali & ors. Vs The St. of H.P., MANU/SC/0723/2020

2. Ghurey Lal Vs St. of U.P. (2008) 10 SCC 450

(Delivered by Hon'ble Om Prakash-VII, J.)

1. This Government Appeal has been preferred by the State-appellant against the judgment and order of acquittal dated 31.10.2003 passed by Additional Sessions Judge / Fast Track Court No.2, Bijnor in Sessions Trial No.456 of 1998, State Versus Ishwar Chandra and others, relating to Police Station Seohara, District Bijnor by which the learned trial court has acquitted all the respondents namely, Ishwar Chandra, Ram Phal Singh, Krishan Bahadur and Hari Om for the offences under sections 307/34, 302/34, 323/34, 504, 506 I.P.C.

2. At the very outset, we would like to point out that leave to appeal was granted and appeal was admitted on 31.7.2008. Pending final outcome, one of the accused-respondents namely, Ram Phal Singh expired and appeal in his respect stands abated vide order dated 16.12.2021. We therefore have to adjudicate this appeal only against surviving accused-respondent no.1, 3 and 4 namely, Ishwar Chandra, Krishan Bahadur and Hari Om.

3. Briefly narrated, prosecution allegations against respondents-accused, as mentioned in the written report (Ex. Ka.-1) given by the informant - Hemraj Singh, are that on 26.5.1998 at about 6:00 in the morning, the brother of the informant namely, Bhopal Singh son of Babu Singh had gone towards the southern direction from the village to attend the nature call. On the way, accused Ishwar Chandra son of Ram Phal Singh, Ram Phal Singh son of Moti Singh, Krishan Bahadur son of Moti Singh and Hari Om son of Krishan Bahadur, who belong to same village and were armed with lathi and tabal, surrounded the brother of the informant and with intention to kill, they started beating him. Due to this assault, brother of the informant became seriously injured. He received multiple injuries on his body. On hearing the noise, when the informant reached there to save / rescue his brother, all the four accused-persons assaulted the informant with lathi and danda, hurled abuses and threatened him with dire consequences. This incident was witnessed by the villager Brijpal Singh son of Umed Singh and Anand Kumar son of Chhotey who also tried to save the informant and his brother. There was old enmity going on between the parties. Request was made to register the case and take legal action.

4. Thereafter, a written report of the incident Ex. Ka.-1 was given at the police station concerned by the informant Hemraj Singh (P.W.1). On the basis of written report, head constable Raj Nath Singh

(P.W.8) prepared chik report (Ex. Ka.-6) and registered the case as crime no.181 of 1998 under sections 307, 324, 323, 450 IPC in the G.D. (Ex.Ka.-7) at serial no.22 on 26.5.1998 at 8:45 A.M.

5. After registration of the case, "chitthi majroobi" (letter for medical examination of injured) was got prepared for injured Hemraj Singh and Bhopal Singh and they were sent for medical examination at Primary Health Centre, Seohara.

6. Dr. Ashok Rana (P.W.3), who was posted at P.H.C., Seohara, examined the injuries of Hemraj Singh (P.W.1) on the same day i.e. 26.5.1998 at 9:00 A.M. and found following injuries on his person :

(i) Abrasion 5 cm. x 1.5 cm. on outer aspect of right lower limb 2.5 cm. below from right shoulder joint away from wound.

(ii) Contusion 4 cm. x 1 cm. on outer aspect of right thigh 10 cm. above from right knee joint, deep red in colour.

(iii) Abrasion 1 cm. x 0.5 cm. on outer aspect of right thigh 7 cm. above from left knee joint oozing from wound.

(iv) Contusion 11 cm. x 2 cm. on left side lumbar region 20 cm. below from scapula, deep red in colour.

(v) Contusion in area 11 cm. x 5 cm. on upper right buttock, deep red in colour.

(vi) Contusion 4 cm. x 2 cm. on outer aspect of right thigh 8 cm. away from injury no. (v), deep red in colour.

(vii) Lacerated wound 5 cm. x 1.5 cm. x muscle deep on right side scalp 11 cm. above from right ear margin irregular, fresh blood clot present.

(viii) Incised wound 3 cm. x 0.5 cm. x 0.25 cm. on right side scalp 1.5 cm. above from injury no. (vii). Margin sharp clean cut everted. Fresh blood clot present.

As per opinion of the doctor, all the injuries found on the person of the injured were simple in nature. Injuries no. (i) and (iii) were caused by friction from rough surface. Injuries no. (ii), (iv), (v), (vi) and (vii) were caused by blunt and hard object whereas injury no. (viii) was caused by some sharp edged object. Injuries were fresh in duration.

7. Injuries sustained by injured Bhopal Singh (deceased) were not noted down by the concerned doctor at P.H.C., Seohara, rather they referred him to Medical College, Meerut. However, the injured Bhopal Singh succumbed to his injuries at 1:00 P.M. at Dhanaura Mandi on the way to Meerut Medical College. Thereafter, dead body of the deceased was brought back to his village and information of his death was given at the concerned police station in writing (Ex.Ka.-9) by P.W.9 Brij Pal Singh. On the basis of this information, section 302 IPC was added in the case. G.D. entry was also made to this effect which is Ex.Ka.-8. Thereafter, S.I. Ram Swaroop Sagar (P.W.10) of the concerned police station reached at village Galla Khedi and performed the inquest on the body of the deceased Bhopal Singh and prepared inquest memo Ex. Ka-10 and other papers relating to inquest. Letters to R.I., C.M.O., photo lash, challan lash, sample seal were also prepared and keeping the dead body of the deceased in a sealed cloth it was sent for postmortem examination at District Hospital, Bijnor.

8. Autopsy on the body of the deceased Bhopal Singh was performed at District Hospital, Bijnor on 27.5.1998 at 1:00 P.M. by Dr. Vijay Kumar Goel (P.W.5) and he prepared the postmortem report (Ex.

Ka-3). The age of the deceased was about 48 years. He was a middle aged man of thin built. Membranes were pale. Eyes were partly opened. Mouth was closed. Rigor mortis was found in all the four limbs.

The following antemortem injuries were found on the body of the deceased :

(i) Incised wound 1.5 cm. x 0.5 cm. x bone deep on right upper arm and on lower part.

(ii) Multiple contusions in an area of 9 cm. x 10 cm. on right upper arm. On exposure, there was collection of blood inside the muscles and humerus bone was found fractured.

(iii) Three abrasions in an area of 12 cm. x 5 cm. in right forearm upto wrist. On exposure, there was collection of blood under skin. Both bones of right forearm were fond fractured.

(iv) Abrasion ½ cm. x ½ cm. on the left elbow, outer side.

(v) Abrasion 5 cm. x ½ cm. on back of left forearm, mid area.

(vi) Abrasion 3 cm. x 1 cm. on left wrist, back and middle side.

(vii) Multiple contusions on whole back side in an areas of 60 cm. x 30 cm. Largest contusion was of size 13 cm. x 4 cm. and smallest one was of 8 cm. x 3 cm. They were ten in numbers.

(viii) Multiple contusions in an area of 30 cm. x 12 cm. on back of left hip and on back side of thigh in size of 5 cm. x 2 cm. to 10 cm. x 4 cm. Six in numbers.

(ix) Multiple abrasions in an area of 27 cm. x 10 cm. in front of left knee and legs. 1 cm. x 1 cm. to 3 cm. x 1 cm. size. Eight in numbers.

(x) Lacerated wound 1 cm. x 0.5 cm. x bone deep on left leg just above medial malleolus. On exposure, both bones of leg were found fractured.

(xi) Contusion 6 cm. x 2.5 cm. in abdomen on right side.

(xii) Multiple contusions in an area of 30 cm. x 15 cm. on right hip and thigh area. Four in numbers.

(xiii) Multiple abrasions in an area of 32 cm. x 6 cm. in front of right knee and leg, ten in numbers, with redness and swelling all around right leg.

(xiv) Abrasion 2 cm. x 1.5 cm. on top of right shoulder.

On internal examination, 7th, 8th and 9th ribs of left side were found fractured and there was fracture on posterior ends. There was injury on the left lung whereas no injury was found on the right lung. Teeth were 16/16. 100 gm. liquid was found in the stomach. As per opinion of the doctor, death of the deceased was the outcome of shock and haemorrhage as a result of ante-mortem injuries.

9. Initially, the investigation was made by P.W.10 S.I. Ramswaroop, who visited the place of occurrence and prepared site plan (Ex.Ka.-15) mentioning all details of the place of occurrence. He also took blood stained and plain earth into possession and prepared fard. Statement of witnesses were also recorded. After the case was converted into section 302 IPC, investigation was handed over to P.W.11 S.O. Jaipal Singh. The said investigating officer, after fulfilling entire formalities, submitted charge-sheet (Ex.Ka.-21) against the accused-respondents.

10. Case, being exclusively triable by the Court of Sessions, was committed for trial. Accused appeared and charge against them was framed for the offence punishable under sections 307/34, 302/34, 323/34, 504, 506. The charges were read out and explained to the accused-respondents, who

all abjured them, pleaded not guilty and claimed to be tried.

11. During trial, in order to prove its case, prosecution examined as many as 11 witnesses i.e. P.W.1 Hemraj, the informant and injured of the case, P.W.2 Anand Singh, P.W.3 Dr. Ashok Rana, who examined the informant injured Hemraj, P.W.4 Constable 866 Mahendra Singh, P.W.5 Dr. Vijay Kumar Goel who performed the autopsy on the body of the deceased, P.W.6 Contable 732 Jeevan Singh, P.W.7 H.C. Sobran Singh, P.W.8 Constable 450 Rajnath Singh, P.W.9 Brijpal Singh, P.W.10 S.I. Ram Swaroop Sagar and P.W.11 S.O. Jaipal Singh.

12. After closing the evidence, statement of the accused under section 313 Cr.P.C. was recorded by the trial court in which the accused denied the entire prosecution evidence and claimed that they were falsely implicated in this case. Oral and documentary evidence ware also adduced by the accused in their defence.

13. Trial court after hearing the parties disbelieved the prosecution version and vide impugned judgment and order, acquitted the accused-respondents for the charges framed against them. Hence, this appeal.

14. We have heard Sri Sanjay Kumar Nigam, learned A.G.A. for the State-appellant as well as Sri G.S. Chaturvedi, learned Senior Advocate assisted by Sri Ajatshatru Pandey, learned counsel for the accused-respondents.

15. Submission of learned A.G.A. appearing for the State was that finding arrived at by the trial court in the impugned judgment and order regarding the acquittal of the accused-respondents are illegal and perverse. P.W.1 Hemraj Singh, P.W.2 Anand Singh and P.W.9 Brij Pal Singh are eye-account witnesses. P.W.1 Hemraj Singh sustained injuries in the said incident. He was also beaten by the accused-respondents in the incident. Medical evidence fully supports the oral version. There was a dying declaration in the form of statement of the deceased under section 161 Cr.P.C., which can be relied upon, but the trial court ignoring the settled principle of law disbelieved the aforesaid statement to be treated as dying declaration. First information report was lodged promptly with clear details. Motive to commit the present offence has also been disclosed in it. Finding of the trial court regarding the first information report is also illegal and perverse. Prosecution was able to prove the date, time and place of the incident. All the accused-persons have participated in commission of the crime. Actual role played by each and every accused has also been established by the prosecution. Weapon assigned to them have also been made clear during examination. Non-examination of the scribe of written report is not fatal to the prosecution case. Minor contradictions occurred in the statement of the witnesses are not material to disbelieve the statement of eye-account / injured witnesses. Thus, referring to the entire evidence adduced by the parties as well as finding recorded by the trial court in the impugned judgment and order, prayer was made to allow the appeal and set-aside the impugned judgment and order convicting the accused-respondents.

16. Per contra, learned counsel appearing for the accused-respondents argued that it was a blind murder case. None has seen the incident. P.W.1 is also not an eye-account witness. He did not

receive injuries in the said incident. Injury report said to have been prepared in respect of P.W.1 Hemraj Singh is a fake and forged document and injuries are self-suffered. First information report was not in existence at the time mentioned in it. Thus it is too prompt which creates doubt about the genuineness of the first information report. Incident is said to have taken place at 6:00 hours in the morning. First information report is said to have been lodged at 8:45 A.M. Injury report prepared in respect of P.W.1 Hemraj Singh is of 9:00 A.M. Thus referring to the aforesaid time, it was further argued that looking to the distance of the police station from the place of occurrence and the conveyance / vehicle said to have been used by the injured and the deceased in reaching the police station, it appears improbable that the first information report was lodged at 8:45 A.M. It is the prosecution case that the written report was prepared in this matter at Tajpur town from one Naresh. Some time would have spent in preparing the written report. Thus, the finding recorded by the trial court in this respect is in accordance with evidence and law. Referring to the finding arrived at by the trial court on the point of motive, it was further submitted that the trial court after discussing in detail the prosecution evidence has reached on a conclusion that enmity was against the informant's side for false implication of the accused-respondents, as the informant's side was convicted and sentenced in a criminal case started on behalf of the accused-respondents' side. Enmity suggested by the prosecution is not believable. This fact finds support with the statement of prosecution witnesses itself. Dying declaration said to have been recorded in the matter in the form of statement under section 161 Cr.P.C. is also not believable. It is not as per Police Regulations. There are major contradictions as to whether witnesses, said to be eye-account witnesses, were present near the place of occurrence or they had gone towards the eastern side of the village to attend the nature call. Thus, on this point also, there is contradiction in the statement of prosecution witnesses. Medical evidence does not support the oral version, as no injury was found, said to have been sustained by the injured and the deceased said to be caused by the weapon tabal. Thus, referring to the entire evidence as well as finding recorded by the trial court in the impugned judgment and order, it was next argued that the impugned judgment and order is based on correct appreciation of fact and law and is well discussed and reasoned order. The appellate court cannot substitute its view over the view of the trial court, as the view taken by the trial court is a possible view. In support of his submissions, learned counsel for the accused-respondents placed reliance on the following case laws :

(i) Anwar Ali and Others Versus The State of Himachal Pradesh, MANU/SC/0723/2020

(ii) Ghurey Lal Versus State of U.P. (2008) 10 SCC 450

17. We have considered the rival contentions advanced by the parties and have gone through the entire record.

18. Before proceeding to deal with the submissions raised across the Bar, we would like to point out the findings arrived at by the trial court in the impugned judgment and order, which are as follows :

(i) F.I.R. was not in existence at the time mentioned in it. Thus, it is ante-timed document.

(ii) Non-examination of the scribe of the written report affects the prosecution case.

(iii) Injury report said to have been prepared in respect of injured Hemraj is not a genuine document as it could not be prepared at the time mentioned in it.

(iv) P.W.1 Hemraj Singh, P.W.2 Anand Singh and P.W.9 Brij Pal Singh are not eye-account witnesses. Their presence at the place of occurrence at the time of commission of offence becomes highly doubtful from their statement itself.

(v) Enmity is against the informant's side itself for false implication of the accused. Enmity shown by the prosecution witnesses is not natural and believable.

(vi) Prosecution was also not able to prove the place of incident from its evidence beyond reasonable doubt.

(vii) Dying declaration is not reliable document.

(viii) Manner of incident is also not proved from the statement of prosecution witnesses.

(ix) There are major contradictions in the statement of prosecution witnesses on material point.

(x) None has seen the incident.

(xi) Incident took place in the night hours. First information was lodged on the basis of false facts due to enmity discussed in the impugned judgment and order.

19. In this matter, as is evident from the record, incident is of 6:00 A.M. First information report was lodged on the same day at 8:45 A.M. Distance between the place of incident and the police station is of 17 kms. Prosecution case is that initially, injured and the deceased both were taken to the police station Seohara on a bullock-cart and after registering the case, they went to P.H.C. Thereafter, deceased, who was alive at that time, was referred to Meerut Medical College for better treatment and on the way he died. If the injury report of P.W.1 Hemraj Singh is taken into consideration, then also it has been prepared at 9:00 A.M. on the same day. First information report was lodged at 8:45 A.M. Trial court was of the view that it appears unbelievable that within 15 minutes after receiving the majroobi chhitthi, injured would have reached at the hospital concerned. If the finding arrived at by the trial court in the impugned judgment and order is minutely analyzed with the statement of P.W.1., P.W.2 and P.W.9 and other police witnesses, it emerge that sometime would have consumed in preparing the first information report, thereafter G.D. and majroobi chhitthi. In this situation, it will not be possible for P.W.1 Hemraj Singh to reach at hospital concerned at 9:00 A.M. itself. From the perusal of entire documents, it is also evident that the doctor concerned, who prepared the injury report, has admitted that injured was medically examined as private person whereas in the injury report, it is mentioned that it has been brought by police concerned. These two facts itself create doubt about the genuineness of the injury report. If such is the position, finding recorded by the trial court regarding the genuineness of the injury report belonging to P.W.1 Hemraj Singh cannot be taken as incorrect. Trial court while concluding the finding on this point has analyzed the entire evidence in detail and after a thorough discussion, has reached on such conclusion. Thus, we are of the view that finding of the trial court on this issue need no interference.

20. Now we are proceeding to deal with the submission regarding enmity. Trial

court has concluded that P.W.1 - the informant has admitted in the cross-examination that he (informant) and the deceased both were convicted and sentenced in a prosecution started on behalf of the accused-respondents' side. Perusal of the record also reveals that when question to this extent was put by the defense counsel during cross-examination, P.W.1 Hemraj tried to conceal this fact. On query made by the court regarding the demeanor of this witness, he has admitted that he was convicted and sentenced as discussed here-in-above. Written report (Ex.Ka.-1) discloses that only this fact has been mentioned in it that "मुल्जिमान से हमारी पुरानी रंजिश चल रही है"

21. During examination before the trial court, P.W.1 Hemraj, who is the brother of the deceased, has stated that there was dispute between the deceased and the accused-respondents' side regarding the portion of the purchased land. When he was cross-examined, he has admitted that settlement was arrived at between the parties and portion of land belonging to the parties had been bifurcated. At one point of time, he has admitted that portion belonging to the accused-respondents was found better and portion belonging to the deceased was found less better. Analyzing to this fact, the trial court was of the view that if the portion belonging to the accused-respondents' side was better than the portion belonging to the deceased, then in that situation, grudge will be to the deceased side and the enmity disclosed during examination will not be sufficient to commit the present offence by the accused-respondents, rather there is probability that accused-respondents were falsely implicated in this matter due to enmity admitted by P.W.1, the informant. If the findings arrived at by the trial court in the impugned judgment and order are minutely analyzed with the facts and evidence of the present matter, it is clear that finding of the trial court is based on evidence available on record and is a possible view. It is not based on conjecture and surmises. Thus, findings of the trial court on point of enmity is also not interfererable.

22. As far as non-examination of scribe of the written report is concerned, it has been admitted in the evidence by P.W.1 that Naresh is the relative of the informant. He met with him at Tajpur and at that place he drafted the written report on his dictation. If the statement of prosecution witnesses are closely analyzed in the light of findings arrived at by the trial court regarding the non-examination of Naresh, it is clear that his close relative was in serious condition. He did not think to go to police station nor to the hospital. Trial court finding is that non-examination of Naresh by the prosecution became fatal to the prosecution case. If the finding arrived at by the trial court on this issue be not taken as correct appreciation of fact and evidence, then the Court has to analyze other evidence adduced by the parties to form an opinion contrary to the opinion formed by the trial court. So far as presence of P.W.1 Hemraj, P.W.2 Anand Singh and P.W. 9 Brijpal on the date, time and place of occurrence is concerned, nothing has been mentioned in the written report (Ex.Ka.-1) disclosing this fact that P.W.1 - the informant was also heading towards the field following the deceased. When he was examined during trial, he has stated that he was also going towards the field for nature call behind the deceased. Trial court has opined that P.W.1 was not an eye-account witness. He was not present at the place of occurrence at the time of offence. If the statement of P.W.2 Anand Singh and P.W.9

Brijpal are taken into consideration, it is evident that P.W.9 Brijpal has stated that this witness along with P.W.1, P.W.2 and the deceased were easing towards eastern side of the village whereas in the written report (Ex.Ka.-1) it has been mentioned that the deceased Bhopal had gone to ease towards southern side of the village. P.W.9 has also admitted that pond is situated towards eastern side of the village and they had gone towards that pond to attend the nature call. P.W.2 Anand Singh has also admitted that when he was easing, he heard the noise and thereafter he reached at the place of occurrence. Distance between the place of occurrence and the place where they were easing has been stated about 200 yards. At one point of time, P.W.2 has stated that when he reached at the place of occurrence, deceased was unconscious, but no blood was oozing. He has also made contradictory statement to the aforesaid statement that incident took place when he reached at the place of occurrence. P.W.1 claimed himself to be an eye-account injured witness. His medical report was prepared on the same day at about 9:00 A.M. First information report was lodged at 8:45 A.M. When P.W.3 Dr. Ashok Rana was cross-examined, he has specifically stated that medical examination of P.W.1 was conducted by him as a private person. He has also admitted in cross-examination that injuries found on the body of the injured P.W.1 Hemraj may be self-suffered and no injury was found over his body said to have been caused by weapon "tabbal". Trial court taking into consideration the entire facts, circumstances and the evidence adduced by the parties was of the view that P.W.1 was not present at the place of occurrence, injuries said to have been found on the body of the injured were not occurred in the said incident, rather injury report is a forged document and injuries are manufactured. If the prosecution evidence are minutely analyzed in light of the argument advanced by learned counsel for the parties as well as finding arrived at by the trial court, it can safely be held that finding of the trial court that P.W.1 was not present at the place of occurrence at the time of commission of the offence is also based on correct appreciation of facts and evidence. Had he been the eye-account witness of the incident, the material contradictions elucidated in the impugned judgment and order in his statement do not occur and material fact regarding his presence at the place of occurrence comes in the written report (Ex.Ka.-1) itself. As far as presence of P.W.2 Anand Singh at the place of occurrence is concerned, this witness has also made contradictory statement. If the statement made by this witness are minutely analyzed / compared with the statement of P.W.9 Brijpal and P.W.1 Hemraj in light of the discussion made by the trial court in the impugned judgment and order, it is clear that in fact, this witness was also not present at the place of occurrence. When deceased was being beaten by the accused-persons, he has not seen the incident. Finding arrived at by the trial court regarding presence of this witness at the place of occurrence is also based on correct appreciation of fact and evidence.

23. So far as the presence of P.W.9 Brijpal at the place of occurrence at the time of offence is concerned, this witness has admitted that he was government employee and was on duty in his office. If the statement of this witness is taken into consideration, as has been discussed here-in-above, this witness has made different story with the facts disclosed in the written report (Ex.Ka.-1) and as stated by P.W.1 and P.W.2. If this witness was present in the

eastern side of the village near the pond and the deceased had gone to ease towards southern side of the village, it appears improbable and unbelievable that incident took place before this witness. Trial court has discussed the entire evidence minutely and has rightly observed that P.W.9 Brijpal was also not present at the time of occurrence. If the statement of P.W.1, P.W.3 and P.W.9 are also compared with the site plan prepared in the matter and the statement of investigating officers, it is evident that nothing has been stated by these witnesses to the investigating officer regarding the enmity between the parties on point of mend. Thus, we are also of the view that finding of the trial court, which is based on evidence adduced by the parties, is correct appreciation of fact and evidence. P.W.1, P.W.2 and P.W.9 were not eye-account witnesses. No interference is required in the finding of the trial court on this score.

24. As far as medical evidence is concerned, we have discussed here-in-above that injury report of the injured P.W.1 Hemraj is a forged document. No injury from the weapon tabbal was found on his body, although, the fact witnesses have stated that P.W.1 was also beaten by the accused-respondents by tabbal. Trial court has also doubted the presence of P.W.1, P.W.2 and P.W.9 at the place of occurrence at the time of commission of the offence on the ground that their statement are not supported with medical evidence. No injury was found on the body of the deceased said to have been caused by weapon tabbal. Trial court has also observed that tabbal is a heavy cutting weapon. No such injuries said to have been caused by the weapon tabbal were found on the body of the deceased. Trial court has also based its finding on the basis of contents of the stomach and has opined that incident took place in other manner caused by some unknown persons. Due to this reason, there was contradiction in the statement of prosecution witnesses on point of injuries. P.W.1 Hemraj has also made contradictory statement as to whether he was hospitalized in P.H.C., Seohara or he was accompanying the deceased for Meerut Medical College. If the finding of the trial court regarding the medical evidence are minutely analyzed with the submission raised across the Bar, no illegality, infirmity or perversity is found in it. Certainly medical evidence and the oral version of the said eye-account witness are contradictory to each other.

25. So far as the dying declaration said to have been recorded in the matter is concerned, initially the first information report was lodged in this matter under section 307 IPC. Deceased was taken to P.H.C., Seohara on a tractor-trolley. It is the case of the prosecution that looking to the serious condition of the deceased, he was immediately referred to the Meerut Medical College, but he died on the way when he was being taken to the Medical College. No evidence was adduced on part of the prosecution to establish that treatment was given to the deceased before proceeding to Medical College, Meerut. When postmortem of the deceased was conducted, dressing / bandage was found over the wounds of the deceased. Trial court while analyzing the prosecution evidence has opined that if no treatment / first aid was done to the injuries said to have been sustained by the deceased on his body, then under what circumstances and how the wounds dressing was found over the body of the deceased. If the statement of P.W.5 Dr. Vijay Kumar Goel, who conducted the postmortem on the body of the deceased, is taken into consideration, it

has come that no inury was found on the body of deceased said to have been caused by the weapon "tabbal".

26. Statement of P.W.1 Hemraj and the deceased are said to have been recorded by the investigating officer concerned at P.H.C., Seohara itself. Trial court doubting the genuineness of the dying declaration was of of the opinion that dying declaration has not been recorded following the guidelines of Police Regulations. Doctor was present at that time. Prosecution witnesses themselves have admitted that condition of the deceased was serious. The investigating officer concerned did not obtain the certificate of the Doctor concerned regarding the physical and mental condition of the deceased. Trial court has also opined that condition of the deceased was serious and he was not in a position to speak, as has been admitted by the prosecution witnesses themselves. Therefore, it appears that the dying declaration was recorded by the investigating officer at his own. Trial court while arriving at the conclusion on this point has discussed in detail the entire evidence and thereafter has formed opinion that the dying declaration said to have been recorded in the matter is not free from suspicion. If the entire prosecution evidence are analyzed in light of the submissions raised across the Bar, no illegality, infirmity or perversity is found in the finding of the trial court on this point. Thus, no interference is required on this issue.

27. As far as the place of incident is concerned, if the statement of prosecution witnesses are compared with the site plan prepared in the matter and also with the fact disclosed in the written report, it emerge that the written report is clear that incident took place on the way whereas site plan discloses that incident occurred at two places. Firstly, in the field of the deceased and thereafter in the field of Rampal. The investigating officer has not shown the place of occurrence on the path. Witnesses examined in the matter, who claimed themselves to be eye-account witnesses, have also made contradictory statement. The contradiction occurred in the statement of prosecution witnesses due to the reason that they are not eye-account witnesses. Had they been eye-account witnesses, contradictions on point of place of occurrence would not have come in their statements. Trial court while analyzing the findings on this point has discussed the entire evidence, which is based on reasoning. On comparison of the evidence adduced by the parties with the findings of the trial court in light of the submissions raised across the Bar on this point, we do not find any error, illegality or perversity in the findings of the trial court on this point.

28. It is pertinent to mention here that the powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellant court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial court in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate court can interfere with the order of acquittal. It is also golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused

should be adopted. It is also settled principle of law that paramount consideration of the Court is to ensure that miscarriage of justice is avoided. The case of the prosecution must be judged as a whole having regard to the totality of the evidence in appreciating the evidence. The approach of the court must be an integrated one and not truncated or isolated.

29. Thus, on close scrutiny of the entire evidence adduced by the prosecution and comparing the same with the finding arrived at by the trial court in the impugned judgment and order, the Court is of the opinion that finding of the trial court is based on correct appreciation of fact and evidence. The view taken by the trial court in the impugned judgment and order is a possible view. The appellate court will interfere in such type of cases only when there is strong and compelling reasons in the prosecution evidence which dislodge the finding of the trial court itself. Merely, on the basis of statement of the witnesses examined in the matter, whereas prosecution case is not supported with medical evidence, manner and style of the incident stated by the prosecution witnesses is also not believable, then Court is of the view that the trial court has passed the impugned judgment and order after proper appreciation of the evidence and it is well reasoned order. Findings recorded by the lower appellate court in the impugned judgment and the order acquitting the accused-respondents from the charges levelled against them cannot be termed to be illegal, improper or illogical. Lower appellate court has rightly held that prosecution has not succeeded to prove guilt of accused-respondents beyond reasonable doubt. The accused-respondents are not found guilty for the offence punishable under Sections 307/34, 302/34, 323/34, 504, 506 IPC. As such, impugned judgment and order passed by lower appellate court is liable to be upheld and government appeal, having no force, is liable to be dismissed.

30. Accordingly present Government Appeal is dismissed and the impugned judgment and order passed by the lower appellate court is affirmed.

(2022)07ILR A918
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.07.2022

BEFORE

THE HON'BLE OM PRAKASH-VII, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Government Appeal No. 1709 of 1984

The State of U.P. ...Appellant
Versus
Baji Nath & Ors. ...Respondents

Counsel for the Appellant:
D.G.A.

Counsel for the Respondents:
Sri V.C. Katiyar, Sri Dhirendra Kumar Srivastav, Ms. Pushpa Varma, Sri V. Singh, Sri Virendra Singh

Criminal Law - Criminal Procedure Code, 1973 - Res Gestae -accused not bound to establish his innocence-it has been proved that witnesses had not seen and recognize the accused—no direct evidence-chain of circumstances not complete-case not proved beyond reasonable doubt.

Appeal dismissed. (E-9)

List of Cases cited:

1. Bishan Dass Vs St. of Pun. A.I.R 1975 Supreme Court 573

2. Kali Ram Vs St. of H.P, A.I.R 1973 Supreme Court 2773

3. Pratap Vs St. of U.P. AIR 1976 Supreme Court 966

4. Shyam Sunder Vs St. of Chattisgarh, AIR 2002 S.C 2815

5. Ramnand Yadav Vs Prabhu Nath Jhan & ors.AIR 2004 SC 1053

6. Jagga Singh Vs St. of Pun. A.I.R 1995 S.C, 135

7. St. of Pun. Vs Bhajan Singh, A.I.R 1975, Supreme Court 258

8. St. of Goa Vs Sanjay Thakran (2007) 3 S.C.C 755

9. Ashish Batham Vs St. of M.P, A.I.R 2002, S.C 3206

10. St. of Maharashra Vs Sukhdev Singh, A.I.R 1992 Supreme Court Page 2100

11. S. Govindaraju Vs St. of Karn., (2013) 15 Supreme Court Cases 315

12. Gangabhavani Vs Rayapati Venkat Reddy & ors., (2013) 15 Supreme Court Cases 298

13. Sharad Birdhi Chand Sarda Vs St. Of Mah. 1984 Supreme Court AIR - 1622

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

1. At the outset, it is clarified that accused-respondent no. 2 - Saggal and respondent no. 3 Bhaggu have died during the pendency of the appeal, thus the appeal filed against them have been abated vide order dated 08.04.2022, henceforth the Court is proceeding to decide the appeal against surviving respondent.

2. Heard Shri Ratan Singh, learned A.G.A. for the State, Shri Virendra Singh, learned counsel for the accused-respondent and gone through the entire court record with the assistance of the respective counsels.

3. The instant appeal has been filed against the judgment and order dated 02.03.1984 passed by Assistant Sessions Judge, Mirzapur, in Sessions Trial No. 156 of 1982 arising out of Case Crime No. 227 of 1981, under Section 307 I.P.C., whereby, the deceased accused persons Bhaggu and Saggal and alive accused-respondent have been acquitted.

4. In brief the State of U.P. has pleaded in appeal that judgment and order of acquittal is wholly illegal and erroneous and against the law. Learned Trial Court has not assessed the prosecution evidence appropriately and has not considered the facts and circumstances of the case and material on record. The alleged offence took place on 02.11.1981 at 07:30 P.M. and the F.I.R. was lodged on the same night at 10:00 A.M. Blood was recovered from the Ekka and pieces of bomb and splinter etc. were also recovered. The prosecution has examined the following 08 witnesses, to prove the prosecution version:- (i) P.W.-1, Paggal, informant witness (ii) P.W.-2, Gulab, informant (iii) P.W.-3, Dr. A. D. Singh (iv) P.W.-4, Dr. K.N. Srivastava, (v) P.W.-5, Dr. C.P. Singh (vi) P.W.-6, S.I. Sarju Prasad Chaudhari, I.O. (vii) P.W.-7, Girija Shanker Tripathi, Head Constable and (viii) P.W.-8, Kunwar Bind Narayan, Pharmacist. There was no occasion to acquit the accused persons, therefore, the impugned judgment and order be set aside and the appeal be allowed and the accused-respondent, Baijnath be convicted and sentenced in accordance with law.

5. In brief facts of the case are that complainant- Gulab moved an application on

02.11.1981 to lodge the F.I.R. with the allegation that his brother Paggal used to drive Ikka and he was going on Ikka with his brother from Mirzapur city to his house; Amarnath Nai was also sitting on the said Ikka: At about 07:30 P.M., when all the three persons sitting on the Ikka reached at Railway crossing on Aam Ghat, three accused persons suddenly came and threw bombs on his brother Paggal. Miscreants were seen and recognized in the head light of truck. Upon hearing the noise of explosion of bomb, witnesses Figgal S/o unknown and so many other persons reached on the spot. Accused persons escaped. Paggal was seriously injured as well as Amarnath Nai has also received injuries. Few parts of Ikka were broken. There were inimical terms between the Paggal and accused persons due to some criminal cases as a result of which the accused persons inflicted bomb injuries with intention to kill him. The informant admitted the victim in the hospital and went to police station to lodge the F.I.R. One Jai Prakash has scribed the F.I.R. This information *(Tahrir)* has been exhibited as Exhibit Ka-I.

6. Informant Paggal was medically examined on the same day at 09:00 P.M. in District Hospital Mirzapur where the Doctor found 08 injuries; out of which 06 were lacerated and 02 were abrasion on the body of the victim. A radiological report was also prepared which is exhibited as Exhibit Ka-3, proved by Dr. K.N. Srivastava whereas the injury report of the injured Paggal has been proved by Dr. C.P. Singh as Ex. Ka-2, who opined that all injuries have incurred by the bombastic attack. He deposed that it appears that the attack was done from the front side.

7. Since the injuries nos.1 & 2 were serious in nature, therefore, X-ray was advised by the Doctor. P.W.-4, Dr. K.N. Srivastava, Radiologist found in X-ray that libera and fibula bones of the right leg of Paggal were broken in several parts on the lower part. About 2nd injury; report was NAD and no foreign body shadow was seen. P.W.-4 was of the opinion that X-ray done by him is trustworthy. P.W 5, Dr. C.P. Singh examined another injured Amarnath Nai on 03.11.1981 at 12 'o' clock and found contusion (scabbed) 0.5x0.5 cm on the middle of internal side of his right leg and 2.0x2.0 cm abrasion (scabbed) on the front of left leg below 0.8 cm from the left knee. The third injury (scabbed) abrasion 2.5x0.5 c.m was on the outer part of left wrist. According to the Doctor, these injuries were not caused by the explosive substance or fire-arm, but were caused by blunt object and rubbing and were ½ day old. It is noteworthy that during the trial the injured witness Amarnath Nai has not been examined.

8. P.W.-6, Sarju Prasad Chaudhari, S.H.O started the investigation on the same day i.e. on 03.11.1981 and reached the place of occurence and recorded the statement of informant Gulab and injured Paggal, searched the accused person and collected the parts of bombs, sutali, kathari and Ikka and blood stained wooden part of Ikka and prepared the recovery memo which is exhibited as Exhibit Ka-5. He has also proved the recovery memo as exhibit Ka-7. He has also prepared the site map and proved as Exhibit Ka-8 in the Court. He also sent another injured Amarnath Nai for treatment through a Constable after recording of his statement. He arrested accused Baiznath and recorded his statement. On 04.11.1981 after surrender, recorded the statement of the other accused persons namely, Saggal and Kallu and submitted the charge-sheet which is exhibited as Exhibit Ka-9, after completing the investigation.

9. Case being exclusively triable by the Sessions Court was committed to the

Court of Sessions. Accused appeared. Charge for the offence u/s 307/34 I.P.C. was framed against them. To which they denied and claimed their trial.

10. Prosecution in support of its case examined eight witnesses in total as disclosed hereinabove.

11. The following documentary evidence have also been produced by the prosecution to prove its case.

(1) Exhibit ka-01, written statement by the complainant PW 1 Gulab

(2) Exhibit Ka-02, injury report of injured Paggal

(3) Exhibit Ka-03, radiology report of injured Paggal

(4) Exhibit Ka-04, injury report of Amaranth Nai

(5) Exhibit Ka-05, recovery memo of blood stained wooden parts of Ikka

(6) Exhibit Ka-06, recovery memo of blood stained "Kathari'

(7) Exhibit Ka-07, recovery memo regarding Sutali Bomb

(8) Exhibit Ka-08, recovery memo of site plan prepared by the investigation officer

(9) Exhibit Ka-09, charge sheet

(10) Exhibit Ka-10, copy of chik FIR

(11) Exhibit Ka-11, carbon copy of GD regarding lodging of FIR

(12) Exhibit Ka-12, GD regarding arrest of accused Baijnath

(13) Exhibit Ka-13, bed head ticket

(14) Exhibit Ka-14, outdoor ticket.

The burden of proof lies on the parties, who substantially asserts the affirmative of the issue and not upon the party, who denies it. In criminal cases it is for the prosecution to bring the guilt home to the accused. The accused is not bound to establish his innocence for the reason that there is no burden laid on the accused to prove his innocence and it is sufficient if he succeeds in raising a doubt as to his guilt.

In the case of ***Bishan Dass Vs. State of Punjab A.I.R 1975 Supreme Court 573,*** the Supreme Court held that even total silence of the accused as to any defense of his part does not lighten the prosecution burden to proof it's case satisfactorily.

In the case of ***Kali Ram Vs. State of H.P, A.I.R 1973 Supreme Court 2773,*** the Supreme Court held that in a criminal trial the onus is upon the prosecution to prove the different ingredients of the offence and unless it is discharge that onus it can not succeed.

In the case of ***Pratap Vs. State of U.P. AIR 1976 Supreme Court 966***, the Supreme Court held that the burden on the accused is not onerous as that which lies on the prosecution. While the prosecution is required to prove this case beyond reasonable doubt, the accused can discharge his onus by establishing a mere preponderance of probability.

A case is a "proceedings" within the meaning of Section 102 Evident Act and the burden of proof in such a proceeding lies on the prosecution for the simple reason that if neither the prosecution nor the defense leads evidence, the accused is entitled to be acquitted.

In the light of above principles of law, the oral and documentary evidence adduced by the prosecution shall be analyzed.

12. P.W. 1 Paggal injured (brother of the informant P.W. 2 Gulab), has deposed as injured eyewitness and he has stated that

when Ikka reached near the turning point after crossing the railway crossing, accused Saggal Bhaggu and Baij Nath, who were hiding there, started bombing. Baijnath fired the first bomb on him which hit the wheel of Ikka. Bhagu detonated the second bomb, which fell on the ground and exploded. Third bomb was detonated by Suggal which fell on the bamboo of the ace, it hurt his leg, hand and ear. Horse and Amarnath also got injuries, the horse-ran by its sound and stopped before the Aamghat river. He admits that Saggal & Bhaggan are the real brother, Baijnath is a mechanic.

13. According to this witness four months before this incident, he was thatching shanty when Saggal, Bhaggan, Jogi and Chhote Lal (deceased) came and started hitting him and did not allow the shanty to be kept, Chhotel Lal got hurt by sticks of them, but they suspected him for his injury who succumbed to death on next day. Since then they bored enmity with him and started looking for him to kill. He admits that Baijnath is the resident of another village and there is no kinship among them. He admitted that he has been convicted for the murder of Chhotey Lal despite being innocent. He admits that in the night of the incident, it was dark and he started journey from Peeli Khoti at about 6:30 to 6:45 p.m. He also admits that the spot is not deserted place, there are houses of several persons adjacent to it and there is an adjacent railway gate where one or two men remain present always on duty, there is also a betel shop near the railway gate. According to this witness that time accused was going from west to east. The gate was closed, so they had stood up north, when the gate opened, they went towards the south. Accused were in some speed, which he could not see. Again, he deposed that he did not see where the killers were hiding, when his face was towards east, suddenly a bomb fell on him and he exhorted the accused. The bomb was thrown at him from the southern track of the road. He was stunned when the first bomb hit him. He could not run away after jumping. Rather the horse-ran fast after hearing the sound of the bomb. Then two bomb fell on him. He shouted, by then the accused had reached the bridge of Amghat. The truck was parked on the bridge of Aamghat, so the accused stopped. There was a lot of smoke when the bomb exploded. The killer fled away to the west. He did not have a torch. Amarnath did not even have a torch. The killer did not wear a bounty on their faces, they did not try to hide themselves. No one followed the killer. There was a huge crowd of people around, they did not have any conversation with them. In such a situation it can not be concluded that the witness had recognised the accused persons.

14. According to the opinion of this Court, if the victim had actually recognised the accused he would have told the people of the crowd that such people had attacked upon him. Further he admits that he did not tell the doctor as to who fired the bomb upon him. He again could not tell as to whether he got bombed first or Amarnath. In such as a fact, how it is possible that he would have recognised the accused persons. The statement of the people residing in the nearby houses or the government servants doing duty at the railway gate were not recorded nor they were examined in the court. This witness admits that he did not see the place where the accused were hiding. He admits that the dense smoke was near by at the scene. The witness does not say that before committing the incident he had seen the accused person at the spot. He admits that it

was a dark night and there was no light at the scene and that he or Amanath did not have a torch. It is the contention of the prosecution that the witnesses recognized the accused persons in the light of the truck. But according to this witness the truck was not standing on the spot but the truck was standing on the Aamghat bridge. In such a situation it would not be possible to identify the accused in the light of the truck. If the P.W. 1 was plying the Ace, he would be looking at the road ahead and not side by side. According to this witness, when the bomb fell, the horse-ran very fast and reached to the Aamghat bridge, in such a situation there was no opportunity to see the accused persons by any of the witness. According to this witness the face of the accused persons were open and they did not try to hide their identity, but it is contrary to human nature that if the injured and the witnesses are familiar to the accused persons, they will keep their faces hidden. If the testimony of the witness is true then in such a situation, it can be thought that the accused had no fear, if so why did they choose the night time for attack, they could have openly committed such an incident, even during the day time.

15. P.W. 1 in his cross examination at Page 6 admits that in his area if the killer is not seen, then any one can be implicated, that is why he was implicated for the murder of Chhotey Lal. In the opinion of court as to why the same principle can not be applied in this case. He deposed that his face was towards the east and the accused persons attacked from the west and fled away towards the west. In such a case there will be no opportunity to identify the accused persons by the witnesses. He could not tell the name of truck driver or truck number in the light of which he had identified the accused persons and the I.O. has not shown and found any such truck and source of light. This leads to the conclusion that there was no truck head light in which he has recognised the accused persons. Thus the finding of this court is that the evidence of this witness is not credible and acceptable and without recognising the accused persons they were implicated on the basis of enmity.

In the case of ***Shyam Sunder Vs. State of Chattisgarh, AIR 2002 S.C 2815,*** Apex Court held that where it is found that the relationship between the prosecution witness and his family members on the one hand and the deceased and his family members on the other hand were strained and a criminal litigation was also pending between them, the testimony of the witness needs to be subjected to careful scrutiny.

In case of ***Ramnand Yadav Vs. Prabhu Nath Jhan & Ors AIR 2004 SC 1053,*** the Supreme Court held that if the relatives or interested witnesses are examined, the Court has a duty to analyse the evidence with deeper scrutiny and then come to a conclusion as to whether it has ring of truth or there is a reason for holding that the evidence was biased. Whenever a plea is taken that the witness is already partisan or has any hostility towards the accused, foundation for the same has to be laid. If the material shows that there is a partisan approach, the Court has to analyse the evidence with care and cation.

16. P.W - 2, Gulab is the real brother of injured P.W. 1, who is said to be present with Amarnath on the Ace at the time of the incident, exact and word to word similar deposition by the witnesses about the manner of attack leads to the inference that the witnesses are tutored, because every witness shall see the occurrence from their own angle. In this case there is no source of

light and incident took place in a dark night, in spite of that witnesses have also deposed about the manner of attack by the accused persons with utmost similarity in their examination-in-chief.

17. Contrary to P.W. 1, this witness says that the night was the moonlight. This witness also admits heavy smoke on the spot. Contrary to P.W- 1 this witness says that attackers ran to the side of south. This witness says that their faces were towards the east and when the Ace went to the east accused persons threw the bombs. In the above situation there would be least possibility of recognising the accused persons. This witness also did not contacted the truck driver. According to him crowd of about 25 persons put off them from the Ace but no conversation took place with them. This also leads and creates doubt that if P.W 1 and P.W-2 had recognised the accused persons why in natural way they shall not speak about the accused persons and shall not share their names with the people of crowd. This witness also admits previous enmity with the accused persons which may be a reason for false implication or may be reason of committing the offence also as the enmity is the double edged weapon.

18. Both the witnesses of fact are real brother and interrelated and inimical witnesses. About the injured witness, there is presumption that he was present on the spot but there is no presumption that he is deposing the true facts. An independent witness Amarnath Nai did not come forward to support the prosecution case, which leads inference that he was not ready to tell a lie in support of the prosecution case. P.W.- 3, P.W-4 & PW-5 are doctors, who examined the injured persons but from their report and oral evidence, it is not proved that the injuries were caused by the accused persons as they are the formal witnesses .

19. In cross-examination, P.W-6 deposed that Railway gate is situated towards the north-west of the place of occurrence. He admitted that railway personnel do their job there 24 hours but he has not recorded the statement of any employee of the Railway Department. He has also recorded the statement of nearby residents such as Jaggu, Mangaru and Seva. He admits that he had not recorded the statement of Doctor. He admits that since there was no source of light on the spot, therefore he did not mention and showed it in the map. He visited the spot in the night and found it darky and cloudy.

20. P.W.-7, HCP Giriza Shanker Tripathi had prepared chik F.I.R. which is exhibited as Ex. Ka-10. On the basis of written Tehrir of the informant Exhibit Ka-1 and carbon copy of GD regarding registering the case as Exhibit Ka-11 and GD regarding the arrest of the accused Baiznath as Exhibit Ka-12 were prepared. He has proved these documents from his evidence on oath.

21. P.W.-8, Kunwar Bind Narayan, Pharmacist has adduced secondary evidence about the acts and report of Doctor A. D. Singh. He proved the Bed Head Ticket as Exhibit Ka-13 and out door slip as Exhibit Ka-14 prepared by Dr. A. D. Singh to be prepared by him in his hand-writing and signature.

22. After closure of oral evidence, statement of accused persons were recorded under section 313 IPC. Accused Baij Nath has stated that pagal is his relative and had taken loan from him and to avoid

repayment Paggal has falsely implicated him. Paggal and Gulab are real brothers. Bhaggu has stated that due to enmity, he has been falsely implicated as accused. Due to enmity Gulab and Paggal, have adduced the evidence against him. Similar explanation has been given by the accused Saggal. Both these two persons have not given any details of enmity. The co-accused Baijnath has also not given any particulars regarding the loan from the accused persons and they have not produced any oral or documentary evidence in defence.

23. The Trial Court has not believed the testimony of P.W.-1 on the ground that at the time of occurrence there was dark smoky night and the witnesses were not able to see the place where the accused persons were hidden.

On the above discussion, this Court is of the considered view that there is some variations on the point that as to whether at the night of the occurrence there was dark or of full moon light. It is proved that it was a dark and cloudy night and there was no light of truck to recognize the accused persons. The accused persons have falsely been implicated in this case on the basis of previous enmity and no explosive substance, ammunition or bombs have been recovered from their possession upon their pointing out. The I.O. of the case has neither satisfactorily investigated the case nor recorded the statements of the railway employees deputed on Railway Gate. He has not recorded the statement of the Doctor and he has not found any source of light on the spot. He has not shown any truck or truck light in the map prepared by him and according to him it was a cloudy night, he has not shown any place of hiding of the accused persons or any drum alleged by the witnesses of fact. The independent witness Amar Nath has not been examined by the prosecution. This incident might have been caused by some other persons for the purposes of robbery etc.

From the above discussions, it is clearly established that the witnesses have not been able to recognize the accused persons and the accused persons were named in F.I.R on account of enmity. Thus, it is a case based on circumstantial evidence, in which chain of circumstances must be completed, but in this case except the one ingredient that is motive none else could be proved.

In the case of ***Jagga Singh Vs. State of Punjab A.I.R 1995 S.C, 135,*** the Supreme Court has held that, it is fundamental maxim of criminal jurisprudence that the suspicion and conjuncture are no substitute for proof.

In the case of ***State of Punjab Vs. Bhajan Singh, A.I.R 1975, Supreme Court 258,*** the Supreme Court has held that suspicion by itself however strong, it may be, is not sufficient to take the place of proof.

In the case of ***State of Goa Vs. Sanjay Thakran (2007) 3 S.C.C 755,*** the Supreme Court held that the Court shall take utmost precaution in finding the accused guilty only on the basis of circumstantial evidence.

In the case of ***Ashish Batham Vs. State of M.P, A.I.R 2002, S.C 3206,*** the Supreme Court held that if the charge is graver, greater has to be the standard of proof, the Court must keep in mind that there is a long mental distance between ***"may be true"*** and ***"must be true".***

In the case of **State of Maharashra Vs. Sukhdev Singh, A.I.R 1992 Supreme Court Page 2100,** the Supreme Court held that in the absence of reliable evidence it is unwise to act on mere suspicion.

In this case except mere suspicion on the part of informant and the injured there is no any other evidence to conclude that only accused persons had committed the offence.

Hon'ble Supreme Court in the case of ***S. Govindaraju Versus State of Karnataka, (2013) 15 Supreme Court Cases 315*** has held as under:-

"It is a settled legal proposition that in exceptional circumstances, the appellate court, for compelling reasons, should not hesitate to reverse a judgment of acquittal passed by the court below, if the findings so recorded by the court below are found to be perverse i.e if the conclusions arrived at by the court below are contrary to the evidence on record, or if the court's entire approach with respect to dealing with the evidence is found to be patently illegal, leading to the miscarriage of justice, or if its judgment is unreasonable and is based on an erroneous understanding of the law and of the facts of the case. While doing so, the appellate court must bear in mind the presumption of innocence in favour of the accused, and also that an acquittal by the court below bolsters such presumption of innocence."

In the case of ***Gangabhavani Versus Rayapati Venkat Reddy and Others, (2013) 15 Supreme Court Cases 298***, Hon'ble Supreme Court has held as under.

"This Court has persistently emphasised that there are limitations while interfering with an order against acquittal. In exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the acquittal by the lower Court bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

In the case of ***Sharad Birdhi Chand Sarda Vs. State Of Maharashtra 1984 Supreme Court AIR - 1622,*** the Supreme Court pointed out reiterating the cardinal principle of law that where the facts placed before the Court point out two views, one of the guilt of the accused and another to his innocence, the Court should give the benefit of the view, which is favourable to the accused.

In this case it has been proved that the witnesses had not seen and recognize the accused persons committing the offence on spot. Therefore, it can not be said that it is a case of direct evidence. This Court is of the view that it is a case based on circumstantial evidence, in which all the chains of the circumstances are not completed, except only one ingredient that is motive, no other ingredient such as last seen or any extra judicial confession or any recovery has been proved.

24. In all attending circumstances on the basis of evidence, the lower court has rightly come to the conclusion that the prosecution has not been able to prove the case beyond reasonable doubt, therefore, trial court has rightly acquitted the accused persons. This Court is also of the considered view that there is no sufficient evidence and attending circumstances to interfere with the judgment of the acquittal of the lower court, therefore this appeal lacks merit and is hereby liable to the dismissed.

Accordingly, the appeal is **dismissed.**

The Lower Court Record be sent back to the concerned court with certified copy of this judgment forthwith.

(2022)07ILR A927
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.07.2022

BEFORE

THE HON'BLE OM PRAKASH-VII, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Government Appeal No. 1990 of 1985

The State of U.P. ...Appellant
Versus
Narendra Singh & Anr. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Sri U.K. Saxena, Sri Kamal Kishor Mishra, Sri Satish Trivedi, Sri Satya Prakash Srivastava

Criminal Law - Criminal Procedure Code, 1973 - if view adopted by the Trial Court is a possible view—Trial Court has well discussed the facts and evidence-**Appeallate Court to not superimpose its view.** (E-9)

List of Cases cited:

Vadivelu Thevar Vs The St. of Madras, 1957 AIR 614

(Delivered by Hon'ble Om Prakash-VII, J.)

1. This appeal against acquittal by appellant State is directed against the impugned judgment and order dated 22.4.1985 passed by Special Judge (E.C. Act)/ Additional Sessions Judge, Jalaun at Orai in S.T. No. 143 of 1980 (State Vs. Narendra Singh and another), P.S. Kotwali Orai, district Jalaun by which the accused respondents have been acquitted of the charges under Sections 302/34, 302 IPC.

2. At the very outset, it is very relevant to mention here that during pendency of Appeal, accused respondent No.2 Ramesh has died. Accordingly, by the order dated 27.11.2021, this Court passed order directing abatement of Government Appeal as against the accused respondent no.2.

3. Now, we are proceeding to consider the government appeal in respect of rest of the accused respondent i.e. Narendra Singh.

4. Brief facts of the case, in nutshell, are that informant and his brother Bhanu Pratap Singh had gone to the Court on 16.7.1980 for taking certified copy of certain judgment. At about 02.00 - 02.15 p.m. after finishing their court work they were going towards Orai market. Near the Orai Jhansi Bus Stand at the gate of Kutchahri they were joined by Taqdir Singh, Bal Ram Tewari and Ram Swarup Singh. While going to the Orai market, Informant Ram Lakhan Singh and his brother Bhanu Pratap Singh accompanied by the aforesaid three witnesses reached the Konch Bus Stand. At about 02.25 p.m. accused Narendra Singh, Ramesh and one Surendra Singh Yadav saw them all. Accused Ramesh alarmed Surendra Singh that the enemy was coming and on seeing this Surendra exalted the accused Narendra to kill Bhanu Pratap Singh. Bhanu Pratap Singh seeing these persons tried to run away but before that he was fired at by the accused Narendra Sigh and Ramesh with country made pistol and a pistol. Informant Ram Lakhan Singh and the aforesaid witnesses challenged the accused persons but they made their escape good under the cover of fire by them. Then the informant found that his brother Bhanu Pratap Singh was dead. The aforesaid murder by the accused persons, namely, Narendra Singh

and Ramesh was committed due to old enmity between the accused Narendra Singh and the informant. The accused Ramesh and Surendra Singh were the party-men of the accused Narendra Singh. Informant Ram Lakhan Singh prepared F.I.R. and lodged the same at the police station concerned. Necessary formalities i.e. Panchayatnama etc. were prepared and the dead body of the deceased Bhanu Pratap Singh was sent for post mortem. Investigation started and and after completion of investigation charge sheet against Narendra Singh, Surendra Singh and Ramesh was submitted. Accused Surendra Singh died during trial. Trial started against accused respondents Narendra Singh and Ramesh.

5. Accused persons appeared and charge under Sections 302/34 and 302 IPC was framed in the trial court against them. Accused have denied the charges framed against them and claimed their trial.

6. Trial proceeded and on behalf of prosecution, eight witnesses i.e. PW-1 Ram Lakhan Singh (informant), PW-2 Bal Ram Tiwari, PW-3 Constable Mani Ram, PW-4 Constable Ram Kishore, PW-5 Constable Ram Gopal, PW-6 Dr. G.C. Mishra, who conducted the post mortem on the dead body of deceased, PW-7 Sub-Inspector D.N. Chaturvedi, PW-8 Sub-Inspector Yagya Datt Rai, PW-9 Constable Har Narain Singh were examined.

7. After closure of prosecution evidence, statement of accused persons under Section 313 Cr.P.C. was recorded in which they denied the allegations and stated that they have been falsely implicated due to enmity. Deceased was a notorious Gunda and a known criminal having his criminal history. He was leader of the dacoits engaged in road hold-up and therefore he was killed by the then Kotwal Devraj Singh through his men. They produced one head constable named Sobran Singh in their defence as DW-1. This witness brought the road gang register to show that the deceased Bhanu Pratap Singh was registered as leader of road gang engaged in dacoity by road hold-up in the police record.

8. Having heard the learned counsel for the parties and going through the record, the trial court found that the prosecution has not fully succeeded in bringing home the charges against the accused respondents beyond reasonable doubt and acquitted the accused respondents.

9. Aggrieved with the said judgment and order dated 22.4.1985, the State Government has preferred the present appeal.

10. Vide order dated 5.5.1987 the leave to appeal application was allowed and the appeal was admitted.

11. Heard Shri Raj Kamal Srivastava, learned AGA appearing for the State as well as Shri Satish Trivedi, learned Senior Counsel assisted by Shri Kamal Kishore Mishra, learned counsel for the accused respondent.

12. Castigating the impugned judgment and order, learned learned AGA has submitted that prosecution has established the guilt of the accused respondents beyond reasonable doubt. It was further submitted that findings recorded by the trial court in the impugned judgment and order are perverse and illegal. It was a day hours incident. There

are eye account witnesses. Presence of PW-1 and PW-2 at the place of occurrence at the time of incident is natural and probable. Finding of the trial court placing the PW-2 Balram Tiwari in the category of 'unreliable witness' is against the facts and evidence. Referring to entire evidence adduced by the prosecution it was further submitted that deceased and witnesses disclosed in the F.I.R. were returning together from the District Court and as and when they reached near the place of occurrence, accused persons opened fire upon the deceased. This fact has been proved by the prosecution beyond reasonable doubt. Medical evidence fully supports the oral version. F.I.R. was lodged promptly. It was also submitted that PW-2 Balram Tiwari is a reliable witness and his statement finds support with the statement of PW-1 and medical evidence. There was no reason to falsely implicate the accused respondents in this case. Charges framed against the accused respondents are proved. It was lastly submitted that the findings recorded by trial court in the impugned judgment and order are not based on correct appreciation of facts and evidence and suffer from infirmity and illegality warranting interference by this Court. In support of his submissions, learned AGA placed reliance on a decision of Apex Court in **Vadivelu Thevar Vs. The State of Madras, 1957 AIR 614.**

13. In reply, learned Senior Counsel appearing for the accused respondent has submitted that the accused had not committed the present offence. Referring to the findings recorded by the trial court in the impugned judgment and order it was further submitted that PW-2 Balram Tiwari in his cross examination done by the accused Narendra has admitted that he received information about the incident in the District Court premises and thereafter this witness and PW-1 both went to the place of occurrence. To substantiate this argument, learned Senior Counsel appearing for the accused respondent referred to the statement of PW-1 and further submitted that this witness has also stated in the beginning part of examination-in-chief that he was returning from the District Court alongwith Takdir Singh, Balram Tiwari and Ram Swarup Singh. No other person was alongwith them. It was further submitted that F.I.R. was lodged after due consultation. Witnesses disclosed in the F.I.R. were planted after calling them from their houses. They were said to be present at the place of occurrence after the incident and Investigating Officer was also present there but their statements under Section 161 CrPC were not recorded immediately. Prosecution has also not produced the FSL report. Thus, place of occurrence is also not established in this case. Referring to cross-examination of PW-1 it was also submitted that witnesses disclosed in the F.I.R. were the witness in a number of cases initiated on behalf of informant. They are pocket witness of the police. In fact they were not present on the spot nor they had seen the incident. It was also submitted that it was blind murder case. Deceased was hardened criminal. A number of criminal cases were pending against him and due to this reason he was done to death by some unknown person. It was next contended that at this time age of accused respondent Narendra Singh is about 80 years. He was aged about 45 years at the time of recording of statement under Section 313 CrPC. Prosecution was not able to prove its case beyond reasonable doubt against the accused respondent. There is no infirmity, illegality or perversity in the impugned judgment and order warranting interference by this Court.

Findings of trial court in the impugned judgment and order are based on correct appreciation of facts, evidence and law. View adopted by the trial court is also a possible view.

14. We have considered the rival submissions made by the learned counsel for the parties and have gone through the entire record and evidence carefully.

15. Before proceeding to discuss the submissions raised by the learned counsel for the parties, we may mention the findings of the trial court on material points in the impugned judgement and order, which are as under:

(i). PW-1 and PW-2 are not the eye account witnesses. They were present at the time of incident in the District Court premises and had received information about the incident there.

(ii). Prosecution was not able to prove the place of incident.

(iii). It was a blind murder case.

(iv). PW-1 being the real brother of the deceased is interested witness.

(v). PW-2 is pocket witness of the police and he appeared as witness in several cases initiated on behalf of prosecution.

16. After outlining the findings recorded by the trial court in the impugned judgement and order on material points, we are proceeding to deal with the submissions advanced by the learned counsel for the parties.

17. In this matter, as is evident from the record, incident took place on 16.7.1980 at about 2.45 p.m.. F.I.R. was lodged by PW-1, brother of the deceased, on the basis of written report - Ext. Ka-1 on 16.7.1980 itself at 3.30 p.m.. Distance between place of occurrence and police station concerned was about one and half furlong. Specific role for causing injuries to the deceased is assigned to present accused respondent and co-accused Ramesh (since dead). PW-1 in his examination-in- chief has stated that he was returning from the Court alongwith Takdir Singh, Balram Tiwari and Ram Swarup Singh. No other person was alongwith them. A lengthy cross-examination was done from this witness wherein he has admitted that number of criminal cases were pending against the deceased started by the police and private person. Though PW-2 has supported the prosecution case in examination-in- chief and in his cross-examination completed in the year 1982 yet no cross-examination was done on the part of accused respondent Ramesh (since dead) at that time. He was recalled on the application moved by the co-accused in the year 1985 for cross-examination and he has specifically stated that at the time of incident he was present in the District Court premises alongwith PW-1 and had received information about the present incident in the Court premises itself and thereafter they went to the place of occurrence. Looking to the statement of PW-2 made in the cross-examination done by accused Ramesh (since dead) the trial court has observed that PW-2 is not a reliable witness. He has not been declared hostile by the prosecution. Statement made by this witness in the cross-examination done by co-accused Ramesh (since dead) placed him in the category of 'fully unreliable witness'. Trial court was also of the view that examination-in-chief of PW-1 itself makes it clear that this witness was also not present at the place of occurrence at the time of incident. On the basis of aforesaid facts, the findings of the trial

court recorded in the impugned order are to be analyzed.

18. It is settled principles of law that in the appeal against acquittal the Appellate Court should interfere with the judgment and order of acquittal passed by the Trial Court if it arrives at a finding that the trial Court's decision was perverse or otherwise unsustainable. It is also settled that if the view adopted by the trial court is a possible view and trial court has well discussed the entire facts and evidence in the impugned judgment and order, the Appellate Court should not interfere with the said findings. The Appellate Court will not superimpose its view over the view adopted by the Trial Court in the impugned judgment and order.

19. In this case, as is evident from the record, PW-2 was cross-examined on two occasions, firstly, in the year 1982 and secondly, in the year 1985. In the year 1985 when he was cross-examined on behalf of co-accused Ramesh (since dead) he did not support the prosecution case but he was not declared hostile. If the statement of this witness made in the examination-in-chief and cross-examination both are taken together it is evident that PW-2 cannot be placed in the category of 'fully reliable witness'. He can also not be placed in the category of 'fully unreliable witness'. If such is the position, he can be placed in the category of neither wholly reliable witness nor wholly unreliable witness and in that situation Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony. The trial court has taken into consideration the statement of PW-1 and has compared the same with the statement of PW-2 and was of the view that PW-1 was also not present at the time of occurrence at the place of incident. He himself has admitted in the examination-in-chief that when they were returning from the Court towards the market, deceased was not accompanying them. If the statement of PW-1 in the examination-in-chief in this case is compared with the cross-examination of PW-2 made in the year 1985 it can safely be held that view taken by the trial court in the impugned judgment and order regarding presence of PW-1 and PW-2 at the place of occurrence at the time of incident is not illegal and perverse. PW-2 has not been declared hostile. Thus, the trial court has rightly taken into consideration the part of cross-examination done in the year 1985 on the part of accused Ramesh (since dead). Had he (PW-2) been declared hostile on the basis of cross-examination done in the year 1985, its impact could be otherwise. The trial court has rightly taken into consideration the cross-examination part of PW-2 done in the year 1985, as he cannot be placed in the category of 'fully reliable witness' and his statement in the cross-examination are self-contradictory. Presence of this witness alongwith PW-1 and other witnesses disclosed in the F.I.R. at the time of incident was not found believable , which is based on correct appreciation of facts and evidence. The trial court while recording the aforesaid facts has discussed the entire evidence in detail and has rightly concluded that PW-1 and PW-2 were not present at the place of occurrence at the time of incident. They were planted later on by the police after due consultation.

20. Prosecution has examined only two fact witnesses i.e. PW-1 and PW-2, however, some other witnesses were disclosed in the F.I.R. but they were not examined. There remains only formal witnesses. Presence of PW-1 and PW-2 at the time of incident is not believable, as

discussed here-in-above. Thus, it can safely be held that prosecution was not able to prove its case beyond reasonable doubt. It is pertinent to mention here that prosecution has also not produced the FSL report to establish the place of occurrence. If the findings of the trial court recorded in the impugned judgment and order are analyzed in consonance with the facts and evidence adduced by the parties in the present matter in light of submissions advanced by the learned counsel for the parties, we are of the view that the view taken by the trial court in the impugned judgment and order is a possible view.

21. Considering the entire aspects of the matter, we are of the view that impugned judgment and order passed by the trial court is well thought and well discussed and trial court has rightly held that prosecution has not succeeded to prove guilt of accused respondent beyond reasonable doubt. The accused respondent is found not guilty for the offence punishable under Sections 302/34, 302 IPC. As such, impugned judgment and order passed by trial court is liable to be upheld and government appeal having no force is liable to be dismissed.

22. Accordingly, present Government Appeal is **dismissed** and the impugned judgment and order passed by the trial court is affirmed.

(2022)07ILR A932
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 45 of 2022

Air Plaza Retail Holding Pvt. Ltd., Chennai ...Revisionist

Versus

Nitin Malhotra & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Sushil Shukla, Sri Ishir Sripat, Sri Rahul Sripat (Senior Adv.)

Counsel for the Opposite Parties:
Sri Navin Sinha, Sri Ashish Kumar Srivastava

A. Civil Law -Civil Procedure Code, 1908 - Order IX Rule 13 r/w Section 17 - Provincial Small Cause Courts Act, 1887 --- while filing application under Order IX Rule 13 CPC, 1908, it is mandatory to comply Section 17 of Act, 1887 first and failure of that, no application can be entertained under Order IX Rule 13 CPC, 1908

Held: Revision dismissed. (E-12)

List of Cases relied upon:-

Subodh Kumar Vs Shamim Ahmad passed in Civil Appeal Nos. 802-803 of 2021 (arising out of SLP (C) Nos. 18118-18119 of 2019 decided on 03.03.2021.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Rahul Sripat, learned senior counsel assisted by Sri Sushil Shukla along with Sri Ishir Sripat, learned counsel for the revisionist-defendant and Sri Navin Sinha, learned senior counsel assisted by Sri Ashish Kumar Srivastava, learned counsel for the respondents-plaintiffs.

2. Present revision has been filed challenging the order dated 28.02.2022 passed by Additional District Judge, Court No. 10, Varanasi in Misc. Case No. 389 of 2021 (Air Plaza Holding Pvt. Ltd. Vs. Nitin Malhotra And Another).

3. Learned counsel for the revisionist-defendant submitted that revisionist-defendant is a company incorporated under the Companies Act, 1956 engaged in business of operation of retail outlets of apparel, food, products, FMCG products and other goods throughout India and is currently operating around 500 retail outlet stores in the country. The agreement to lease dated 30.08.2019 was signed by revisionist-defendant and plaintiffs- respondents-plaintiffs for ten years, which provides 60 days of rent free period from the date of possession. The revisionist-defendant entered into possession on 5.10.2019 and was not liable to pay rent till December, 2019. Without waiting for the said free period, he started paying rent from 10.11.2019 and there is no default on his part. Suddenly, he has received notice dated 31.01.2020 terminating the tenancy against the terms and condition of agreement to lease upon which revisionist-defendant has submitted detail reply dated 17.2.2020. Thereafter, plaintiffs-respondents-plaintiffs have filed SCC Suit No. 11 of 2020 before Judge, Small Causes Court/ Additional District and Sessions Judge, Court No. 10, Varanasi. Notices were issued, but the revisionist-defendant could not appear and ultimately, the said suit was allowed by ex parte judgement dated 12.03.2021 accepting the verbatim claim made in plaint. Further, direction was issued to vacate the house in question failing which liberty is given to plaintiffs- respondents to move execution application for eviction and recovery of rent. Judgement was given on 12.03.2021 and decree was prepared on 24.3.2021.

4. Revisionist-defendant has filed application under Order IX Rule 13 Civil Procedure Code, 1908 (in short CPC, 1908) read with Section 17 of The Provincial Small Cause Courts Act, 1887 (hereinafter referred to as "Act, 1887") dated 26.3.2021 to set aside ex parte decree. He next submitted that application under Order IX Rule 13 CPC, 1908 has been filed prior to preparation of decree, therefore, in paragraph 14 of the application, it is mentioned that no direction for paying any amount is mentioned in the judgement/ decree due to which he has not deposited any amount in compliance of Section 17 of Act, 1887. He next submitted that after going through decree, he has moved application dated 27.9.2021 for compliance of Section 17 of Act, 1887.

5. Learned counsel for the revisionist-defendant has assailed the impugned order basically on three grounds. First ground is taken about limitation and submitted that Apex Court has taken suo motu cognizance vide order dated 23.09.2021 in Misc. Application No. 665 of 2021 alongwith SMW (C) No. 3 of 2020 in which Apex Court has excluded the period from 15.03.2020 till 02.10.2021 for any suit, appeal, application or proceeding, therefore, his application dated 27.9.2021 may be treated filed within time. He may be given the benefit of judgement of Apex Court and be permitted to comply the Section 17 of Act, 1887 by depositing the decretal amount. For ready reference, relevant paragraph of order of Apex Court is quoted below;

"*Therefore, we dispose of the M.A. No. 665 of 2021 with the following directions:-*

I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021."

6. Second ground is that at the time of filing of application under Order IX Rule 13 CPC, 1908 more than decretal amount has already been paid to plaintiffs-respondents, therefore, there is no need to

deposit any additional decretal amount and further, he is regularly paying the rent to plaintiffs- respondents, which is Rs. 7,69,928/- per month till date. Therefore, it was required on the part of Court below to adjust this amount in decretal amount.

7. Third ground is that even in case of non compliance of Section 17 of Act, 1887, while filing application under Order IX Rule 13 CPC, 1908 Court has discretion to condone the delay and permit the revisionist-defendant to deposit the decretal amount as required under Section 17 of Act, 1887. In support of his contention, he has placed reliance upon the judgement of this Court in the matter of ***Waqf Alal Avlad and Ors. Vs. IInd District Judge, Jaunpur and others; 1992 (1) ARC 86*** and submitted that in the similar matter, to make good the deficiency in depositing the amount, Court below has granted time, which was challenged before the Court and Court has held that there is no illegality in the order of Court below.

8. He next submitted that provisions of Section 17 of Act, 1887 is being only procedural in nature has to be interpreted in such a way as to advance justice and to facilitate to meet its ends. He next relied upon the judgement of this Court in the matter of ***Suresh Chand Vs. VII Additional District Judge, Muzaffarnagar and Ors; 1992 AWC 40 All*** and submitted that in that matter, Court is of the view that it was not necessary that application under Section 17 of Act, 1887 may be filed first to be followed by the application under Order IX Rule 13 CPC, 1908.

9. He further placed reliance upon the judgement of this Court in the matter of ***Masih Das and Ors. Vs. Court of Additional District Judge 13th and Ors.; 1992 (19) ALR 529*** where the Court has permitted to make the deficiency good by permitting the defendant to deposit the amount so required under Section 17 of Act, 1887 after filing application under Order IX Rule 13 CPC, 1908.

10. Thereafter, he placed reliance upon the judgement of this Court in the matter of ***Quazi Neemat Ullah Vs. 6th Additional District Judge, Gorakhpur and Ors.; AIR 1993 All 126*** in which Court is of the view that if Court finds security insufficient, may give further time to defendant to make good the deficiency.

11 Further, he placed reliance upon the judgement of this Court in the matter of ***Prem Chandra Mishra Vs. Iind Additional District Judge and Ors.; 2008(9) ADJ 13.***

12. He submitted that in this matter, revisionist-defendant has already paid arrears of rent, cost of suit and interest of JSCC Suit much before passing of ex parte decree and same may be taken into consideration while entertaining application. Court has held that it is required on the part of Court below to consider the said amount, if any, against the decretal amount. Lastly, he submitted that purpose of legislation is to provide justice and application under Order IX Rule 13 CPC, 1908 may not be rejected merely on technical ground ignoring this fact that revisionist-defendant has come before this Court with clean hand and also submitted application dated 27.9.2021 to make good the deficiency by depositing the decretal amount, therefore, order impugned is bad and liable to be set aside.

13. Learned counsel for the respondents-plaintiffs has vehemently opposed the submissions raised by learned counsel for the revisionist-defendant and submitted that so far as first judgement relied upon by the revisionist-defendant about limitation is concerned, same is

having no relevance in the present case in light of Section 17 of Act, 1887. The same cannot be bifurcated into two parts i.e. first file application under Order IX Rule 13 CPC, 1908 and thereafter, deposit the money under Section 17 of Act, 1887. In case, there would have been two parts and second has not been complied within the time provided in Section 17 of Act, 1887, this judgement may have its effect, but in present case, it is required on the part of revisionist-defendant to first deposit the decretal amount as required under Section 17 of Act, 1887 and thereafter, file application under Order IX Rule 13 CPC, 1908. Therefore, this judgement has no relevance in the present case.

14. He next submitted that in the present case, there is no dispute on the point that ex parte judgement was pronounced on 12.3.2021, decree was prepared on 24.3.2021 having the detail of decretal amount, application under Order IX Rule 13 CPC is dated 26.03.2021 i.e. after preparation of decree. Therefore, there is no occasion for the revisionist-defendant to file application under Order IX Rule 13 CPC, 1908 alongwith averment that there is no direction to pay the amount. He has not deposited any amount for compliance of Section 17 of Act, 1887 which is very well mentioned in decree dated 24.3.2021. So far as non mentioning of decretal amount in judgement dated 12.3.2021 is concerned, it is undisputed that no written submission was filed, therefore, Court below allowed the suit in terms of pleadings made in plaint treating correct meaning thereby, whatever is claimed by the plaintiffs- respondents is awarded and amount has not been mentioned.

15. So far as contention of revisionist-defendant that sufficient amount, which is more than decretal amount already given to plaintiffs-respondents is concerned, it is necessary to point out here that it has never been pointed out before the Court below as to whether defendant has deposited any amount or not as no written submission was filed. Therefore, there is no occasion for Court to see as to whether any alleged amount has been deposited or not except to treat the facts mentioned in plaint is correct in absence of written submission. This can only be seen by the Court once the application under Order IX Rule 13 CPC, 1908 is allowed and time is granted to file written submission. Therefore, claim of revisionist-defendant about any amount already deposited cannot be considered for the purpose of meeting the requirement of Section 17 of Act, 1887. It is mandatory requirement on the part of revisionist-defendant to deposit the same. Not only this, revisionist-defendant in application dated 27.9.2021 has admitted this fact that inadvertently, he could not comply Section 17 of Act, 1887 and further time may be granted to comply Section 17 of Act, 1887. He next submitted that this issue came before Apex Court as well as this Court on many occasions and Court is of the firm view that no such additional time can be granted to comply Section 17 of Act, 1887 by depositing the money at later stage.

16. In support of his contention, he has placed reliance upon the judgements of this Court in the matter of ***Roshan Lal and others Vs. Rishi Pal Singh and others; 2013 (2) ARC 74, Gorakhnath (Dr.) Vs. Judge, Small Causes Court and others; 2015 (2) ARC 527*** and ***Mohd. Israil and another Vs. Nausaba A Sabari and 5 others; 2016 (3) ARC 448.***

17. Further, he placed reliance upon the latest judgement of Apex Court in the matter of ***Subodh Kumar Vs. Shamim Ahmad*** passed in Civil Appeal Nos. 802-

803 of 2021 (arising out of SLP (C) Nos. 18118-18119 of 2019 decided on 03.03.2021. In that case, Apex Court after hearing learned counsel for the parties, has framed the very same issue and decided that before filing application under Order IX Rule 13 CPC, 1908, provisions of Section 17 of Act, 1887 has to be complied with.

18. Lastly, he submitted that under the provisions of Section 17 of Act, 1887, law laid down by this Court as well as Apex Court in the matter of ***Subodh Kumar (supra)***, there is no illegality in the impugned order and revision is liable to be dismissed with costs.

19. I have considered the rival submissions of learned counsel for the parties and perused the record, provisions of law as well as judgements relied upon the parties.

20. Issue before this Court is as to whether after filing of application under Order IX Rule 13 CPC, 1908 to set aside ex parte decree, compliance of Section 17 of Act, 1887 can be done later on or not?

21. Before coming to issue, it is useful to reproduce the provisions of Section 17 of Act, 1887 as well as Order IX Rule 13 CPC, 1908;

Section 17 of Act, 1887

17. Application of the Code of Civil Procedure.- *(1) [The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 1908), shall save in so far as is otherwise provided by that Code or by this Act,] be the procedure followed in a Court of Small Causes, in all suits cognizable by it and in all proceedings arising out of such suits: Provided that an applicant for an order to set aside a decree passed ex parte or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give [such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed].*

(2) Where a person has become liable as surety under the proviso to sub-section (1), the security may be realised in manner provided by section [145] of the Code of Civil Procedure, [1908] (5 of 1908)."

Order IX Rule 13 CPC, 1908

Setting aside decree ex parte against defendant. *- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that there was sufficient cause for his failure to appear when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:*

Provided also that no such decree shall be set aside merely on the ground of irregularity of service of summons, if the Court is satisfied that the defendant knew, or but for his willful conduct would have known, of the date of hearing in sufficient time it enable him to appear and answer the plaintiff's claim

Explanation.-1. Where a summons has been served under Order V, Rule 15, on an adult male member having an interest adverse

tothat of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule.

Explanation II.- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.

22. The legal provision is very much clear. Section 17 of Act, 1887 clearly provides to deposit the decretal amount in Court or gives security for the performance of decree or compliance with the judgement before filing application for setting aside the decree. There is nothing in section which permits to first file application and thereafter deposit the decretal amount. Order IX Rule 13 CPC, 1908 shall govern with the provisions of Section 17 of Act, 1887.

23. Now under such proposition of law referred and discussed hereinabove, Court shall consider the argument raised by the learned counsel for the parties and judgments relied upon by them.

24. So far as first argument with regard to benefit of limitation in light of relaxation granted by the Apex Court is concerned, it is not applicable in the present matter for the reason that Section 17 of Act, 1887 and Order IX Rule 13 of CPC, 1908 cannot be bifurcated in two parts. There is no such provision to first file application under Order IX Rule 13 of CPC, 1908 and thereafter deposit the decretal amount under Section 17 of Act, 1887. In case, there would have been bifurcation in two parts, revisionist-defendant may claim benefit of limitation, therefore, argument of limitation is having no relevancy in the present case.

25. Further, learned counsel for the revisionist-defendant placed reliance upon the judgments of High Court in the matter of ***Waqf Alal Avlad and Ors. (supra), Suresh Chand (supra), Masih Das (supra), Quazi Neemat Ullah (supra) and Prem Chandra Mishra (supra)*** in which Courts granted time to make the good deficiency by permitting the defendant to deposit the amount so required under Section 17 of Act, 1887 after filing the application under Order IX Rule 13 of CPC, 1908.

26. Relevant paragraphs of the aforesaid judgements are quoted below;

Waqf Alal Avlad (supra)

"The petitioners filed, in the Court of Civil Judge, Jaunpur, suit No. 68 of 1978 for ejectment of Smt. Safia Mariam, respondent No. 3 and for recovery of arrears of rent and damages for the use and occupation of the accommodation in dispute. The suit was decreed ex parte on 3rd May, 1985. Respondent No. 3 applied for setting aside of the ex parte decree on 5th May, 1985. She also deposited a sum of Rs. 1450 in order to satisfy the requirements of Section 17 of Provincial Small Cause Courts Act, 1887. The petitioners objected to the restoration applied for on the ground of alleged noncompliance of Section 17 inasmuch as the deposit made by respondent No. 3 fell short by Rs. 2500. Considering the facts and circumstances of the case, the trial Court allowed respondent No. 3 a week's further time to make the deficiency in the deposit good vide its order dated 28th August, 1985. This order of the trial Court was challenged in Revision No. 260 of 1985 which was decided by the II

Additional District Judge, Jaunpur. The learned District Judge affirmed the order of the trial Court and dismissed the revision by means of his judgment and order dated 29th July, 1987. The two orders of the trial Court and the revisional Court are under challenge in the instant writ petition under Article 226 of the Constitution of India.

The Court has carefully scrutinised the impugned judgment and orders and is clearly of the opinion that respondent No. 3 has rightly allowed further time to make good the deficiency in deposit. The interest of justice required so. The Court is, further, of the opinion that the impugned judgment and orders stand to promote justice between the parties and do not result in any manifest injustice to the petitioners, which is a condition precedent for exercise of extraordinary jurisdiction under Article 226 of the Constitution of India.

For the foregoing reasons the Court declines to interfere with the orders impugned in the writ petition. The petition is, therefore, dismissed summarily."

Suresh Chand (supra)

"Section 17 of the Act being only procedural in nature has to be interpreted in such a way as to advance justice and to facilitate to meet its ends. The provision is to be liberally construed. The Court has to see that substantial compliance has been done. Reference may be made to a case reported in Bhagwan Swaroop v. Mool Chand.

The provisions of Section 17 of the Act are only procedural. The Legislature intended that when an ex parte decree is sought to be set aside the judgment-debtor should deposit the decretal amount either in cash or to give security for performance of the decree. It is only to protect the interest of the decree-holder. If the contention of the learned Counsel for the respondent is accepted that would frustrate the object of Section 17 of the Act itself. The use of the word "previous application" is only directory and not mandatory. The only duty cast upon the Court is to ensure, that on the date of allowing the application under Order 9, Rule 13, C.P.C. the entire decretal amount has been deposited or the security has been furnished for the performance. Thus I am of the view that it was not necessary that the application under Section 17 of the Act may be filed first to be followed by the application under Order 9, Rule 13, C.P.C."

Masih Das (supra)

"The Plaintiffs obtained an ex parte decree against the Defendants on 30-3-87. The Defendants claim that they came to know of the said ex parte decree on 5-5-87 and immediately on the next day i.e. on 6-5-87 they moved an application, supported by an affidavit, wherein, the' Defendants stated that they had no knowledge of the said suit, as the Defendants were never served with any summons and the said ex parte decree has been obtained without service of any summons on the Defendants. On 14-5-87. the Defendants moved an application for complying with the proviso of Section 17 of the Provincial Small Causes Court Act (hereinafter referred to as 'the Act'). In this application, the Defendants stated that a money-order has been sent of Rs. 975/- towards rent of the house, which has been received by the Plaintiffs during the course of the suit. As such, the Defendants should be permitted only to execute a personal bond for compliance of proviso to Section 17 of the Act. Alongwith application, a photostat copy of the original receipt of the money-order for Rs. 975/-, showing receipt of the aforesaid amount by the Plaintiffs on

21-4-86, was filed. The trial court, vide its order dated 14-5-87, permitted the Defendants to deposit half of the decretal amount in cash and security for half of the decretal amount by 10-7-87. However, before the aforesaid date i.e. 10-7-87, the Defendants moved an application on 26-5-87 that the Plaintiffs' suit has been decreed ex parte on 30-3-87, wherein the Plaintiffs had admitted the receipt of a sum of Rs. 975/- from the Defendants on account of rent and mesne profits during the pendency of the case but the said amount has not been adjusted in preparing the ex parte decree. As such, the ex parte decree, may be amended suo-moto. In the aforesaid background on 10-7-87, the Defendants moved another application, saying that so far as the rent is concerned, the Defendants have paid the rent but the exact amount of the decree is not being ascertained. The original record may be summoned, so that the Defendants may deposit the full amount. On the said application, the court directed the original file to be summoned, fixing 23-7-87. On 23-7-87 the court granted one week's time for complying with the court's order dated 14-5-87. On 30-7-87 an application was moved on behalf of the Defendants, seeking one month's time for depositing the decretal amount on the ground that the Defendant Masih Das had fallen ill on the said date. The application was allowed and 15 days' time was granted to the Defendants for complying with the court's order dated 14 5-87. On 4-8-87 the Defendants deposited a sum of Rs. 590.25 paise in cash and furnished security for a sum of Rs. 590.25 paise, which was duly accepted by the trial court. The trial court issued notice on Defendants' application under Order 9 Rule 13 of Code of Civil Procedure to the Plaintiffs and also stayed further proceedings in execution case for ejectment of the Defendants. The Defendants claim that the notice was issued to the Plaintiffs, after the trial court was satisfied that proviso of Section 17 of the Act has been complied with.

The Plaintiffs contested the said application on the ground that the Defendants' application, under Order 9 Rule 13 of Code of Civil Procedure is barred by time. It was also contended that the summons were duly served on the Defendants and there is no justification for setting aside the ex parte decree.

…..

The Defendants' counsel has made following submissions : Firstly, that the Defendants have sent money-order of Rs. 975/-to-wards rent which was admitted to the Plaintiffs. The ex parte decree was passed by the court, ignoring the aforesaid admission As such, the amount should have been adjusted before judging the compliance of the requirement of the proviso to Section 17 of the Act If the said amount would have been adjusted in the decretal amount, the defents duty com-plied with the requirement of the proviso to Section 17 of the Act within the time allowed by the court.

Secondly, the court having itself permitted the Defendants to comply with the requirement of the proviso to Section 17 of the Act and the Defendants having complied with the said requirement within time allowed by the court, the courts below were not justified in taking a view that the court had no jurisdiction to grant time for compliance of proviso to Section 17 of the Act It is a settled proposition of law that no party should suffer for the mistake of the court.

Thirdly in any case the decree was corrected by the court as late as on 22-8-88 As such, the court should have examined that the short fall, if any could have been condoned on the Defendants' application for condonation of delay given in the month of May, 1988.

The Plaintiffs' counsel has mainly contended that an application, under Order 9, Rule 13 of Code of Civil Procedure shall be deemed to be filed only on the date the judgment debtor complies with the requirement of Section 17 of the Act. There is no power with the court for extending time for complying with the requirement of proviso to Section 17 of The Act. The counsel contended that the application for condonation of delay was given as late as on 13-5-88 and there was no justification for this inordinate delay. The court below rightly rejected the said application and rightly held that there was no proper application moved on the Part of Defendants under Order 9 Rule 13 of Code of Civil Procedure read with proviso to Section 17 of the Act within time.

The revisional court, while dismissing the Defendants' revision held that even though the trial court had no jurisdiction to extend time for complying with the requirement of proviso to Section 17 of the Act, still the Defendants should not be penalised for the mistake of the court and it may be held that the Defendants were entitled to comply with the requirement of proviso to Section 17 of the Act latest by 10-7-87 but the Defendants failed to comply with the said requirement even on 10-7-87 There was no justification for the Defendants to have sought further time on 10-7-87 for complying with the requirement of proviso to Section 17 of the Act. The and 30-7-87, whereby time was advantage of the court's order dated 23-7-87 and 30-7-87, whereby time was further extended for complying with the court's order dated 14-5-87. The revisional court also held that there was no justification for the Defendants to have not complied with the court's order dated 14-5-87 by 10-7-87, as it was open to the Defendants to have ascertained the exact decretal amount by 10-7-07 and should have complied with the requirement of the proviso to Section 17 of the Act latest by 10-7-87.

…..

From the above discussion, it is clear that the revisional court has not approached the problem from the correct angle. The revisional court has not taken into account the fact that there was no fault on the part of the Defendants in complying with the requirement of proviso to Section 17 of the Act within the time allowed by the court: The revisional court having itself held that the Defendants should not be penalised for the mistake of the court, there was no justification for the revisional court to have taken a view that after 10-7-87, the Defendants could not have taken advantage of the courts' order.

The revisional court also failed to take into consideration that the Defendants were claiming adjustment of Rs. 975/- towards compliance of the requirement of proviso to Section 17 of the Act right from the very beginning. The said amount should have been adjusted in the decree, is clear from the fact that the said decree has been amended by the court itself in exercise of powers under Section 152 of Code of Civil Procedure. It has been held by the trial court itself that it was due to mistake of the court that a wrong decree was prepared. If

the correct decree would have been prepared, the said amount would have been adjusted in the decree and if the said amount would have adjusted in the said decree, still can it be held that the Defendants failed to deposit the requisite amount and failed to furnish security of the requisite amount, as per directions of the court even on 4-8-87. All these matters require-re-consideration of the revisional court. The judgment of the revisional court apparently suffers from the errors pointed out in this judgment. As such, the order of the revisional court is liable to be set aside. The matter may be remanded back to be decided afresh in the light of the observations made in the judgment."

Quazi Neemat Ullah (supra)

"The expression "on previous application made by him in this behalf occurring in proviso to Section 17(1) of the Act, does not, in my opinion, necessarily comprehend that an application to give such security for the performance of the decree or compliance with the judgment as the court may direct must be filed before an application for setting aside an ex parte decree is filed. All that the said expression comprehends is that the order of the Court directing defendant-judgment debtor to give such security as it considers necessary, should be passed on an application moved in this behalf before the application for setting aside ex parte decree is entertained.

The word 'entertained" in this connection has the meaning assigned to it by the Supreme Court in M/s. Laxmi Engineering Works Ltd. V. Asstt.Commissioner (Judl) Sales Tax Kanpur Range Kanpur, AIR 1966 SC 488 followed in Sri Shyam Kishore v. M.C.D., 1992 (5) JT 335,

…..

In view of the above discussion, I am of the opinion that the surety bonds furnished by the defendant petitioner on 16-11-1989 i.e. within the time specified by the Court vide order dated 10-11-1989, upon its acceptance by the court vide order impugned, has to be taken as due or, in any case, substantial compliance of the proviso to sub-sec. (1) of S. 17 of the Act. Therefore, the order passed by Judge Small Cause Court was not liable to be set aside on the ground that the surety bond was not deposited on the date of filing of the application for setting aside the ex parte decree. Since other pre requisite conditions for setting aside the ex parte decree within the meaning of O.9 Rule 14, C.P.C. were satisfied in the opinion of the trial court, the order passed by the revisional court has to be quashed."

Prem Chandra Mishra (supra)

"The object behind proviso of Section 17(1) of Provincial Small Causes Courts Act 1887 is that unscrupulous tenants against whom rent is due, who do not appear on the date fixed may not take advantage of not paying rent and thereby causing harassment of the landlord. The purpose of adding this proviso to Section 17 is to protect the interest of landlord from further harassment and to secure and ensure payment of rent and to put tenant to term to legally make said deposits. Idea behind said provision is to strike a balance between rival interests so as to be just to law. In case of exparte decree tenant has been given liberty to move application under Order IX Rule 13 of Code of Civil Procedure on the ground provided therein but under proviso to Section 17 (1) of Provincial Small Cause Courts Act 1887

condition has been imposed so that tenant does not take undue advantage for non-appearance and in this background as condition precedent is it has been made obligatory on the part of the tenant to deposit the amount which is due so that in the event an application for setting aside decree is dismissed the decree in question may be satisfied from the amount deposited or from the security furnished by the judgment debtor.

Question arising in the present case is that Revisional Court has recorded finding of fact which has not at all been assailed before this Court that entire amount which is due from tenant under decree qua the same deposit is already there even before passing of decree and once entire amount in question is there can even in this contingency application under Section 17 (1) of Provincial Small Cause Courts Act 1887 can be dismissed for non-compliance of provision of proviso. Amount in question under Section 20(4) of U.P. Act No. 13 of 1972 is permitted to be deposited in any suit for eviction on the ground mentioned in Clause (a) of sub-Section (2) of Section 20 by the tenant on the first hearing of the suit unconditionally and amount which is already deposited under Sub-Section (1) of Section 30 of U.P. Act No. XIII of 1972 is liable to be deducted for enabling tenant to save eviction. Sub-Section (6) of Section 20 clearly provide that any amount deposited by the tenant under Sub-Section (4) or under Rule 5 of Order VX of the First Schedule to the Code of Civil Procedure, 1908 shall be paid to the landlord forthwith on his application without prejudice to the parties pleadings and subject to the ultimate decision in the suits. Similarly Sub-Section (4) of Section 30 provides that on any deposit which are made under Section 30 the amount in question which has been deposited can be withdrawn on an application made in this behalf and further sub-Section (6) of Section 30 provides that any deposit made, same shall be deemed that the person depositing it has paid it on the date of such deposit to the person in whose favour it is deposited in the case referred to in sub-section (1) or to the landlord in the case referred to in sub-section (2). Thus, deposits which are made under Sub-Section (4) of Section 20 and under Section 30 of U.P. Act No. 13 of 1972 and under Order XV Rule 5 C.P.C. are in custody of the Court and said amount in question can at any point of time, be withdrawn by the landlord in question, and are readily available to the landlord.

…..

In the present case admitted position is that after ex pate decree has been passed application to recall ex-parte decree was made on 24.05.1993 and alongwith the same application under the proviso to Section 17(1) has not at all been moved. Said application was admittedly moved subsequent to the same on 25.02.1994 and in the said application mention was made by him that he has already deposited the rent, cost of suit and interest of JSCC suit much earlier before passing of exparte decree. Said application which has been moved on behalf of tenant was not stating any thing new rather it was sought to be stated by the tenant that in the present case decretal amount is already with the court as he has already paid arrears of rent, cost of suit and interest of JSCC suit much before passing of exparte decree and same may be taken into consideration while entertaining application. Distinction will have to be drawn qua the cases wherein entire amount as mentioned in the proviso to Section 17 of Provincial Small Cause

Courts Act 1887 already stands deposited even before passing of exparte decree. In the said event of entire amount in question being prior deposited, information has to be furnished before Judge Small Causes Court, then said fact on verification can be treated as sufficient compliance as provided under the proviso to Section 17 (1) of Provincial Small Cause Courts Act 1887, inasmuch as nothing new has been sought to be done after expiry of the period rather only information has been furnished that said condition has already been complied with and interest of landlord is fully protected as per object and the purpose of Section 17. Tenant cannot be asked to make deposit for second time and furnish security for the second time in the backdrop that prior to passing of decree entire amount due under decree or judgment has already been deposited. Judge Small Causes can make inquiry in the matter of this fact on being apprised as to whether decretal amount is there or not but where decree in question has been passed and decretal amount mentioned as above is not at all there then law laid down by Hon'ble Apex Court in Kedarnath's case (supra) has to be followed in its word and spirit. Facts narrated above clearly makes Kedarnath's case (supra) distinguishable."

27. It is necessary to point out that this issue has also been considered very well by this Court in the cases of ***Roshan Lal (supra), Gorakhnath (Dr.) (supra)*** and ***Mohd Israil (supra)*** where the Courts had different view and held that before filing the application under Order IX Rule 13 of CPC, 1908, compliance of Section 17 of Act, 1887 is mandatory. Relevant paragraphs of the aforesaid judgements are quoted below;-

Roshan Lal and others (supra)

"The respondent No.1 filed an application dated 21.5.2003 under Order IX, Rule 13 C.P.C. for setting aside ex parte decree, which was registered as Misc. Case No.19 of 2003. It was neither accompanied by deposit in the Court the amount due from defendant-applicant i.e. respondent no.1 under the decree nor any security for performance of the decree nor any application for furnishing such security. In other words there was no compliance of Section 17(1) of Provincial Small Cause Courts Act, 1887 (hereinafter referred to as "Act, 1887").

Subsequently on 28.10.2003 respondent no.1 filed an application under Section 17 *of Act, 1887 seeking permission of Trial Court to furnish security of Rs.9,600/- and deposit of Rs.8003/- by Tender since according to him total amount under decree would come to Rs.17,603/-. The Trial Court, vide order dated 5.12.2003 permitted the deposit by tender subject to the rights of the parties. Besides above, respondent No.1 also filed an application under Section 5 of Indian Limitation Act seeking condonation of delay in filing application for compliance of* Section 17 *of Act, 1887.*

…..

The short issue up for consideration before this Court whether there was compliance of proviso to Section 17 (1) *of Act, 1887 in the present case or not and whether the view taken by Revisional Court that deposit need not be on the date of submission of the application for setting aside ex parte order but if it is so on the date of hearing of application, that would be sufficient compliance of proviso to* Section 17 (1) *of Act, 1887, is correct?*

In my view, Revisional Court has not only misread proviso to Section 17 (1) *of Act, 1887 but has also ignored catena of*

decisions of this Court as also that of Apex Court, which have considered proviso to Section 17 (1) *of Act, 1887 wherein it has been held unambiguously that requirement of deposit or application for security must accompany or precede the application for setting aside ex parte decree and not to be seen on the date of hearing of such application.*

The Apex Court has considered this aspect in Kedarnath Vs. Mohan Lal Kesarwani & Ors., 2002(1) ARC 186. The Court has clearly held that an application moved for compliance of Section 17 *at a later stage after filing the application for setting aside ex parte decree cannot be considered as due compliance since it would not fall within the ambit of strict compliance of proviso to* Section 17. *Paras 9 and 10 of judgment reads as under:*

"9. A bare reading of the provision shows that the legislature have chosen to couch the language of the proviso in a mandatory form and we see no reason to interpret construe and hold the nature of the proviso as directory. An application seeking to set aside an ex-parte decree passed by a Court of Small Causes or for a review of its judgment must be accompanied by a deposit in the court of the amount due from the applicant under the decree or in pursuance of the judgment. The provision as to deposit can be dispensed with by the court in its discretion subject to a previous application by the applicant seeking direction of the court for leave to furnish security and the nature thereof. The proviso does not provide for the extent of time by which such application for dispensation may be filed. We think that it may be filed at any time up to the time of presentation of application for setting aside ex-parte decree or for review and the Court may treat it as a previous application. The obligation of the applicant is to move a previous application for dispensation. It is then for the court to make a prompt order. The delay on the part of the court in passing an appropriate order would not be held against the applicant because none can be made to suffer for the fault of the court.

10. In the case at hand, the application for setting aside ex parte decree was not accompanied by deposit in the court of the amount due and payable by the applicant under the decree. The applicant also did not move any application for dispensing with deposit and seeking leave of the court for furnishing such security for the performance of the decree as the court may have directed. The application for setting aside the decree was therefore incompetent. It could not have bee entertained and allowed."

The Apex court has referred to the several decisions of this Court which were cited and has approved in the above judgment which are Krishan Kumar v. Hakim Mohd., 1978 ALJ 738, Sharif v. Suresh Chand and Ors. 1979 AWC 256, Roop Basant v. Durga Prasad and Anr. 1983 1 ARC 565, Mohd. Islam v. Faquir Mohammad 1985 1 ARC 54, Krishan Chandra Seth v. K.P. Agarwal and Anr. 1988 1 ARC 310, Mamta Sharma v. Hari Shankar Srivastava and Ors. 1988 (1) ARC 341, Mohd. Yasin v. Jai Prakash 1988 (2) ARC 575, Purshottam v. Special Additional Sessions Judge, Mathura and Ors. 1991 (2) ARC 129, Ram Chandra (deceased Lrs.) and Ors. v. Ixth Additional District Judge, Varanasi and Ors. AIR 1991 All 223 : 1991(1) ARC 501, Sagir Khan v. The District Judge, Farrukhabad and Ors. 1996 (27) ALR 540 : 1996 (1) ARC 414, Mohammad Nasem v. Third Additional District Judge, Faizabad and Ors. AIR 1998 All. 125 and Beena Khare v.

VIIIth Additional District Judge, Allahabad and Anr. 2000 (2) ARC 616.

It is not disputed that at the time of filing of application i.e. 21.5.2003 neither decretal amount was deposited nor it preceded or accompanied any application for furnishing security for performance of decree. The decisions of this Court in Ashok Kumar Dhiman (supra) relied by Revisional Court would not lend any help to respondent no.1 in view of authoritative pronouncement on the question by Apex Court in Kedarnath (supra). A belated application for purported compliance of Section 17 (1) *of Act, 1887 has been deprecated by Apex Court in Kedarnath (supra) as is evident from para 11 of the judgment:*

"11. The trial court was therefore right in rejecting the application. The District Judge in exercise of its revisional jurisdiction could not have interfered with the order of the trial court. The illegality in exercise of jurisdiction by the District Court disposing of the revision petition was brought to notice of the High Court and it was a fit case where the High Court ought to have in exercise of its supervisory jurisdiction set aside the order of the District Court by holding the application filed by the respondent as incompetent and hence not entertainable. We need not examine the other question whether a sufficient cause for condoning the delay in moving the application for leave of the court to furnish security for performance was made out or not and whether such an application moved at a highly belated stage and hence not being a 'previous application' was at all entertainable or not."

In view of the above, impugned revisional judgment cannot sustain. The writ petition is allowed. The judgment dated 18.01.2005 (Annexure No.14 to the writ petition) passed by Revisional Court is hereby set aside. The decree of ejectment and recovery for arrears of rent passed by Trial Court dated 25.8.2004 passed by Judge Small Cause Court, Bijnor is hereby restored and confirmed. "

Gorakhnath (Dr.) (supra)

"The respondent/landlord IInd set filed a suit for eviction and arrears of rent before Small Cause Court at Gorakhpur being Suit No. 106 of 1993. The suit was decreed against the petitioner/tenant on 23 December 1998. The petitioner filed a restoration application under Order 9 Rule 13 of the Code of Civil Procedure on 23 November 2002 for setting aside the ex parte judgment and order. The petitioner admittedly did not deposit the entire decretal amount as required in terms of the proviso to Section 17 of the Small Causes Court Act, 18871. On 8 September 2006, the restoration application was rejected by the Court on the ground that mandatory provision of proviso to Section 17 of the Act 1887 was not complied. On 4 January 2011, the petitioner moved another application (27-Ga) before the Small Causes Court, for recalling the earlier order dated 8 September 2006 and praying that the application under Order 9 Rule 13 of the C.P.C. be decided by permitting the petitioner to deposit the decretal amount. The Court vide order dated 16 April 2011 rejected the application being barred by res judicata.

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This Court in the case of Khilla Devi @ Manju Singh v. Vishwa Mohini3, Jai Prakash v. Gulab Singh Rathor4, Dinesh Kumar Dubey v. Ganga Shankar Tiwari5 and in Raj Kumar and another vs. Neeraj Kumar Singhal,6 held that the compliance

of Section 17 of the Act is mandatory for the maintainability of an application under Order IX, Rule 13 C.P.C.

A Division Bench in Raj Kumar Makhija and others vs. M/s S.K.S. And Company and others7, on a reference made regarding the scope of Section 17 of the Act held that a bonafide mistake on the part of the applicant in not depositing the entire decretal amount cannot be condoned under Section 17 of the Act, the application would be liable to be rejected. The reference before the Court was as follows:

"Whether the proviso to Section 17 of the Provincial Small Causes Courts Act completely bars any rectification or removal of a bona fide error after the expiry of the period of limitation when substantial compliance by way of deposit of the decretal amount and furnishing security has been made within the period of limitation particularly when Section 5 of the Limitation Act, 1963 has been made applicable to Order IX Rule 13 of the Code of Civil Procedure?"

The Division Bench considered the judgment rendered in Kedarnath (supra) and held that the provisions of Section 17 of the Act is mandatory and non compliance thereof would entail dismissal of the application, non-compliance cannot be condoned or overlooked by the Court. There is no provision in the statute that would provide either for extension of time or to condone the default in depositing the rent within the stipulated period, the Court does not have the power to do so."

Mohd. Israil (supra)

"*The two sons and a daughter of late Anwar Ahmad Sabari instituted Suit No.20 of 2002 against Ismail Khan for arrears of rent and eviction. Ismail Khan expired after the institution of the suit leaving behind as alleged his widow, four sons and a daughter. On his death, his two sons Mohd. Israil and Atula were substituted and the suit proceeded against them. The notice of the suit could not be served upon them. Therefore, recourse to substituted service was taken and the notice was published in the news-paper. Thereafter the suit was decreed ex-parte on 16.2.2004 in their absence.*

The aforesaid two defendants in the suit on 30.5.2014 filed an application under Order 9 Rule 13 C.P.C. contending that they had no knowledge of the aforesaid ex-parte decree. They came to know about it in May, 2014 when the same was put in execution. Accordingly, after inspection of the record on 29.5.2014 they have moved the above application.

Section 17 of the Act provides for application of the Code of Civil Procedure in suits cognizable by Small Cause Courts but lays down that in order to set-aside a decree passed ex-parte the applicant at the time of presenting his application has to either deposit the amount due under the decree or furnish security for its performance as the Court may direct on a previous application made in that behalf. Thus, the aforesaid defendants were supposed to deposit the amount due to them under the ex-parte decree at the time of presenting the application for setting aside the same.

There is no dispute that according the decree they were supposed to deposit `.86,016.32 at the time of presenting the application under Order 9 Rule 13 C.P.C. The defendants deposited only `.76,918.44 for the purposes of setting aside the ex-parte decree in compliance of Section 17 of the Act. Thus there was a shortage of `.9097.88 (`.9098 in round figure).

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In view of the aforesaid facts and circumstances and the respective arguments of both the sides the only question which crops up for consideration is whether the shortage of `.9098/- in complying with the proviso to Section 17 of the Act can be regarded as negligible and ignored so as to enable the Court to consider the application under Order 9 Rule 13 C.P.C. on its merit.

In Kedarnath Vs. Mohan Lal Kesarwani and others 2002 (1) ARC 186 : 2002 (2) SCC 16 the Apex Court in considering the provisions of Section 17 of the Act laid down that a bare reading of it shows that the legislature have chosen to couch the language of the proviso in a mandatory form and there is no reason to interpret, construe and hold the nature of the proviso as directory. An application seeking to set aside an ex-parte decree passed by a Court of Small Causes must be accompanied by a deposit in the Court of the amount due from the applicant under the decree or in pursuance of the judgment. In the end, agreeing with the various pronouncements of the Allahabad High Court on the point, except for one, the Apex Court held that the provisions of Section 17 of the Act are mandatory and non compliance therewith would entail dismissal of the application for setting the ex-parte decree.

It may be relevant to state that the language of the proviso to Section 17 of the Act is plain and clear which leaves no ambiguity. The use of word 'shall' therein makes the provision mandatory in nature. It is settled in law that where the statutory provisions are plain and unambiguous, the Court shall not interpret the same in a different manner for the reason that the consequence therefrom may be harsh.

It is also well settled principle that if a statute requires an act to be performed by a private person within a specified time, the same would ordinarily be mandatory but the same is not the position when the duty to act is cast upon a public functionary in which case the provision would be directory in nature unless the consequence thereof are specified.

In view of the above principle also the provisions of Sections 17 of the Act which casts an obligation to deposit the amount under the decree upon a private party is certainly mandatory in nature. Accordingly, the deposit of the amount at the time of the presentation of the application under the decree sought to be set-aside is mandatory unless the Court otherwise directs for furnishing security.

In Amar Nath Agarwal Vs. Ist Additional District Judge and others, 1982 ARC 734 a Division Bench of this Court has held that if the deposit made by the tenant falls short of amount required to be deposited, the tenant will be deprived of the benefit, even if shortfall in such deposit was because of tenant's ignorance or without any mala fide intention. It means if there is any shortfall in the deposit, the tenant will be cease of his right to press the application on merits.

In view of the above mandatory provision the argument of substantial compliance may not be available to the defendants but for the maxim of "de minimis non curat lex".

The principle of "de minimis non curat lex" means that "the law does not concern itself about trifles". Thus, the question is if the shortage in deposit can be ignored by applying the said principle.

The aforesaid maxim in relation to Section 17 of the Act came up for consideration before a Division Bench of this Court in

Raj Kumar Makhija and others Vs. M/s. S.K. and Co. and others 2012 (9) ADJ 337 (DB). The Division Bench explaining the principle observed that where the shortfall in deposit is of a negligible amount the aforesaid principle can be applied and the shortfall may be ignored. What would be a negligible amount would depend upon the facts of each case. In the above case before the Division Bench the tenants were required to deposit pendente lite and future damages at the rate of `.1,000/- per month but they deposited only at the rate of `.700/- per month. The Court refused to apply the above principle as the shortfall was not held to be of trivial amount.

The Court therein distinguished the case with those cases where the shortfall was held to be of no consequence, inasmuch as in those cases the mistake was in calculation on the part of the Court and those decisions were rendered in different factual background. Ultimately the Court held that on the basis of the above principle the Court can ignore shortfall in deposit of a negligible amount only, otherwise there has to be a strict compliance.

In one case referred by the Division Bench the amount required to be deposited was `.1,944/- and there was deficiency of `.104/- , the shortage was not held to be negligible to attract the principle.

In the case in hand admittedly the amount required to be deposited was `.86,016/- whereas the deposit made was of only `.76,918/- and there was a shortfall of `.9,018/-. The aforesaid shortfall, if examined in the light of the above two illustrations and percentage-wise keeping in mind the amount required to be deposited, it is around 10% of the amount. The shortage of 10% is not negligible to attract the principle of "de minimis non curat lex".

There cannot be any hard and fast rule as to the percentage which may be regarded as negligible in such cases but broadly speaking shortfall of about 1-2 percent of the total amount required to be deposited may in some cases be regarded trivial so as to apply the principle of "de minimis non curat lex" but not more. Accordingly, the shortage of `.9,098/- in deposit the amount under the decree is not trivial to be ignored.

In view of the aforesaid facts and circumstances, the court below has not committed any error of law in rejecting the application of the defendants filed under Order 9 Rule 13 C.P.C. for non compliance of the mandatory provision of proviso to Section 17(1) of the Act."

28. Now the picture so emerges before this Court that Courts are having two different view, which ultimately settled while matter came up for consideration before the Apex Court in the matter of ***Subodh Kumar (supra).*** Apex Court after considering the controversy, framed issues and first issue framed by the Apex Court is the issue, which is before this Court and quoted below;

"From the submissions of the learned counsel for the parties and materials on record, following issues arise for consideration in this appeal:-

1) Whether in the application filed by the respondent-tenant under Order 9 Rule 13, CPC on 25.08.1998, the requirements as contained in Proviso to Section 17 of the Provincial Small Cause Courts Act, 1887, were complied with?"

29. After considering the issue in detail, Court has replied that compliance of Section 17 of Act, 1887 is mandatory before filing of the application under Order

IX Rule 13 of CPC, 1908. The Apex Court went to the extent that any deposit made under Section 30(2) of Act, 1997 shall not be adjusted for compliance of Section 17 of Act, 1887.

30. Relevant paragraphs of the judgement of ***Subodh Kumar (supra)*** are quoted below;-

"This Court has held that compliance of the proviso to Section 17 is mandatory for making application Under Order 9 Rule 13. In paragraph 8 and 9, following was laid down:

8. A bare reading of the provision shows that the legislature has chosen to couch the language of the proviso in a mandatory form and we see no reason to interpret, construe and hold the nature of the proviso as directory. An application seeking to set aside an ex parte decree passed by a Court of Small Causes or for a review of its judgment must be accompanied by a deposit in the court of the amount due from the Applicant under the decree or in pursuance of the judgment. The provision as to deposit can be dispensed with by the court in its discretion subject to a previous application by the Applicant seeking direction of the court for leave to furnish security and the nature thereof. The proviso does not provide for the extent of time by which such application for dispensation may be filed. We think that it may be filed at any time up to the time of presentation of application for setting aside ex parte decree or for review and the court may treat it as a previous application. The obligation of the Applicant is to move a previous application for dispensation. It is then for the court to make a prompt order. The delay on the part of the court in passing an appropriate order would not be held against the Applicant because none can be made to suffer for the fault of the court.

9. In the case at hand, the application for setting aside ex parte decree was not accompanied by deposit in the court of the amount due and payable by the Applicant under the decree. The Applicant also did not move any application for dispensing with deposit and seeking leave of the court for furnishing such security for the performance of the decree as the court may have directed. The application for setting aside the decree was therefore incompetent. It could not have been entertained and allowed.

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On the date when the application was filed Under Order 9 Rule 13, i.e., 25.08.1998, neither any deposit was made by the tenant nor there was any previous application seeking permission of the Court to give security. Hence, there being non-compliance of proviso to Section 17, application was liable to be rejected and the trial court vide its order dated 19.04.2007 had rightly rejected the application Under Order 9 Rule 13.

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The application Under Order 9 Rule 13 Code of Civil Procedure was filed on 25.08.1998, i.e., subsequent to filing of the execution application, thus, at least the amount of Rs. 21,660/- was due. The tenant Respondent has made a deposit Under Section 30(2) in July, 1997 of Rs. 16,800/- and again Rs. 750/- on 18.10.1997 which was rent from 30.06.1997 to 30.11.1997. Thus, on the date when the application was filed Under Order 9 Rule 13, total deposit made by the tenant Under Section 30(2)

was onl y R s . 17,550/- whereas the amount due as per execution application was Rs. 21,660/-. It was only on 25.11.1998, i.e., much after filing of the application Under Order 9 Rule 13, the tenant deposited amount of Rs. 1,950/- as a rent from 30.11.1997 to 31.12.1998. Thus, even according to the own case of the Respondent tenant on the date when application Under Order 9 Rule 13 was filed, i.e., 25.08.1998, the tenant had not deposited Under Section 30(2) the total amount due, thus, by no stretch of imagination the tenant could have claimed compliance of proviso to Section 17 of Act, 1887.

Now, we may proceed to consider as to whether deposit Under Section 30(2) in the facts of the present case could have enured to the benefit of tenant for the purposes of deposit Under Section 17 of Act, 1887. The deposit was made on an application Under Section 30(2) filed by the Respondent tenant. The Court while allowing the application on 23.05.1997 had passed the following order: ORDER 4Kh application Under Section 30(2) of Act No. XIII of 1972 is allowed without prejudice to the respective contentions of the parties. The Plaintiff may deposit the amount if he so likes at his own risk. The parties shall be free to agitate the question of validity of deposit in the S.C.C. Suit pending. File be consigned.

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When the Plaintiff had claimed exemption from the operation of the Act No. 13 of 1972, it was specific pleading as noted above, how deposit can be made Under Section 30 of the Act by the tenant Respondent. Section 2 begin with the expression that 'Nothing in this Act shall apply'. When there is exemption from the applicability of the Act No. 13 of 1972 as pleaded by the Plaintiff, Section 30 of the Act shall also not be applicable. When Section 30 itself is not applicable to the building, the deposit claimed to be made Under Section 30(2) is wholly irrelevant, for any purposes including for purposes of proviso to Section 17 of Act, 1887."

31. Now in light of judgment so pronounced by the Apex Court on this issue, law has been settled and accordingly, while filing application under Order IX Rule 13 CPC, 1908, it is mandatory to comply Section 17 of Act, 1887 first and failure of that, no application can be entertained under Order IX Rule 13 CPC, 1908.

32. So far as present case is concerned, facts are not disputed. Undisputedly, SCC Court has pronounced the judgement on 12.03.2021, decree was prepared on 24.03.2021, application under Order IX Rule 13 CPC, 1908 filed on 26.03.2022 and in decree, decretal amuont is mentioned. Therefore, there is no occasion for the revisionist-defendant to skip away with the compliance of Section 17 of Act, 1887 and straightway file the application under Order IX Rule 13 CPC, 1908. Further, it is also admission on the part of revisionist-defendant that he was aware of this fact and, therefore, he has filed application dated 27.9.2021 seeking time to comply the Section 17 of Act, 1887 as inadvertently he could not comply the same earlier.

33. Therefore, under such facts of the case as well as law laid down by the Apex Court, I found no good ground to interfere

in the impugned order. Revisions lacks merit and is accordingly, **dismissed.**

34. No order as to costs.

(2022)07ILR A951
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 60 of 2022

Dinesh Kumar ...Revisionist
Versus
Smt. Asha Agarwal & Anr.
...Opposite Parties:

Counsel for the Revisionist:
Sri Rahul Sahai

Counsel for the Opposite Parties:

A. Civil Law - Provincial Small Cause Courts Act, 1887- Sections 17 & 23 -Civil Procedure Code, 1908 - Order IV Rule 4 & Order L - The Small Causes Court is a summary proceedings and detailed reasons are not required to be given in judgments. The point for determination does not need for framing an issue and there is no need for the procedure applicable for the regular civil suits. In case the detail procedure of regular suit is also followed in the matter of the Small Causes Court, the very object of the Act No. 9 of 1887 shall be frustrated.

B. Proceeding of SCC suit shall be governed by the provisions of Order XX, Rule 4 of Code, 1908 and not by the provisions of Order XIV, Rule 5 of Code, 1908.

C. Order XIV of Code, 1908 says for settlement of issue in Civil Suit whereas Order XX, Rule 5 of Code, 1908 says for framing of point of determination in SCC Suit and Order L Rule 1 of Code, 1908 clearly bars the certain provisions of Code, 1908 including settlement of issues also. Therefore, intention of legislation is very much clear while having two different provisions for Civil Suit and SCC Suit and it cannot be said that Order, XIV Rules 1 & 3 & Order XX Rule 4 of Code, 1908 are having the same meaning. Mandate of Order L Rule 1 of Code, 1908 cannot also be ignored which is inserted by the legislation to remove any confusion while dealing with the provisions of Order XIV Rules 1 & 3 and Order XX Rule 4 of Code, 1908.

D. If by such a refusal to frame issues a serious prejudice is being caused to the plaintiff or the defendants then it is always expedient for the trial court to exercise its jurisdiction in framing such issues to facilitate the parties to adduce evidence in the light of pleadings on the basis of which issues were framed.

E. It is the discretionary power of the trial court to frame additional issues if it finds it necessary for determining the list between the parties but merely refusal to frame additional issues does not give a right to the parties to prefer a revision as by such refusal Jo frame such additional issues neither the rights nor the obligations of the parties are adjudicated upon. Therefore, it is upon the Court to have a new point of determination before pronouncing the judgment, if so required.

Revision dismissed. (E-12)

List of Cases relied upon:-

1. Rameshwar Dayal Vs Banda (dead) through his L.Rs. & anr.; ARC 1993 (1) 249

2. Krishna Kumar Gupta Vs Subhash Chand Surana; 2013 0 Supreme(All) 727

3. Sardar Sujeet Singh & ors. Vs Suresh Chandra Porwal; 2014 0 Supreme (All) 529

4. Vikas Gupta Vs M/s. Shri Ram Mahadev Prasad & anr.; 2014 0 Supreme(All) 1675.

5. Kisan Udyog Vs United Bank of India; 1989 0 Supreme(All) 233

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Rahul Sahai, learned counsel for revisionist.

2. Present revision has been filed for setting aside the judgment/order dated 07.04.2022 passed by Additional District Judge Court No. 1, Mathura in SCC Case No. 01/2017 (Smt. Asha Agarwal and another vs. Dinesh Kumar), and/or to allow the application 74Ga of the revisionist.

3. Learned counsel for revisionist submitted that earlier SCC Suit No. 01 of 2017 was filed by the plaintiff-opposite party No.1, upon which revisionist-defendant has preferred written submission and replica has also been filed. Accordingly, considering the written submission, issues were framed on 06.03.2018. It is next submitted that to decide the SCC Suit, it is necessarily required to frame additional issues with regard to title as well as landlordship. Therefore, revisionist-defendant has moved application under Section 23 of The Provincial Small Cause Courts Act, 1887 (hereinafter referred to as "Act, 1887') numbered as 74-Ga, which provides return of plaints in suits involving questions of title. The said application has been rejected by the Court below on the ground that after completion of evidence and during the course of arguments, just to linger on the proceeding, the application was moved. It is also observed in the impugned order that while deciding the case, if required, additional issues would be framed. It is further submitted that under Order XIV Rule 5 of Code of Civil Procedure, 1908 (hereinafter referred to as "Code, 1908'), it is required that before passing a decree, Court may amend the issues or frame additional issues on such terms as it thinks fit, but in the impugned order, it is observed that while delivering the judgment, if required, Court may frame additional issues, which is contrary to the provisions of Code, 1908. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matter of ***Rameshwar Dayal vs. Banda (dead) through his L.Rs. And another; ARC 1993 (1) 249***. He has also relied upon the judgments of this Court in the matters of ***Vikas Pawar vs. Smt. Tara Rani and another; 2005 (1) ARC 196 and Satish Chandra Agarwal vs. Ashok Jaiswal ; 2016 (2) ARC 605.***

4. I have considered the submissions advanced by learned counsel for revisionist and perused the impugned order, provisions of law as well as judgments relied upon.

5. Revisionist-defendant has filed application under Order XIV Rule 5 of Code, 1908 for framing of additional issues, which was rejected. Issue before the Court is to decide as to whether the proceeding of SCC Court shall be governed under the provisions of Order XX of Code, 1908 or Order XIV of Code, 1908 and application under Order XIV, Rule 5 of Code, 1908 is maintainable or not.

6. Present proceeding of suit is governed by the provisions of Act, 1887 as well as Code, 1908 and Section 17 of Act, 1887 provides applicability of Code, 1908. Relevant provisions of Act, 1887 and Code, 1908 are quoted below:-

Act, 1887

"17. Application of the Code of Civil Procedure.--(1) 1[The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 1908), shall, save in so far as is otherwise provided by that Code or by this

Act,] be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits:

Provided that an applicant for an order to set aside a decree passed ex parte or for a review of judgment shall, at the time of presenting his application, either deposit in the court the amount due from him under the decree or in pursuance of the judgment, or give [such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed.]

(2) Where a person has become liable as surety under the proviso to sub-section (1), the security may be realised in manner provided by section 3[145] of the Code of Civil Procedure, 4[1908 (5 of 1908)]."

Code, 1908

"Order XIV Rule 1. Framing of issues.-(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one-party and denied by the other shall form the subject of distinct issue.

(4)Issues are of two kinds:

(a)issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

Order XIV Rule 5. Power to amend, and strike out, issues.-(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

Order XX Rule 4. Judgments of Small Cause Courts.- (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

(2) Judgments of other Courts.- Judgments of other Courts shall contain concise statement of the case, the points of determination, the decision thereon, and the reasons for such decision.

Order L Rule 1. Provincial Small Cause Courts.- The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887 (9 of 1887) [or under the Berar Small Cause Courts Law, 1905] or to Courts exercising the jurisdiction of a Court of Small Causes [under the said Act or Law], [or to Court in [any part of India to which the said Act does not extend] exercising a corresponding jurisdiction] that is to say-

(a) so much of this schedule as relates to-

(I) suits excepted from the cognizance of a Court of Small Causes or

the execution of decrees in such suits;(ii) the execution of decrees against immovable property or the interest of a partner in partnership property;

(iii) the settlement of issues; and

(b)....."

7. From the perusal of aforesaid legal provisions, it is clear that as per Section 17 of Act, 1887, Code, 1908 would be applicable in the matter of SCC suits also. Further, Order L Rule 1 of Code, 1908 restrains the applicability of certain provisions of Code, 1908, which also includes the settlement of issues. Order XIV Rule 1 of Code, 1908 provides for settlement of issues which includes issue of law and issue of facts both. Order XX Rule 4 of Code, 1908 provides for judgment of Small Cause Courts and says that judgments of Court of Small Cause need not contain more than the point of determination and decision thereon. Therefore, whole picture so emerges is that Code, 1908 would be applicable in SCC suit, but as per Order L Rule 1 of Code, 1908, judgment shall be pronounced as per Order XX Rule 4 of Code, 1908 and not as per Order XIV of Code, 1908.

8. So far as present case is concerned, undoubtedly, earlier SCC Court has framed "विचारण बिंदू" on 06.03.2018 which according to revisionist is the "issue". This Court has also observed that neither other issues are made out nor pressed by either of the parties for framing of additional issues. Further, Court has fixed the date of 28.03.2018 for evidence. "विचारण बिंदू" is Hindi terminology, which may be translated as issue as well as point of determination both having almost no difference. Therefore, before coming to the conclusion as to whether its an "issue" or "point of determination", this Court has gone through the legal provisions and according to that in SCC suit, there is no provision of framing of issues, therefore, it must have been translated as point of determination under Order XX Rule 4 of Code, 1908.

9. Now another issue is as to whether application of revisionist under Order XIV Rule 1 of Code, 1908 is maintainable or not. Before deciding this question, it is necessarily required to discuss the cases relied upon by learned counsel for revisionist.

10. Learned counsel for revisionist has placed reliance upon the judgment passed by the Apex Court in the matter of ***Rameshwar Dayal (Supra)***, where Court has held that point of determination referred to in Order XX Rule 4(1) of Code, 1908 are absolutely nothing but an issue as contemplated by Rules 1 & 3 of Order XIV of Code, 1908. In the said case, the issue before the Apex Court was that SCC suit was decided without framing any point of determination or issues as required either under Order XX Rule 4 or Order XIV Rule 1 & 3 of Code, 1908. The Apex Court has dealt with this issue in detail and basically Apex Court was of the opinion that before deciding the suit, point of determination or issue is necessarily required to be framed.

11. In next paragraph of the said judgement, Apex Court has held that it was obligatory for the Small Cause Courts, in the present case, to state the points for determination and give its finding or decision on each of the said points meaning thereby though in previous paragraph, Apex Court has held that issue and point of determination are same, but in next paragraph, Apex Court has clarified that so far as SCC suit is concerned, it is required to frame point of determination. Relevant

paragraph Nos. 22 & 23 of judgment of ***Rameshwar Dayal (Supra)*** is quoted below:-

"Points for determination" referred to in Rule 4(1) are obviously nothing but "issues" contemplated by Rules 1 and 3 of Order XIV of the Code. The present decision of the Small Causes Court which has not even stated the points for determination and given finding thereon, is obviously not a judgment within the meaning of Section 2(9) of the Code. Since the matters were controversy between the parties, it is only a judgment which could have given rise to a decree. The so-called decision of the Small Causes Court, therefore, does not amount to a decree within the meaning of Section 2(2) read with Section 2(9) and Rules 4(1) and 5 of Order XX of the Code.

It is not disputed that in view of the provisions of Section 17(1) of the Provincial Small Causes Court Act, the Code is applicable to Small Causes Court except where it is otherwise provided either by the Code or the said Act. Apart from Rules 4(1) and 5 of Order XX of the Code, on this count also, it was obligatory for the Small Causes Court, in the present case, to state the points for determination and give its finding or decision on each of the said points. Hence the present decision of the Small Causes Court is not a judgment and a decree in the eye of law and is, therefore, no nest as far as the respondent is concerned."

12. This issue again came up before the **Division Bench** of this Court in the matter of **Krishna Kumar Gupta vs. Subhash Chand Surana; 2013 0 Supreme(All) 727** and Court has dealt this matter in detail and also interpreted the judgment of ***Rameshwar Dayal (Supra)*****.** Relevant paragraph Nos. 13 & 14 of judgment is quoted below:-

"The matter can be viewed from another angle. Legislature in Order XIV of the Code has used the words framing of issues', whereas in Order XX Rule 4 pertaining to Small Causes the words used are 'points for determination and decision thereon'. The provision of Order XIV relating to 'Settlement of issues' having been expressly excluded from its application in suits and proceedings before the Judge, Small Causes under the provisions of Small Cause Courts Act by virtue of Order 50 Rule 1(b) by no stretch of imagination, it can be said that it is mandatory upon the Judge, Small Cause Court while trying a suit under the Provincial Small Cause Courts Act to frame issues as per the procedure prescribed by Order XIV and non-compliance of the said provision would vitiate the proceeding. In view of use of two different expression by the legislature namely, 'framing and settlement of issues' and 'points for determination' it cannot be held that the procedure prescribed for framing of issues are to be adhered to or followed by a Judge, Small Causes Court. It is well-settled that when in relation to the same subject-matter different words are used in the same Statute, there is a presumption that they are not used in the same sense unless it leads to unreasonable or irrational results. No doubt the Hon'ble Apex Court had observed in the case of ***Rameshwar Dayal (Supra)*** that points for determination referred to in Rule 4(1) are nothing but 'issues' contemplated by Rule 1 and 3 of Order XIV of the Code but neither it has been observed specifically nor it can be inferred that procedure and stage prescribed by Order 14 of the Code for framing/settlement of issues is to be followed by the Judge, Small Causes as

well while trying a suit under the Provincial Small Causes Court Act. Thus the view taken by learned single Judge in the case of Akhil Kumar Jain (Supra) that it is mandatory to frame issues in suit being tried under the Provincial Small Cause Courts Act is against the ratio of the decision of the Hon'ble Apex Court in case of ***Rameshwar Dayal (Supra)***."

13. The very same issue was again subject matter before this Court in the matter of **Sardar Sujeet Singh and others vs. Suresh Chandra Porwal; 2014 0 Supreme (All) 529** and Court has again taken the same view that in light of Section 17 of Act, 1887 and Order L Rule 1 of Code, 1908 and held that so many provisions of Code, 1908 are not applicable to the proceeding of SCC suit and accordingly, Order 14 Code, 1908 has not been extended to the Courts constituted under the Act. Relevant paragraph Nos. 25 & 26 of judgment is quoted below:-

" The procedural law is enacted to regulate the proceeding in Court and the case proceeding should be conducted strictly in accordance with the prescribed procedure. The Provincial Small Cause Courts Act has been enacted with the object to decide the cases triable by the S.C.C. expeditiously. It is for this reason that as per section 17 of the Act and Order L, C.P.C. so many provisions of C.P.C. are not made applicable to the proceeding of S.C.C. suit and further the decree passed by the S.C.C. has been given finality and the decision is not appealable.

Since the provisions of settlement of issues contained in Order XIV has not been extended to the Courts constituted under 'the Act', the Application No. 58-C moved by the defendants for framing the additional issues purported to be under Rule 5 Order XIV, C.P.C. is not legally maintainable. The impugned order is completely justified in view of provisions of section 17 of 'the Act' and Order L, C.P.C."

14. Once again this issue came up before the this Court in the matter of **Vikas Gupta vs. M/s. Shri Ram Mahadev Prasad and another; 2014 0 Supreme(All) 1675.** Relevant paragraph Nos. 8, 11, 12, 13 of the said judgment is quoted below:-

"8 . From a perusal of the said Section it is manifest that the Small Cause Court has limited pecuniary jurisdiction. The intent of the legislature is manifest that the suits of small causes should be decided expeditiously. With the said view of the matter the detail procedure of the regular suit is not applicable.

11. A simple reading of aforesaid Rules 4 and 5 make it clear that the judgment of a Court of Small Causes need not contain more than the points for determination and the decision thereon, whereas judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

12. The distinction between sub rule (1) and (2) of Rule 4 of Order XX of the CPC by itself is sufficient to indicate that the Small Causes Court is a summary proceedings and detailed reasons are not required to be given in judgments. The point for determination does not need for framing an issue and there is no need for the procedure applicable for the regular civil suits. In case the detail procedure of regular suit is also followed in the matter of the Small Causes Court, the very object of the Act No. 9 of 1887 shall be frustrated. Therefore, the submission of the learned

Counsel for the revisionist does not stand to reasons.

13. After careful consideration of the matter, I am of the view that framing of the issue in the suits under the Act No. 9 of 1887 is not mandatory. It is a discretion of the court to formulate some points for determination, if it needs it is necessary to meet the ends of justice, but framing of the issue like a regular suit, as stated above, would be against the object of the Act to dispose of small matters expeditiously."

15. Learned counsel for revisionist also relied upon the judgments of ***Vikas Pawar (Supra)*** and ***Satish Chandra Agarwal (Supra)***. While deciding the issue, this Court in ***Vikas Pawar (Supra)*** has not considered Paragraph No. 23 of the judgment of ***Rameshwar Dayal (Supra)***, which clarifies that in the matter of SCC suit, point of determination is required to be framed. Similarly, while deciding the matter of ***Satish Chandra Agarwal (Supra)***, this Court has not considered the judgment of Division Bench of this Court in the matters of ***Kisan Udyog (Supra) and Sardar Surjeet Singh (Supra)***, where this issue has been clarified with observations that proceeding of SCC suit shall be governed by the provisions of Order XX, Rule 4 of Code, 1908 and not by the provisions of Order XIV, Rule 5 of Code, 1908 which is the intention of the judgment given in ***Rameshwar Dayal (Supra)*** also.

16. As earlier mentioned, while deciding the SCC suit, provisions of Act, 1887 and Code, 1908 would be applicable. Certainly, Section 17 of Act, 1887 provides for applicability of provisions of Code, 1908 whereas Code, 1908 is having different provisions for Civil Suit and SCC Suit. One Code, 1908 is having two different provisions for deciding Civil Suit, therefore, it cannot be said that both the provisions would have same meaning. Order XIV of Code, 1908 says for settlement of issue in Civil Suit whereas Order XX, Rule 5 of Code, 1908 says for framing of point of determination in SCC Suit and Order L Rule 1 of Code, 1908 clearly bars the certain provisions of Code, 1908 including settlement of issues also. Therefore, intention of legislation is very much clear while having two different provisions for Civil Suit and SCC Suit and it cannot be said that Order, XIV Rules 1 & 3 & Order XX Rule 4 of Code, 1908 are having the same meaning. Mandate of Order L Rule 1 of Code, 1908 cannot also be ignored which is inserted by the legislation to remove any confusion while dealing with the provisions of Order XIV Rules 1 & 3 and Order XX Rule 4 of Code, 1908. Further, in the case of ***Rameshwar Dayal (Supra)***, Apex Court has considered this fact and clarified that in the matter of SCC Suit, point of determination has to be decided.

17. Now coming again to the issue involved in the present case, there is no doubt on this point that Court below has framed point of determination vide order dated 06.03.2018, upon which both the parties were having no objection for more than four years and only after closure of evidence, there is no occasion for filing application for framing additional issues or point of determination. Inordinate delay in filing application intends towards the delaying tactics adopted by the revisionist-defendant coupled with this fact that while framing the point of determination vide order dated 06.03.2018, revisionist was not aggrieved. Secondly, though Order XIV of Code, 1908 is not applicable, but even if it provides that it is upon Court to amend the issue or frame additional issue at any time

before passing of decree and this view has also been upheld by the this Court in the matter of ***Kisan Udyog vs. United Bank of India; 1989 0 Supreme(All) 233.*** Relevant paragraph No. 4 of the said judgment is quoted below:-

"4 . In the instant case the plaintiff has filed a suit for the recovery of Rs. 52479/- together with interest at the rate of 13% per annum. This amount has been claimed in view of the alleged advance having been made. It is alleged on behalf of the plaintiff that the defendants executed an agreement. In any case it is for the plaintiff to satisfy the court that the amount is due and is recoverable from the defendants. No doubt, the defendants may resist the claim in the Court. However, if by such a refusal to frame issues a serious prejudice is being caused to the plaintiff or the defendants then it is always expedient for the trial court to exercise its jurisdiction in framing such issues to facilitate the parties to adduce evidence in the light of pleadings on the basis of which issues were framed. In the instant case I do not find that any prejudice would be caused to the defendant applicant. It is the discretionary power of the trial court to frame additional issues if it finds it necessary for determining the list between the parties but merely refusal to frame additional issues does not give a right to the parties to prefer a revision as by such refusal Jo frame such additional issues neither the rights nor the obligations of the parties are adjudicated upon. As no right or obligation of a party is determined by refusal to frame additional issues it cannot be held to be deciding a case so as to attract the expression "case which has been decided."

18. Therefore, it is upon the Court to have a new point of determination before pronouncing the judgment, if so required and there is no illegality in the observations made by the Court below in the impugned order.

19. From the perusal of impugned order, it is very much clear that SCC Court has rightly held that in the light of Order L Rule 1 of Code, 1908, there is no provision for framing issues and provisions of Order XIV Code, 1908 shall not be applicable. It is also held that in impugned order, revisionist-defendant has not claimed himself to be the owner of property and co-owner/landlord may also have the right to file suit for eviction, therefore, there is no issue of title between tenant and landlord before SCC Court. On facts too, there is no illegality in the order impugned. It has been rightly held in the impugned order that point of determination was framed on 06.03.2018 agreed between the parties and after closer of evidence, filing of such application is nothing but an attempt to linger on the proceeding.

20. Therefore, in the light of discussions made here-in-above about the law and facts, I found no good reason to interfere in the impugned order. Revision lacks merit and is accordingly, **dismissed.**

No order as to costs.

(2022)07ILR A958
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.07.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Sales/Trade Tax Revision No. 2 of 2005

M/S Bindal Smelting Pvt. Ltd.
...Revisionist
Versus
Commissioner of Trade Tax Lucknow
...Opposite Party

Counsel for the Revisionist:
P. Agrawal

Counsel for the Opposite Party:
C.S.C.

A. Tax Law - U.P. Trade Tax Act, 1948 - Section 4(A) - The Eligibility Notification lay down conditions for seeking benefit of Exemption Notification, which have to be fulfilled and are mandatory in nature and have to be strictly complied with by the dealer if he wishes to claim exemption. In case any of the conditions are not fulfilled, same would dis-entitle the dealer from being granted benefit under the said notification.

B. Tax Law - Central Sales Tax Act- Section 10 - Cannot be imposed unless there is an element of mens rea and the goods have been purchased under bonafide belief or under mistake of fact.
Revision dismissed. (E-12)

List of Cases relied upon:-

1. Commissioner of Income-tax, Amritsar Vs Straw Board Manufacturing Co. Ltd., [1989] Supp. 2 S.C.C. 523

2. Bajaj Tempo Ltd. Bombay Vs Commissioner of Income-tax, Bombay City - III, Bombay, [1992] 3 S.C.C. 78

3. Akross Synthetics Pvt. Ltd. Vs Commissioner of Trade Tax, U.P., Lucknow, (2008) 13 VST 504 (All)

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Pradeep Agrawal, learned counsel for the revisionist as well as Sri Rohit Nandan Shukla, learned counsel for the opposite party.

2. Present revision under Section 11 of the U.P. Trade Tax Act, 1948, has been preferred assailing order dated 05.11.2004, passed by the Commercial Tax Tribunal, U.P., Lucknow *(hereinafter referred to as "the Tribunal")*, on the following questions of law :-

i) Whether the learned Tribunal was justified in not considering the decision of this Hon'ble Court in the case of Kanhaiya Beverages Pvt. Ltd. wherein it has been specifically held that the ownership of the land in the name of the Promotor Director can be considered to be the land of the unit and the grant of eligibility certificate can not be refused.

ii) Whether the learned Tribunal was justified in not considering the fact that the final registration with the Industries Department was in continuation of the provisional registration granted in 1996 and 2001.

iii) Whether the learned Tribunal was justified in twisting the fact of the case and without proper appreciation of fact has recorded the perverse finding which has vitiated the law.

iv) Whether the learned Tribunal was justified in holding that the plot no.F-63 allotted in favour of Ajay Kumar Gupta Promotor Director in 1994 will not be deemed to be the plot of the unit until it is registered in the name of unit.

v) Whether the learned Tribunal was justified in holding that the registration of the plot in the name of unit and the amendment in the registration certificate of the Industries Department are the material dates and as such the applicant is not entitled to exemption under Section 4-A of the Act in view of notification no. 3867 dated 22.12.2001.

vi) Whether the Tribunal was justified in not considering the basic legislative intent of the provisions of Section 4-A granting incentives for promoting growth and development should be liberally construed.

vii) Whether the learned Tribunal was justified in ignoring the law laid down by the Apex Court as well as by this

Hon'ble Court and passed the impugned order on the basis of extraneous consideration which has vitiated the findings recorded in the impugned order.

3. The revisionist is a smelting unit being run on Plot number 64 Industrial Area Surajpur Site B Greater Noida and had applied under Section 4 [a] of the UP Trade Tax Act *(hereinafter referred to as "the Act")* for grant of exemption from payment of trade tax under facility available to a newly set up industry. The said application was duly considered by the Divisional Level Committee constituted in this regard, and rejected on the ground that the applicant did not fulfill the conditions laid down in the notification dated 22/12/2001. The application for review was also rejected and consequently the revisionist approached the Full Bench of the Tribunal which rejected the appeal by means of the order dated 05/11/2004, which has been assailed before this court in the present revision.

4. Sri Pradeep Agarwal counsel for the revisionist submitted that the application for exemption under Section 4 of the Act was rejected on two grounds, firstly that the adjacent plot number F 63 was transferred to the revisionist after the due date prescribed in the exemption notification dated 22.12.2001, and also that Sri Ajay Kumar Gupta who was the director of the revisionist and also lessee of plot number 63 did not have any right to transfer the same in favour of the revisions and hence the land was illegally and improperly transferred in name of the revisionist, and secondly the machinery used by the revisionists was not new machinery as prescribed in the exemption notification but old machinery which had been used thereby dis-entitling them for the benefit of the said exemption.

5. The first ground for rejection of the application for exemption was that plot number F 63 was allotted in favour of Sri Ajay Kumar Gupta who was the promoter Director of the revisionist firm on 17/01/1994 by U.P. State Industrial Development Corporation *(hereinafter referred to as "the UPSIDC")* and subsequently it was is said to have been transferred to the revisionist by means of an agreement to sell dated 25/11/99. The UPSIDC granted permission to Sri Ajit Kumar Gupta to transfer the plot number F 63 by means of its letter dated 17/12/2001 In favour of the revisionist and it was subsequently registered with the Industries Department on 25/03/2002.

6. The above facts were considered by the Tribunal and while dismissing the appeal, recorded a finding that Sri Ajay Kumar Gupta could not have transferred the said land in favour of the revisionist prior to 17.12.2001 as the lease agreement clearly stipulated In clause 4(j) that "licensee will not directly or indirectly transfer, assign, sale, encumber or part with his interest under or benefit of this agreement or any part thereof in any manner whatsoever without the previous consent in writing of the grantor and it shall be open for the grantor to refuse such consent or grant the same subject to such conditions and may be laid down by the grantor in that behalf"

7. The Tribunal was of the considered view that in light of the aforesaid restrictions the land could not have been transferred in favour of the revisionist. It also rejected the existence and validity of the agreement to sell and that Sri Ajay

Kumar Gupta was not the owner of the said land and therefore could not have executed an agreement to sale, which was also an unregistered document, and the original was never brought on record, and the same was never produced before the Divisional Level Committee along with the application for exemption and its very existence was therefore held to be doubtful. In light of the above facts the Tribunal rejected the contention of the applicant holding that plot number F 63 was not validly transferred to the revisionist and hence the conditions mentioned in the notification Dated 22.12.2001 were not fulfilled and therefore did not find any fault with the findings recorded by the division level committee rejecting the application of the revisionist.

8. Sri Pradeep Agarwal assailing the findings of the Tribunal submitted that according to the notification dated 22.12.2001, Clause (b) all the conditions provided that the "unit has obtained land from any source".

9. The notification dated 22nd December, 2001 is reproduced hereinafter:-

"UTTAR PRADESH SHASAN KAR AVAM NIBANDHAN ANUBHAG-2 The Governor is pleased to order the publication of the following English translation of Government Notification No. KA.NI. -2-3867/XI -9(116)/94 - U.P. Act -15-48 - Order -(74)- 2001 dated : December 22, 2001, for general information:

NOTIFICATION No. KA.NI. -2-3867/XI -9(116)/94 - U.P. Act -15-48 - Order -(74)- 2001 Dated : Lucknow : December 22, 2001 WHEREAS the State Government is of the opinion that for promoting the development of certain industries in the State, it is necessary to grant exemption from, or reduction in rate of, tax to new units and also to units which have undertaken expansion or diversification:

NOW, THEREFORE, in exercise of the powers under Section 4-A of the Uttar Pradesh Trade Tax Act, 1948 (Act No.XV of 1948), the Governor is pleased to declare that subject to the conditions and restrictions referred to in Section 4-A of the said Act and in notifications issued from time to time thereunder and subject to the fulfilment on March 31, 2000, by the concerned unit the conditions specified in this notification,-

(a) in respect of any goods manufactured in a new unit whose date of starting production falls on or after April 1, 2000 but no later than December 31, 2001, no tax shall be payable, or as the case may be, the tax shall be payable at the reduced rate, by the manufacturer thereof on the turnover of sales of such goods from the date of first sale or the date following the expiration of six months from the date of starting production whichever is earlier.

(b) in respect of any goods manufactured in a unit which has undertaken expansion and the date of production in excess of the base production falls on or before March 31, 2000, no tax shall be payable, or as the case may be, the tax shall be payable at the reduced rate, by the manufacturer thereof on the turnover of sales of the quantity of goods manufactured in excess of the base production.

(c) in respect of any goods manufactured in a unit which has undertaken diversification and the date of production of goods of a nature different from those manufactured earlier by such units falls on or before March 31, 2000, no tax shall be payable, or as the case may be, the tax shall be payable at the reduced rate

by the manufacturer thereof on the turnover of sales of goods, which are of a nature different from those, manufactured by the unit earlier:

Provided that the unit intending to claim tax relief under this notification shall intimate in writing accordingly to the assessing authority within 20 days from the date of this notification.

CONDITIONS

(a) the unit is registered/licensed under Industry Department or unit has obtained letter of intent or letter of will from Government of India;

(b) the unit has obtained land from any source;

(c) the unit has applied for a term loan from any regular Financial Institution.

By order (T. George Joseph) Pramukh Sachiv"

10. Admittedly the provisions for exemption from Sales Tax have been introduced in the Act for the purpose of increasing the production of goods and for promoting the development of industries in the State. In fact, when the scheme called "Grant of Sales-tax Exemption Scheme 1982 to industrial units under Section 4-A of the Sales-tax Act" was originally framed, it was expressly stated that the Government granted the facility of exemption in order to encourage the capital investment and establishment of industrial units in the State. The Scheme contained various rules for grant of such exemption. The Section itself has referred to the purpose for which the Government could grant such exemption. Sub-Section (1) of Section 4-A prescribes the maximum period for which the exemption could be granted as 7 years. As per the section, such exemption should commence from the date of first sale by such manufacture if such sale takes place within six months from the date of starting production and in any other case from the date following the expiration of six months from the date of starling production. The expression "date of starting production" has been defined in the explanation as the date on which any raw material required for use in the manufacture or packing of the goods is purchased for the first time. The term "new unit" used in the Section has also been defined in the explanation. The revisionist has submitted that it fulfilled the relevant conditions at the time when it applied for exemption. Such period was to be reckoned from the dale of first sale if such sale took place not later than six months from the date starting production and in other cases from the date following the expiration of six months from the date of starting production subject to the condition that the unit had not discontinued production of such goods for a period exceeding six months at a stretch in any assessment year.

11. Sri Pradeep Agarwal, learned counsel for the revisionist submitted that the provision of the exemption notification deserve liberal consideration and the revisionist was validly transferred the land, which was already alloted to its Director-Promotor and there is no illegality in the same. He relied on the agreement to sell and submitted that the plot was transferred prior to the cut off date prescribed in the exemption notification, and hence he fulfilled all the conditions as laid down in the said notification. With regard to the old machinery, it was submitted that the same was not used in the manufacturing process and hence has assailed the findings recorded by the authority below and urged this Court to set aside the judgment of the Tribunal.

12. Learned counsel appearing for the Revenue has supported the findings

recorded by the authorities below and prayed that the revision deserves to be dismissed.

13. Considering the above submissions, it is necessary to interpret the exemption notification and to analyze its provisions in order to determine as to whether the conditions laid down would be directory or mandatory.

14. In **Commissioner of Income-tax, Amritsar v. Straw Board Manufacturing Co. Ltd., [1989] Supp. 2 S.C.C. 523,** the Supreme Court held that in taxing statutes, provision for concessional rate of tax should be liberally construed. So also in **Bajaj Tempo Ltd. Bombay v. Commissioner of Income-tax, Bombay City - III, Bombay, [1992] 3 S.C.C. 78,** it was held that provision granting incentive for promoting economic growth and development in taxing statutes should be liberally construed and restriction placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the objective of the provision.

15. We find that the object of granting exemption from payment of sales tax has always been for encouraging capital investment and establishment of industrial units for the purpose of increasing production of goods and promoting the development of industry in the State.

16. The exemption notification dated 22.12.2001, was also subject to consideration before this Court in the case of **Akross Synthetics Private Limited Vs. Commissioner of Trade Tax, U.P., Lucknow, (2008) 13 VST 504 (All)**, where this Court has held as follows :-

"13. Perusal of the Notification No. KA-NI-2-2591, dated August 24, 2000 and the Notification No. KA-NI-2-3867, dated December 22, 2001 reveals that in both the notifications there was a condition that the unit should apply for term loan from any regular financial institution: As per notification dated August 24, 2000 this condition was to be fulfilled on January 17, 2000 and as per Notification No. KA-NI-2-3867, dated December 22, 2001 this condition was to be fulfilled on March 31, 2000. Admittedly, the applicant had not applied for term loan prior to March 31, 2000. The term loan was applied after May 26, 2000 by the applicant-company much after March 31, 2000. In the circumstances, the applicant could not fulfil the requirement of the notification for the grant of exemption. It is nobody's case that the term loan was sanctioned in pursuance of the applications moved in the year 1994. The term loan was sanctioned in pursuance of the application moved by the company much after March 31, 2000.

14. The "new unit" established after March 31, 1990 is defined by the Explanation II to section 4A of the Act, which says that the new unit after March 31, 1990 means a factory or workshop set up by a dealer after such date and satisfying the conditions laid down under this Act or Rules or Notifications made thereunder with regard to such factory or workshop and includes an industrial unit manufacturing the same goods at any other place in the State or an industrial unit manufacturing any other goods on, or adjacent to the site of an existing factory or workshop but does not include.

15. The above definition provides that only those units which fulfil the conditions laid down in the notifications issued under the Act or Rules are said to be "new units" and eligible for exemption under section 4A of the Act. Thus, fulfilment of" conditions mentioned in the

notifications is mandatory and to be strictly complied with.

16. In the case of Novopan India Ltd., Hyderabad v. Collector of Central Excise and Customs, Hyderabad reported in 1994 Supp (3) SCC 606, apex court held as follows:

"16. We are, however, of the opinion that, On principle, the decision of this court in Mangalore Chemicals, [1991] 83 STC 234 (SC); 1992 Supp (1) SCC 21 and in Union of India v. Wood Papers Ltd., [1991] 83 STC 251 (SC); 1990 SCC (Tax) 422 referred to therein-- represents the correct view of law. The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee--assuming that the said principle is good and sound--does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in Mangalore Chemicals, [1991] 83 STC 234 (SC); 1992 Supp (1) SCC 21 and other decisions, viz., each such exception/exemption increases the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. As observed by a Constitution Bench of this court in Hansraj Gordhandas v. H.H. Dave, [1969] 2 SCR 253; AIR 1970 SC 755, that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption."

17. In the case of State Level Committee v. Morgardshammar India Ltd. reported in [1996] 101 STC 1 (SC); [1996] UPTC 213; the apex court held that section 4A of the Act provides for exemption from tax and is to be construed strictly.

18. In the case of Kartar Rolling Mills v. Commissioner of Central Excise, New Delhi reported in (2006) 4 SCC 772, apex court held that the exemption notification is to be construed strictly.

19. In view of the above, for the claim of exemption it is necessary to comply with the conditions mentioned under the provisions of section 4A of the Act and the notifications issued thereunder. It is on the dealer; who claims the exemption to establish that the conditions of the notifications are fulfilled. If any of the condition is not fulfilled, the exemption cannot be allowed. As referred hereinabove dealer was not able to fulfill the conditions of the notifications on the day on which it was required to be fulfilled and, therefore, the exemption has rightly been refused: In the circumstances, no interference is called for.

20. In the result, revision fails and is accordingly, dismissed."

16. Considering the aforesaid judgments with regard to the manner of interpretation of the Exemption Notification, it is noticed that the Eligibility Notification lay down conditions for seeking benefit of Exemption Notification, which have to be fulfilled and are mandatory in nature and have to be strictly complied with by the dealer if he wishes to claim exemption. In case any of the conditions are not fulfilled, same would

dis-entitle the dealer from being granted benefit under the said notification.

17. Applying the aforesaid to the facts of the present case, it is noticed that even though the land did not belong to the Promotor/Director of the revisionist firm, but the same was sought to be transferred to the revisionist and that transfer can be said to have been completed on 17.01.2001, when UPSIDC directed for transfer of plot no. F-63 in favour of the revisionist firm. It cannot be said that prior to 17.01.2001, the land was transferred in favour of the revisionist. The validity of the agreement to sell dated 25.11.1999, has been doubted by the Tribunal as the original copy was never produced before the Tribunal nor were the documents produced before the Divisional Level Committee, which was considering the case of the revisionist firm. Even before this Court no material has been placed so as to doubt the correctness of findings recorded by the Tribunal and hence there is no material before this Court to interfere with the concurrent findings of authorities below that the condition required for transfer of land was not completed prior to last date i.e. 31.01.2000.

18. In this view of the matter, for the reasons recorded above, no interference is required with the findings recorded by the Tribunal that the land was not transferred prior to cut off date prescribed in the exemption notification dated 22.12.2001.

19. The second contention raised by learned counsel for the revisionist that old machinery was not used in the process of manufacture and it is only 'accessories', and on this basis has assailed the findings recorded by the Tribunal.

20. It is noticed that findings of the Tribunal were based upon the spot inspection report, where the manufacturing process was carefully observed and it has been recorded that 'cranes' were used for lifting of boxes and was also used in the process of manufacture. Hence it cannot be said that findings of the Tribunal are perverse or without any material.

21. Per contra in this regard it has only been submitted on behalf of revisionist that transformer, voltage stabilizer, motor and blower and EOT Crane are not used in the process of manufacture. The said spot inspection report has not been disputed by the revisionist at any stage of the proceedings and categorical finding has been recorded in the spot inspection with regard to use of old machinery which was found to be used in the manufacture process, hence revisionist would not be entitled for the benefit of the Exemption Notification.

21. It is also noticed that one of the condition required for grant of exemption was that the unit should be registered with the Industries Department and both the plots were jointly registered with the Industries Department on 21.03.2001, which is clearly beyond 31.03.2000, which is cut-off date, and consequently for all the aforesaid reasons, it is noted that revisionist did not fulfill the conditions before the cut-off date fixed and hence is not entitled for exemption.

22. No question of law arise for adjudication in this revision. Accordingly present revision is **dismissed.**

(2022)07ILR A965
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.07.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Sales/Trade Tax Revision No. 7 of 2011

M/S Indian Farmers Fertilizer Cooperative Limited Aonla ...Revisionist

Versus

Commissioner of Commercial Tax Lucknow, U.P. ...Opposite Party

Counsel for the Revisionist:
Rahul Srivastava, Arvind Saran Das, Piyush Agarwal, Pooja Tawar, Yogesh Chandra Srivastava

Counsel for the Opposite Parties:
C.S.C.

A. Tax Law - Central Sales Tax Act,1956 - Sections 7 & 10 - The provisions of the Act indicate that every dealer has to make an application for registration under Section 7 of the Act containing the details and particulars of the goods which are to be used by the dealer in the manufacturing process and the authority on being satisfied grants approval in form of Certificate of Registration, pursuant to which the dealer purchases the said goods on Form-C issued by the authorities in this regard and any goods purchased beyond the goods approved in Form of certification of registration would be subjected to penalty proceedings u/S 10 of the Act.

B. Tax Law - Central Sales Tax Act, 1956 - Section 10 - Cannot be imposed unless there is an element of mens rea and the goods have been purchased under bonafide belief or under mistake of fact.

Revision dismissed. (E-12)

List of Cases relied upon:-

Commissioner of Sales Tax, UP V M/s Sanjeev Fabrics 2010 NTN (Volume 44)-69

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Ms. Pooja Talwar, learned counsel for the revisionist as well as Sri Rohit Nandan Shukla, learned counsel appearing for the revenue.

2. The revisionist have assailed the order of the Trade Tax Tribunal dated 13.10.2010 whereby the second appeals preferred by them has been partly allowed, and certain goods have been held to be validly purchased utilizing Form C and were held to be entitled for the concessional rate of tax, while with regard to the purchase of Locomotives and Railway siding and spares, transmitters and computer stationery were held to have been unauthorisedly purchased against Form C, for which penalty of Rs. 56,19,991.00 has been imposed.

3. The revisionist is a Cooperative Society under the administrative control of Ministry of Fertilizer and Chemical, Department of Fertilizers, Government of India and a registered dealer both under the UP Trade Tax Act as well as the Central Sales Tax Act *(hereinafter referred to as "the Act")* and is engaged in the business of manufacture and sale of chemical fertilizers [*urea*] .

4. The controversy in the present case relates to the assessment year 1989-90 arising out of penalty proceedings initiated under Section 10A of the Act, where, by means of order dated 22/02/1993, penalty was imposed on purchase of Iron Steel, cement and other various items to the tune of Rs.1,60,00,000/-. The first appeal was preferred before Joint Commissioner (Appeals), Bareilly which was dismissed on 29/01/1994. The order of the passed by the Joint Commissioner (Appeals), Bareilly was assailed before the Commercial Tax Tribunal (*hereinafter referred to as "the Tribunal"*), in Second Appeal No. 148 of 1994, which was partly allowed by means of order dated 27.10.2006, and sustained the penalty imposed on purchase of cement and iron & steel. Aggrieved by the order of the Tribunal, Revision preferred before this Court being Trade Tax Revision No. 04 of 2007, which was allowed on 04/07/2007, and the order of the Tribunal was set aside and the matter was remanded to the

Tribunal to decide the case on merits afresh expeditiously.

5. It is in the remand proceedings that the present impugned order dated 13.10.2010 has been passed which has been assailed before this court in the instant revision. It has been submitted by Ms. Pooja Talwar appearing on behalf of the revisionist that he had moved an application under Section 7(2) of the Act for registration in Form A on 31/01/1985 for grant of registration certificate with regard to the material used in manufacture of fertilizer, for permitting them to purchase the same at concessional rate of tax. It has been submitted that the applications for purchase of certain items including Steel Pipes and Pipe Fittings as material which is used in manufacture was allowed. Another application was submitted on 16/09/1985 for adding more items on the list and the authorities after being satisfied noticed that Iron and Steel in all forms and shapes has been included in Item 4, cement and another compounding material is already included in Item 5 and pipes of all kinds and pipe fittings including valves and bracket is already registered with the previous registration certificate and proceeded to include all the other items as requested by the revisionist.

6. It has further been submitted that against Form C the revisionist continued to purchase and utilize Iron and Steel, Cement, Pipe Fittings etc. after declaration and submission of his return in this regard before the Assessing authority and no objection was taken by them for the assessment year 1985-86, 1986-87, 1987-88 and 1988-89. For the assessment year 1989-90 after giving a show cause notice, penalty was imposed upon the revisionist holding that the Cement and Iron and Steel purchased on Form C was not used for the purpose of manufacture of goods rather than they were used unauthorisedly for construction of factory building, electrification and building township and road and hence violated the provisions of Section 10 (d) of the Act. The revisionist was also penalized for the utilization of Form C for the purchase of locomotives, as locomotives was not included in the registration certificate and utilizing Form C for purchasing the same on concessional rate of tax constituted an offence under Section 10 (b) of the Act.

7. It has been argued on behalf of the revisionist that Railway siding and locomotives are integral part of the machinery used for the manufacturing process as the raw material is carried to the manufacturing plant and also from the manufacturing site to wagons for loading the finished product, and hence no illegality has been committed by purchasing the said goods against Form C.

8. Following questions arise for consideration before this Court :-

(I) Whether in view of the judgment of Hon'ble Supreme Court in the case of Sanjiv Fabrics (supra) and in the case of Commissioner of Commercial Taxes Vs. Bombay Garage (supra), the imposition of penalty in absence of mens rea which is essential ingredient for levy of penalty under Section 10-A of the Act, the order passed by the Tribunal is justified?

(II) Whether admittedly the railway siding, locomotive and transformer and its spare parts and diesel used therein are so integrally connected without which ultimate production is not possible, still imposition of penalty on the above items is justified?

9. It has been submitted by learned counsel for the revisionist that application under Section 7(2) of the Act in Form-A were given from time to time for including goods stated therein for being purchased at the concessional rate of tax which were essential for the manufacture process and by means of orders dated 03.04.1986, 08.07.1988 and 26.11.1998, were issued permitting the revisionist to include the items as stated in the said applications.

10. It is relevant to state that it is only when an application was made under Section 7(2) of the Act by the revisionist on 26.11.1998 for including Railway Siding , Locomotives and Transmitters, that the application of the revisionist was allowed and they were entitled to purchase the said goods at the concessional rate of tax with effect from 31.03.1995.

11. The provisions of the Act indicate that every dealer has to make an application for registration under Section 7 of the Act containing the details and particulars of the goods which are to be used by the dealer in the manufacturing process and the authority on being satisfied grants approval in form of Certificate of Registration, pursuant to which the dealer purchases the said goods on Form-C issued by the authorities in this regard.

12. The allegation against the revisionist is that he purchased railway siding and locomotives and certain other goods utilizing Form-C to enable him to purchase the said goods at concessional rate of tax, whereas Railway Siding ,Locomotives and Transmitters are not listed as goods for which the revisionist had neither applied nor was he permitted to purchase the same utilizing Form-C, for which he was subjected to penalty proceedings under Section 10 of the Act.

13. The argument of the revisionist that Railway Siding ,Locomotives and Transmitters are essential for manufacture of finished goods, may be correct as for subsequent years i.e. with effect from 31.03.1995 the revisionist has been duly registered for purchase of the said goods but for the assessment year under consideration, admittedly the revisionist was not registered for purchase of the said goods against From-C.

14. Whether the revisionist had correctly utilized Form-C for purchase of said goods can be answered once we peruse the provisions contained in Section 10 of the Act. As per Sub Clause (b) of section 10 of the Act, penalty can be imposed upon registered dealer who falsely purchase any class of goods that goods are covered by certificate of registration. Thus, Section 10(b) of the Act clearly indicates that in case any dealer has not obtained registration certificate for purchase of any product or any class of goods or the same are not covered by the certificate of registration then penalty can be levied upon the dealer in case he purchases the said goods utilizing Form-C. In the present case, admittedly, the revisionist did not have Certificate of Registration for purchase of Railway Siding, Locomotives and Transmitters and hence he could not have utilized Form-C for purchase of said goods and his case is covered under Section 10(b) of the Act and therefore penalty proceedings were initiated by the Assessing Authority.

15. Assailing the said penalty, the learned counsel for the revisionist submitted that Railway Siding, Locomotives and Transmitters are essential for manufacture process and in support of his contention the revisionist has relied

upon the judgment of Hon'ble Supreme Court in the case of **Indian Copper Corporation Ltd. Vs. Commissioner of Commercial Taxes, Bihar and Others, AIR 1965 SC 891**, where the petitioner had applied to the Superintendent of Sales Tax, Jamshedpur for registration as dealer under the Central Sales Tax setting out a list of goods for specification in the certificate of registration under Section 8 of he Act. The Superintendent of Sales Tax issued the certificate of registration to the Corporation without specifying certain categories of goods which the Corporation claimed should be specified under Section 8(3)(b) of the Act. The Corporation then petitioned the High Court under Articles 226 and 227 of the Constitution of India for an order that the Superintendent of Sales Tax be directed to specify the goods mentioned in paragraph 4 of the petition in the certificate of registration granted to the petitioner, and to forbear from levying or realizing tax under the Act from the Corporation in excess of one per cent under Section 8(1) of the Act.

16. The Court in the aforesaid facts was of the considered view that locomotives and vehicles used to carry finished products from factory are included in the expression "goods" intended for use in the manufacturing or processing of goods for "sale", and hence directed the authorities to include certain goods used in the manufacture of final products.

17. The facts of the aforesaid case are clearly distinguishable from the facts of the present case inasmuch as admittedly for the assessment year under consideration there was no application made by the revisionist for including Railway Siding, Locomotives and Transmitters for grant of Registration Certificate and also it is not the case of the Revisionist that authorities have rejected the said application. In fact as stated hereinabove, the application was subsequently made some time in March, 1995 and was allowed on 26.11.1998 with effect from 31.03.1995. The revisionist was fully aware of the all the facts and the requirement of the Railway Siding ,Locomotives and Transmitters , but did not make any application under Section 7 of the Act, but on the other hand continued to purchase the said goods utilizing Form-C, which is not permissible under the scheme of the Act, knowing fully well that the said purchase on Form C was unauthorized.

18. It is also noticed that railway siding, locomotives and transmitters are not such goods as can be included in any other class of goods for which certificate of registration had already been obtained by the revisionist and hence neither it has been argued nor it is established that railway siding, locomotives and transmitters are such goods which can be included in any other class or category of goods for which registration certificate has already been granted to the revisionist.

19. Lastly it has been submitted by the revisionist that unless there is element of 'mens rea' which is essential for imposing penalty under Section 10 of the Act is missing and therefore the penalty order is illegal and arbitrary relying upon the judgment of Supreme Court rendered in the case of **Commissioner of Sales Tax, U.P. Vs. M/s Sanjeev Fabrics** (alongwith another connected case), reported in **2010 NTN (Vol. 44) - 69.**

20. In the aforesaid case, the applicant therein had applied for registration of 'cotton' and had claimed exemption on 'cotton' waste' and he was under bona fide

belief that 'cotton' includes 'cotton waste' and he had purchased the goods in question and furnished Form-C for the said goods and in the aforesaid circumstances it was canvassed that there was no mens rea which is essential ingredient prior to levying penalty under Section 10 of the Act.

21. In the present case, the revisionist had never applied for registration of Railway Siding, Locomotives and Transmitters and in absence of registration of such goods Form-C was issued to him for purchase of the said items and it could not be demonstrated by the revisionist that he had done this under any bona fide belief or under mistake of fact. Apart from the above, clearly Railway Siding, Locomotives and Transmitters cannot be related to any other goods or class of goods for which registration had already been obtained by the revisionist, so as to show that he was under some bona fide belief that the said goods are included in the class of goods for which Registration Certificate had already been issued. In absence of any such bona fide belief, or any other circumstance indicating that revisionist could have validly purchased the said goods against Form-C, it cannot be said that the same had been obtained in a bona fide manner and hence leads to inevitable conclusion that Form-C had been utilized malafidely and unauthorizedly only with intention to evade tax.

22. From the aforesaid facts it cannot be demonstrated that purchase of goods against Form-C was done in bona fide manner nor had the revisionist moved any application for inclusion of said goods for registration under Section 7 of the Act.

23. In the above circumstances it cannot be said that there is any infirmity in imposition of penalty by the revenue under Section 10 of the Act. Hence this Court is of the considered view that there is no infirmity in the order of Tribunal and hence no interference is required by this Court.

24. The revisionist is **dismissed.** The questions of law are answered against the assessee and in favour of the revenue.

(2022)07ILR A970
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 760 of 2022

M/s Kay Pan Fragrances (P) Ltd. Ghaziabad ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Pooja Talwar, Sri Dhruv Agarwal (Senior Adv.)

Counsel for the Respondents:
A.S.G.I., C.S.C., Sri Sanjay Kumar Om, Sri M.C. Chaturvedi (Addl. A.G.)

A. Civil Law - Constitution of India,1950 - The Constitution (101st Amendment) Act - Article 246-A r/w Article 366 (12A) - CGST/ UPGST Act,2016 - Sections 7,8,& 9 -Income Tax Act 1961- Sections 132 & 153-A - Article 246-A r/w Article 366 (12A) and other relevant provisions were enacted by the Constitution (101st Amendment) Act, 2016 so as to bring the taxes on purchase and sale of goods, duties on excise and entertainment tax etc. under one umbrella by empowering the Parliament and the St. Legislatures to enact laws with respect to taxes on supply of goods or services or both including sale of goods. Accordingly, the Parliament enacted the Central

Goods and Services Tax Act, 2017 and the St. Legislatures have enacted the St. Goods and Services Tax Act. Article 246A of the Constitution of India, the provisions of Section 7, 8 and 9 of the CGST Act/ UPGST Act, the St.ment of Objects and Reasons of The Constitution (101st Amendment) Act, 2016 and the St.ment of Objects and Reasons of the CGST/ UPGST Act, leaves no manner of doubt that the word 'supply' includes sale also. Thus, the Parliament does not lack legislative competence to enact Section 7 of the CGST Act levying tax on supply of goods or services or both. Likewise, in view of Article 246-A of the Constitution of India, St. Legislature does not lack legislative competence to enact Section 7 of the UPGST Act.

B. The constitutional validity of an Act can be challenged only on two grounds, viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. Except the above two grounds, there is no third ground on the basis of which the law made by a competent legislature can be invalidated. In considering the validity of a Statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles.

Writ Petition dismissed. (E-12)

List of Cases relied upon:-

1. Anant Mills Vs St. of Guj. reported in AIR 1975 SC 1234 (para 20)

2. Charanjit Lal Choudhary Vs U.O.I. & ors., AIR 1951 SC 41 (para 10),

3. Union of India Vs Elphinstone Spinning and weaving Co. Ltd. 7 ors., AIR 2001 SC 724 (para 9),

4. St. of Bihar & ors. Vs Smt. Charusila Dasi, AIR 1959 SC 1002 (para 14)

5. Kedar Nath Singh Vs St. of Bihar, AIR 1962 SC 955 (para 26)

6. Corporation of Calcutta Vs Libery Cinema, AIR 1965 SC 1107

7. Anandji Haridas and Co. (P) Ltd. Vs S.P. Kasture and ors., AIR 1968 SC 565 (para 32)

8. Sunil Batra Vs Delhi Administration and ors., AIR 1978 SC 1675

9. St. of Bihar Vs Bihar Distilleries, AIR 1997 SC 1511 (para 18),

10. Zameer Ahmad Latifur Rehman Sheikh Vs St. of Mah. and ors., J.T. 2010 (4) SC 256 (para 34),

11. Greater Bombay Co-operative Bank Ltd. Vs United Yarn Tex (P) Ltd. & ors., (2007) 6 SCC 236 (paras 82 to 85)

12. Promoters and Builders Assc. Vs Pune Municipal Corp. (2007) 6 SCC. 143 (para 9)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Sri Dhruv Agarwal, learned Senior Advocate assisted by Pooja Talwar, learned counsel for the petitioner, Sri S.P. Singh, learned Additional Solicitor General of India assisted by Sri Sanjay Kumar Om, learned Central Government Standing Counsel for the respondent No.1 and Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri B.P. Singh Kachhwah, learned Standing Counsel for the respondent Nos.2 to 5.

2. This writ petition has been filed praying for the following reliefs:

*"(a) issue a writ of declaration declaring Section 7 read with Schedule II of the Central Goods and Service Tax Act, 2017 i**n so far as it includes the transaction of sale within the scope of***

supply and levy tax on such sales *as ultra vires the Constitution, null and void;*

(b) issue a writ of declaration declaring Section 7 read with Schedule II of the U.P. Goods and Service Tax Act, 2017 in so far as it includes the transaction of sale within the scope of supply and levy tax on such sales as ultra vires the Constitution, null and void;

(c) issue a writ, order or direction in the nature of Mandamus directing the respondent authorities not to take any coercive action against the petitioner in view of the impugned order dated 07.02.2022 passed by the respondent no.4;

(d) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 07.02.2022 passed by the respondent No.4 (Annexure nos. 29);

(e) issue a writ, order or direction in the nature of mandamus to waive off the mandatory 10% deposit for filing an Appeal under Section 107 of U.P. GST Act, 2017 by the petitioner against the order dated 07.02.2022; and

(f) Award the costs of the petition to the petitioner."

SUBMISSIONS:-

3. Sri Dhruv Agarwal, learned Senior Advocate submits as under:-

(i) Article 246-A does not confer power to impose tax on sale of goods. Therefore, enactment of section 7 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as 'the CGST Act') and the U.P. Goods and Services Tax Act, 2017 (hereinafter referred to as 'the UPGST Act'), lacks legislative competence.

(ii) The word 'supply' does not mean sale. Therefore, sale could not fall within the meaning of the word 'supply'. Reliance is placed upon judgment of Hon'ble Supreme Court in the case of **Southern Petrochemical Industries Co. Ltd. vs. Electricity Inspector & ETIO, (2007) 5 SCC 447** (Para-50) and **Karnataka Power Transmission Corporation vs. Ashok Iron Works (P) Ltd. (2009) 3 SCC 240** (Para-28).

(iii) The words 'tax on the sale or purchase on goods' has been defined in Article 366(29A) and Entry 54, List-II of the VIIth Schedule of the Constitution of India provides for tax on sale of only petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel and alcoholic liquor for human consumption. Therefore, by implication, no law can be legislated which may levy tax on sale of goods inasmuch as amended Entry 54 has narrowed down the field of legislation limited to petroleum crude etc. as aforementioned.

(iv) Opportunity of hearing as provided under Section 75(4) of the CGST/ UPGST Act has not been afforded to the petitioner.

(v) All relied upon documents have not been provided to the petitioner and thus, the assessment order suffers from breach of principles of natural justice.

4. Learned Additional Solicitor General and the learned Additional Advocate General support the impugned order and submit that the provisions of Section 7 of the CGST Act/ UPGST Act are valid and not ultra vires.

5. Sri M.C. Chaturvedi, learned Additional Advocate General has further submitted that challenge to the constitutional validity of a statutory provision can be entertained only if the petitioner is able to show, **firstly**, that there is lack of legislative competence to enact

the impugned statutory provision and **secondly**, impugned provision infringes any of the fundamental rights of the petitioner guaranteed under the Constitution of India or any other constitutional provisions. He submits that neither the Parliament nor the State Legislature lacked legislative competence to enact Section 7 nor Section 7 infringes any of the fundamental rights of the petitioner. He further submits that there is always presumption in favour of validity of a statutory provision. In support of his submissions, he relied on several judgments, constitutional and statutory provisions and Statement of Objects and Reasons.

Discussion and Findings:-

6. We have carefully considered the submissions of learned counsels for the parties and perused the records of the writ petition.

7. The entire submission of learned counsel for the petitioner so as to challenge the constitutional validity of Section 7 of the CGST Act/ UPGST Act is that the Parliament and the State Legislature lacked legislative competence to enact Section 7.

8. Before we proceed to examine the rival submissions, it would be appropriate to note the relevant provisions of the Constitution of India, The CGST Act, The UPGST Act and Statement of Objects and Reasons, as under:-

Relevant Provisions:

(i) **101st Amendment to the Constitution of India:-**

"The Constitution (One Hundred and First Amendment)

Act, 2016

[September 8, 2016.]

An Act further to amend the Constitution of India.

Be it enacted by Parliament in the Sixty-seventh Year of the Republic of India as follows:--

Prefatory Note - Statement of Objects and Reasons-*The Constitution is proposed to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including on Union Territory with Legislature to make laws for* ***levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments*** *and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax.*

2. ***The proposed Bill, which seeks further to amend the Constitution, inter alia, provides for-***

(a) subsuming of various Central indirect taxes and levies such as Central Excise Duty, Additional Excise Duties, Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Service Tax, Additional Customs Duty commonly known as Countervailing Duty, Special Additional Duty of Customs, and Central Surcharges and Cesses so far as they relate to the supply of goods and services;

(b) subsuming of State Value Added Tax/Sales Tax, Entertainment Tax

(other than the tax levied by the local bodies), Central Sales Tax (levied by the Centre and collected by the States), Octroi and Entry tax, Purchase Tax, Luxury tax, Taxes on lottery, betting and gambling; and State cesses and surcharges in so far as they relate to supply of goods and services;

(c) dispensing with the concept of "declared goods of special importance" under the Constitution;

(d) levy of Integrated Goods and Services Tax on inter-State transactions of goods and services;

(e) levy of an additional tax on supply of goods, not exceeding one per cent in the course of inter-State trade or commerce to be collected by the Government of India for a period of two years, and assigned to the States from where the supply originates;

(f) conferring concurrent power upon Parliament and the State Legislatures to make laws governing goods and services tax;

(g) coverage of all goods and services, except alcoholic liquor for human consumption, for the levy of goods and services tax. In case of petroleum and petroleum products, it has been provided that these goods shall not be subject to the levy of Goods and Services Tax till a date notified on the recommendation of the Goods and Services Tax Council;

(h) compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax for a period which may extend to five years;

(i) creation of Goods and Services Tax council to examine issues relating to goods and services tax and make recommendations to the non and the states on parameters like rates, exemption list and threshold limits. The Council shall function under the Chairmanship of the Union Finance Minister and will have the Union Minister of State in charge of Revenue or Finance as member, along with the Minister in-charge of Finance or Taxation or any other Minister nominated by each State Government. It is further provided that every decision of the Council shall be taken by a majority of not less than three-fourths of the weighted votes or the members present and voting in accordance with the following principles:-

(A) the vote of the Central Government shall have a weightage of one-third of the total votes cast, and

(B) the votes of all the State Governments taken together shall have a weightage of two-thirds of votes of the total votes cast in that meeting.

Illustration

In terms of clause (9) of the proposed Article 279-A, the "weighted votes of the members present and voting" in favour of a proposal in the Goods and Services Tax Council shall be determined as under.-

WT = WC + WS

Where

WT = WC + WS = WST/SP x SF

Wherein

WT=Total weighted votes of all members in favour of a proposal.

WC=Weighted vote of the Union = 1/3 i.e., 33.33% if the Union is in favour of the proposal and be taken as "0 if, Union is not in favour of a proposal.

WS= Weighted votes of the States in favour of a proposal.

SP= Number of States present and voting.

WST= Weighted votes of all States present and voting i.e. 2/3, i.e., 66.67%

SF = Number of States voting in favour of a proposal.

(j) Clause 20 of the proposed Bill makes transitional provisions to take care of any inconsistency which may arise with respect to any law relating to tax on goods or services or on both in force in any State on the commencement of the provisions of the Constitution as amended by this Act within a period of one year.

3. The Bill seeks to achieve the above objects.

1. Short title and commencement *- (1) This Act may be called the* ***Constitution (One Hundred and First Amendment) Act, 2016.***

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the commencement of that provision.

2. Insertion of new Article 246-A *- After article 246 of the Constitution, the following article shall be inserted, namely:- -*

"246-A. ***Special provision with respect to goods and services tax.-*** *(1) Notwithstanding anything contained in Articles 246 and 254,* ***Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.***

(2) Parliament has exclusive power to make laws with respect to ***goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.***

Explanation.--The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279-A, take effect from the date recommended by the Goods and Services Tax Council."

3.Amendment of Article 248.- *In article 248 of the Constitution, in clause (1), for the word "Parliament", the words, figures and letter "Subject to article 246-A, Parliament" shall be substituted.*

4. Amendment of Article 249.- *In article 249 of the Constitution, in clause (1), after the words "with respect to", the words, figures and letter "goods and services tax provided under article 246-A or" shall be inserted.*

5. Amendment of Article 250.- *In article 250 of the Constitution, in clause (1), after the words "with respect to", the words, figures and letter "goods and services tax provided under article 246-A or" shall be inserted.*

6. Amendment of Article 268.- *In article 268 of the Constitution, in clause (1), the words "and such duties of excise on medicinal and toilet preparations" shall be omitted.*

7. Omission of Article 268-A *- Article 268-A of the Constitution, as inserted by section 2 of the Constitution (Eighty-eighth Amendment) Act, 2003 shall be omitted.*

8. Amendment of Article 269. *In article 269 of the Constitution, in clause (1), after the words "consignment of goods", the words, figures and letter "except as provided in Article 269-A" shall be inserted.*

9. Insertion of new Article 269-A.- After article 269 of the Constitution, the following article shall be inserted, namely:- -

"269-A. Levy and collection of goods and services tax in course of inter-State trade or commence - (1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of

India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation.--For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under article 246-A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as tax levied by a State under article 246-A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.".

10. Amendment of Article 270.- *In article 270 of the Constitution,--*

(i) in clause (1), for the words, figures and letter "articles 268, 268-A and 269", the words, figures and letter "Articles 268, 269 and 269-A" shall be substituted;

(ii) after clause (1), the following clauses shall be inserted, namely:--

"(1-A) The tax collected by the Union under clause (1) of Article 246-A shall also be distributed between the Union and the States in the manner provided in clause (2).

(1-B) The tax levied and collected by the Union under clause (2) of article 246-A and article 269-A, which has been used for payment of the tax levied by the Union under clause (1) of Article 246-A, and the amount apportioned to the Union under clause (1) of Article 269-A, shall also be distributed between the Union and the States in the manner provided in clause (2)."

11. Amendment of Article 271.- *In Article 271 of the Constitution, after the words "in those articles", the words, figures and letter "except the goods and services tax under article 246-A," shall be inserted.*

12. Insertion of new Article 279-A *- After Article 279 of the Constitution, the following Article shall be inserted, namely:--*

"279-A. Goods and Services Tax Council. - (1) The President shall, within sixty days from the date of commencement of the Constitution (One Hundred and First Amendment) Act, 2016, by order, constitute a Council to be called the Goods and Services Tax Council.

(2) The Goods and Services Tax Council shall consist of the following members, namely:--

(a) the Union Finance Minister

.....

Chairperson;

(b) the Union Minister of State in charge of

Revenue or Finance

.....

Member;

(c) the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government

…..

Members

(3) The Members of the Goods and Services Tax Council referred to in sub-clause (c) of clause (2) shall, as soon as may be, choose one amongst themselves to be the Vice-Chairperson of the Council for such period as they may decide.

(4) The Goods and Services Tax Council shall make recommendations to the Union and the States on--

(a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

(b) the goods and services that may be subjected to, or exempted from the goods and services tax;

(c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-State trade or commerce under article 269-A and the principles that govern the place of supply;

(d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;

(e) the rates including floor rates with bands of goods and services tax;

(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

(g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and

(h) any other matter relating to the goods and services tax, as the Council may decide.

(5) The Goods and Services Tax Council shall recommend the date on which the goods and services tax be levied on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.

(6) While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services.

(7) One-half of the total number of Members of the Goods and Services Tax Council shall constitute the quorum at its meetings.

(8) The Goods and Services Tax Council shall determine the procedure in the performance of its functions.

(9) Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:-

(a) the vote of the Central Government shall have a weightage of one-third of the total votes cast, and

(b) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.

(10) No act or proceedings of the Goods and Services Tax Council shall be invalid merely by reason of--

(a) any vacancy in, or any defect in, the constitution of the Council; or

(b) any defect in the appointment of a person as a Member of the Council; or

(c) any procedural irregularity of the Council not affecting the merits of the case

(11)The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute --

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other side; or

(c) between two or more States, arising out of the recommendations of the Council or implementation thereof.".

13.Amendment of Article 286.- *In article 286 of the Constitution,--*

(i) in clause (1),--

(A) for the words "the sale or purchase of goods where such sale or purchase takes place", the words "the supply of goods or of services or both, where such supply takes place" shall be substituted;

(B) in sub-clause (b), for the word "goods", at both the places where it occurs, the words "goods or services or both" shall be substituted;

(ii) in clause (2), for the words "sale or purchase of goods takes place", the words "supply of goods or of services or both" shall be substituted;

(iii) clause (3) shall be omitted.

14. Amendment of Article366.- *In article 366 of the Constitution,--*

(i) after clause (12), the following clause shall be inserted, namely:--

'(12-A) "goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption;';

(ii) after clause (26), the following clauses shall be inserted, namely:--

'(26-A) "Services" means anything other than goods;

(26-B) "State" with reference to articles 246-A, 268, 269, 269-A and article 279-A includes a Union territory with Legislature;'.

15.Amendment of Article 368.- *In Article 368 of the Constitution, in clause (2), in the proviso, in clause (a), for the words and figures "Article 162 or Article 241", the words, figures and letter "Article 162, Article 241 or Article 279-A" shall be substituted.*

16.Amendment of Sixth Schedule.- *In the Sixth Schedule to the Constitution, in paragraph 8, in sub-paragraph (3),--*

(i) in clause (c), the word "and" occurring at the end shall be omitted;

(ii) in clause (d), the word "and" shall be inserted at the end;

(iii) after clause (d), the following clause shall be inserted, namely:--

"(e) taxes on entertainment and amusements.".

17. Amendment of Seventh Schedule.- *In the Seventh Schedule to the Constitution,--*

(a) in List I--Union List,--

(i) for entry 84, the following entry shall be substituted, namely:--

"84. Duties of excise on the following goods manufactured or produced in India, namely:--

(a) petroleum crude;

(b) high speed diesel;

(c) motor spirit (commonly known as petrol);

(d) natural gas;

(e) aviation turbine fuel; and

(f) tobacco and tobacco products.";

(ii) entries 92 and 92-C shall be omitted;

1. in List II--State List,--

(i) entry 52 shall be omitted;

(ii) for entry 54, the following entry shall be substituted, namely:--

"54. Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not

including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods.";

(iii) entry 55 shall be omitted;

(iv) for entry 62, the following entry shall be substituted, namely:--

"62. Taxes on entertainments and amusements to the extent levied and collected by a Panchayat or a Municipality or a Regional Council or a District Council.".

18. Compensation to States for loss of revenue on account of introduction of goods and services tax.- *Parliament shall, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for a period of five years.*

19. Transitional provisions.- *Notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier.*

20. Power of President to remove difficulties.- *(1) If any difficulty arises in giving effect to the provisions of the Constitution as amended by this Act (including any difficulty in relation to the transition from the provisions of the Constitution as they stood immediately before the date of assent of the President to this Act to the provisions of the Constitution as amended by this Act), the President may, by order, make such provisions, including any adaptation or modification of any provision of the Constitution as amended by this Act or law, as appear to the President to be necessary or expedient for the purpose of removing the difficulty:*

Provided that no such order shall be made after the expiry of three years from the date of such assent.

(2) Every order made under sub-section (1) shall, as soon as may be after it is made, be laid before each House of Parliament."

(ii) Article 366(12A) of the Constitution of India:-

'(12A) "goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption;

(iii) Objects and Reasons of CGST Act, 2017:-

"The Central Goods and Services Tax Act, 2017

[No.12 of 2017]

[12th April, 2017]

An Act to make a provision for levy and collection of tax on intra-State supply of goods or services or both by the Central Government and the matters connected therewith or incidental thereto

Be it enacted by Parliament in the Sixty-eighth Year of the Republic of India as follows-

Statement of Objects and Reasons.-- Presently, the Central Government levies tax on, manufacture of certain goods in the form or Central Excise duty, provision of certain services in the form of service tax, inter-State sale of goods in the form of Central Sales tax. Similarly, the State Governments levy tax on and on retail sales in the form of value added tax, entry of goods in the State in the form of entry tax, luxury tax and

purchase tax, etc. Accordingly, there is multiplicity of taxes which are being levied on the same supply chain.

2. The present tax system on goods and services is facing certain difficulties as under-

(i) there is cascading of taxes as taxes levied by the Central Government are not available as set off against the taxes being levied by the State Governments;

(ii) certain taxes levied by State Governments are not allowed as set off for payment of other taxes being levied by them;

(iii) the variety of Value Added Tax Laws in the country with disparate tax rates and dissimilar tax practices divides the country into separate economic spheres, and

(iv) the creation of tariff and non-tariff barriers such as octroi, entry tax, check posts, etc., hinder the free flow of trade throughout the country. Besides that, the large number of taxes create high compliance cost for the taxpayers in the form of number of returns, payments, etc.

3. ***In view of the aforesaid difficulties, all the abovementioned taxes are proposed to be subsumed in a single tax called the goods and services tax which will be levied on supply of goods or services or both at each Stage of supply chain starting from manufacture or import and till the last retail level.*** *So, any tax that is presently being levied by the Central Government or the State Governments on the supply of goods or services going to be converged in goods and services tax which is proposed to be a dual levy where the Central Government will levy and collect tax in the form of central goods and services tax and the State Government will levy and collect tax in the form of State goods and services tax on intra-State supply of goods or services or both.*

4. In view of the above, it has become necessary to have a Central legislation, namely, the Central Goods and Services Tax Bill, 2017. The proposed legislation will confer power upon the Central Government for levying goods and services tax on the supply of goods or services or both which takes place within a State. The proposed legislation will simplify and harmonise the indirect tax regime in the country. It is expected to reduce cost of production and inflation in the economy, thereby making the Indian trade and industry more competitive, domestically as well as internationally. Due to the seamless transfer of input tax credit from one stage to another in the chain of value addition, there is an in-built mechanism in the design of goods and services tax that would incentivise tax compliance by taxpayers. The proposed goods and services tax will broaden the tax base, and result in better tax compliance due to a robust information technology infrastructure.

5. The Central Goods and Services Tax Bill, 2017, inter alia, provides tor the following, namely-

(a) to levy tax on all intra-State supplies of goods or services or both except supply of alcoholic liquor for human consumption at a rate to be notified, not exceeding twenty per cent as recommended by the Goods and Services Tax Council (the Council);

(b) to broad base the input tax credit by making it available in respect of taxes paid on any supply of goods or services or both used or intended to be used in the course or furtherance of business;

(c) to impose obligation on electronic commerce operators to collect tax at source, at such rate not exceeding one per cent of net value of taxable supplies, out of payments to suppliers supplying goods or services through their portals;

(d) to provide for self-assessment of the taxes payable by the registered person;

(e) to provide for conduct of audit of registered persons in order to verily compliance with the provision of the Act;

(f) to provide for recovery of arrears of tax using various modes including detaining and sale of goods, movable and immovable property of defaulting taxable person;

(g) to provide for powers of inspection, search, seizure and arrest to the officers;

(h) to establish the Goods and Services Tax Appellate Tribunal by the Central Government for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority:

(i) to make provision for penalties for contravention of the provisions of the proposed Legislation;

(j) to provide for an anti-profiteering clause in order to ensure that business passes on the benefit of reduced tax incidence on goods or services or both to the consumers; and

(k) to provide for elaborate transitional provisions for smooth transition of existing taxpayers to goods and services tax regime.

6. The Notes on clauses explain in detail the various provisions contained in the Central Goods and Services Tax Bill, 20l7.

7. The Bill seeks to achieve the above objectives."

(iv) **Section 7 of the CGST Act, 2017:- Section 7** of the CGST Act, 2017, which is para materia with Section 7 of the UPGST Act, is part of Chapter-III providing for Levy of Collection of Tax. Section 7 of the CGST Act provides for scope of supply as under:-

"(1) For the purposes of this Act, ***the expression "supply" includes--***

(a) ***all forms of supply of goods*** *or services or both* ***such as sale, transfer, barter, exchange, licence, rental, lease or disposal*** *made or agreed to be made for a consideration by a person in the course or furtherance of business;*

(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation.--For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;

(b) import of services for a consideration whether or not in the course or furtherance of business; [and]

(c) the activities specified in Schedule I, made or agreed to be made without a consideration; [xxx]

[(d) the activities to be treated as supply of goods or supply of services as referred in Schedule II]

[(1A) Where certain activities or transactions, constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II]

(2) Notwithstanding anything contained in sub-section (1),--

(a) activities or transactions specified in Schedule III ; or

(b) such activities or transactions undertaken by the Central Government, a

State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,

shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of [sub-sections (1), (1A) and (2)], the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as--

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods."

Legislative Competence:-

9. By 101st Amendment in Constitution of India, a new Article 246-A was inserted with overriding effect to Articles 246 and 254 of the Constitution of India. By Clause (1) of Article 246-A, the Parliament, and, subject to clause (2), the Legislature of every State, have been empowered to make laws with respect to goods or services tax imposed by the Union or by such State. Clause (2) has given exclusive powers to the Parliament to make laws with respect to **goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.** Simultaneously, amendments were made in Articles 248, 249, 250, 268, 269, 270, 271, 279A, 286, 366 and 368 of the Constitution of India. Article 268A as existed prior to the 101st Amendment, was omitted. A new Article 269A was inserted. Clause (12-A) in Article 366 was inserted defining the words "goods and services tax" to mean any **tax on supply of goods, or services or both** except taxes on the supply of the alcoholic liquor for human consumption. Newly inserted Clause (26-A) of Article 366 defined the word "services' to mean anything other than goods. Thus, Parliament, and, subject to clause (2) of Article 246-A, the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State and the Parliament has been conferred exclusive powers to legislate with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

10. Prior to 101st Amendment to the Constitution of India, **Entry 52 of List II - State List** of the Seventh Schedule of the Constitution of India provided for "taxes on entry of goods into a local area for consumption, use or sale therein". **Entry 54 of List II** provided for "taxes on sale or purchase of goods other than newspaper, subject to the provisions of Entry 92-A of List I. **Entry 55 of List II** provided for "taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television". **Entry 62 of List II** provided for "taxes on luxuries including taxes on entertainment, amusements, betting and gambling". That apart, **Entry 84 of List I - Union List** to the 7th Schedule of the Constitution provided for "Duties of excise on tobacco and other goods manufactured and produced in India except - (a) alcoholic liquors for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry. **Entry 92 of the List I** - Union List provided for "taxes on the sale or purchase of newspapers and on advertisements published therein." **Entry 92-C of the List I** - Union List provided

for "taxes on services." By 101st Amendment, Entries 92 and 92-C of List I - Union List, and Entries 52 and 55 of the List II - State List of the Seventh Schedule were omitted and Entry 84 of List I - Union List were amended as aforequoted. By 101st Amendment to the Constitution of India, the field of legislation under Entry 84 for duties of excise remained only on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and tobacco and tobacco products.

11. Thus, the field of legislation under Entry 92 of List I providing for taxes on the sale or purchase of newspapers and on advertisements published therein and Entry 92-C providing for taxes on services stood omitted. Likewise in the List II - State list, the Entry 52 providing for taxes on entry of goods into a local area for consumption, use or sale therein and Entry 55 providing for taxes on advertisements stood omitted and Entry 54 providing for taxes on the purchase or sale was made limited to petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods, and Entry 62 also stood amended providing the field of legislation limited to taxes on entertainments and amusements to the extent levied and collected by a Panchayat or a Municipality or a Regional Council or a District Council.

12. Thus, on one hand the entire field of taxation on sale or purchase of goods, tax on entry of goods into a local area for consumption, use or sale therein except those provided by the amended provisions, taxes on luxuries including taxes on entertainments, amusements, betting and gambling except those provided under the amended provisions, taxes on services and taxes on sale or purchase of newspapers and on advertisements published therein and duties on excise except on those items as provided under amended Entry 84 were omitted and in place a comprehensive power of legislation has been conferred under Article 246-A of the Constitution of India empowering the Parliament and State Legislatures to enact law to levy tax on goods or services or both; with a provision of compensation to States for loss of revenue on account of implementation of the Goods and Services Tax Act, for a period of five years.

13. The Statement of Objects and Reasons to the aforesaid 101st Amendment of the Constitution of India as aforequoted, clearly recorded that the 101st Amendment has been brought **subsuming various Central indirect taxes and levies such as** Central Excise Duty, Additional Excise Duties, Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Service Tax, Additional Customs Duty commonly known as Countervailing Duty, Special Additional Duty of Customs, and Central Surcharges and Cesses so far as they relate to the supply of goods and services **and** of **State Value Added Tax/Sales Tax, Entertainment Tax** (other than the tax levied by the local bodies), **Central Sales Tax** (levied by the Centre and collected by the States), **Octroi and Entry tax, Purchase Tax**, Luxury tax, Taxes on lottery, betting and gambling; and State cesses and surcharges in so far as they relate to supply of goods or services. Thus, overall reading of 101st Amendment to the Constitution of India leaves no manner of

doubt that Article 246-A and other relevant provisions were enacted by the Constitution (101st Amendment) Act, 2016 so as to bring the taxes on purchase and sale of goods, duties on excise and entertainment tax etc. under one umbrella by empowering the Parliament and the State Legislatures to enact laws with respect to taxes on supply of goods or services or both.

14. The Statement of Objects and Reasons of the Central Goods and Services Tax Act, 2017 also reveals that there is multiplicity of taxes which are being levied on the same supply chain prior to The Constitution (101st Amendment) Act, 2016 and so as to bring all these taxes under one umbrella, the Parliament and State Legislatures have been conferred with power to legislate for tax on goods or services or both. Accordingly, the Parliament enacted the Central Goods and Services Tax Act, 2017 and the State Legislatures have enacted the State Goods and Services Tax Act. Thus, Statement of Object and Reasons to the 101st Amendment to the Constitution of India and Statement of Object and Reasons of the Central Goods and Services Tax Act, 2017 and the U.P. Goods and Services Tax Act, 2017, leave no manner of doubt that these Acts were enacted as per powers conferred under Article 246-A of the Constitution of India so as to levy tax on all goods or services or both in place of multiplicity of taxes provided under the erstwhile Central Acts and State Acts levying taxes on purchase or sale of goods, entry tax, entertainment tax and duties on excise etc.

15. It is well settled that the court can look into the Statement of Objects and Reasons for the purposes of deciphering the object and purposes of the Act. Reference to background and circumstances in which the Act was passed is permissible for appreciating the mischief, the legislature had in mind and the remedy which it wanted to provide for preventing that mischief. **Reference to object and reasons is permissible for understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute,** and the evil which the statute sought to remedy. Reference in this regard may be had to judgments of Hon'ble Supreme Court in **State of West Bengal vs. Union of India, [AIR 1963 SC 1241], M/s. Sanghvi Jeevraj Ghewar Chand and others Vs. Secretary, Madras Chillies, Grains and Kirana Merchants Workers Union and another, [AIR 1969 SC 530 (para-2)], Dantuluri Ram Raju And Ors vs State Of Andhra Pradesh And Anr, [AIR 1972 SC 828 (para-4)], Narain Khamman Vs. Parduman Kumar Jain, [AIR 1985 SC 4 : 1985 1 SCC 1 (para-12)], State of H.P. Vs. Kailash Chand Mahajan, [AIR 1992 SC 1277 (para 77) : 1992 Suppl. (2) SCC 351 (para-82)], Devadoss vs Veera Makali Amman Koil Athalur, [AIR 1998 SC 750 : (1998) 9 SCC 286 (paras 20 & 21)], State (NCT of Delhi) Vs. Union of India, [(2018) 8 SCC 501 (Para 604.1)], Union of India and another Vs. Mohit Mineral Private Ltd., [(2019) 2 SCC 599 (Paras 50 and 51)], Council Of Architecture vs Mr. Mukesh Goyal, [(2020) 16 SCC 446 (para 43)], M. Ravindran vs. The Intelligence Officer, Directorate of Revenue Intelligence, [(2021) 2 SCC 485 (paras 17.10)], Ghanshyam Mishra and sons (P) Ltd. Vs. Edelweiss Asset Reconstruction Co. Ltd., [(2021) 9 SCC 657 (paras 80 to 84)], and Kshetrimayum Maheshkumar Singh vs The Manipur University, [(2022) 2 SCC 704 (para-33)].**

16. In the case of **State of Gujrat Vs. Mirzapur Moti Kureshi Kassab Jamat ,**

JT 2005 (12) SC 580 (Paras 74 and 76), a Constitution Bench of Hon'ble Supreme Court considered the importance and relevance of Statement of Object and reasons and held as under:-

"74. Reference to the Statement of Objects and Reasons is permissible for understanding the background, antecedent state of affairs in relation to the statute, and the evil which the statute was sought to remedy. (See __ Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edition, 2004, at p.218). In State of West Bengal v. Subodh Gopal Bose and Ors., 1954 SCR 587, the Constitution Bench was testing the constitutional validity of the legislation impugned therein. The Statement of Objects and Reasons was used by S.R. Das, J. ***for ascertaining the conditions prevalent at that time which led to the introduction of the Bill*** *and the extent and urgency of the evil which was sought to be remedied, in addition to testing the reasonableness of the restrictions imposed by the impugned provision. In his opinion, it was indeed very unfortunate that the Statement of Objects and Reasons was not placed before the High Court which would have assisted the High Court in arriving at the right conclusion as to the reasonableness of the restriction imposed. State of West Bengal v. Union of India, (1964) 1 SCR 371, 431-32,* ***approved the use of Statement of Objects and Reasons for the purpose of understanding the background and the antecedent state of affairs leading upto the legislation.***

76. ***The facts stated in the Preamble and the Statement of Objects and Reasons appended to any legislation are evidence of legislative judgment. They indicate the thought process of the elected representatives of the people and their cognizance of the prevalent state of affairs, impelling them to enact the law. These, therefore, constitute important factors*** *which amongst others will be taken into consideration by the court in judging the reasonableness of any restriction imposed on the Fundamental Rights of the individuals. The Court would begin with a presumption of reasonability of the restriction, more so when the facts stated in the Statement of Objects and Reasons and the Preamble are taken to be correct and they justify the enactment of law for the purpose sought to be achieved."*

(Emphasis supplied by us)

17. The 101st Amendment to the Constitution of India and the CGST Act, 2017 including its Statement of Objects and Reasons have been well considered by Hon'ble Supreme Court in **Union of India and another Vs. Mohit Mineral Private Ltd., (2019) 2 SCC 599 (Paras 51 and 56)** and it has been held that the words **"with respect to"** used in Article 246-A of the Constitution of India **are words of expansion.** It has been further held that the power to make the laws under Article 246-A is not general **power related to general entry rather it specifically relates to goods and services tax** and the Constitution "101st Amendment" Act, 2017 was passed **to subsume various taxes, surcharges and cesses into one tax.** Thus, the "scope of supply' as provided in Section 7 of the CGST Act which includes sale also, is well within the legislative power of the Parliament conferred under Article 246-A of the Constitution of India.

18. In the case of **Union of India vs. VKC Footsteps (India)(P.) Ltd., (2022) 2 SCC 603 (para-88)**, Hon'ble Supreme Court has considered the concept of GST

Legislation and held the goods and services tax to be destination-based tax and further held as under:-

".....While adopting the constitutional framework of a GST regime, Parliament in the exercise of its constituent power has had to make and draw balances to accommodate the interests of the States. Taxes on alcohol for human consumption and stamp duties provide a significant part of the revenues of the States. ***Complex balances have had to be drawn so as to accommodate the concerns of the states before bringing them within the umbrella of GST.****....."*

(Emphasis supplied by us)

19. In a most recent judgment in **Civil Appeal No.1390 of 2022 and other connected Civil Appeals (Union of India and others vs. Mohit Minerals Pvt. Ltd.), decided on 19.05.2022,** a three Judges Bench of Hon'ble Supreme Court explained Article 246-A of the Constitution of India (Paras-29, 30, 51, 101 and 119). **Relevant portion of the law laid down therein are summarised as under:-**

(i) ***Article 246-A defines the source of power as well as the field of legislation*** *(with respect to goods and services tax) obviating the need to travel to the Seventh Schedule.*

(ii) Provisions of Article 246-A are available both to Parliament and the State Legislatures, save and except for the exclusive power of Parliament to enact GST legislation where the supply of goods or services takes place in the course of inter-State trade or commerce.

(iii) Article 246-A embodies the constitutional principle of simultaneous levy as distinct from the principle of concurrence. Concurrence, which operated within the fold of the Concurrent List, was regulated by Article 254.

(iv) ***Article 246-A provides Parliament and the State legislature with the concurrent power to legislate on GST.*** *Article 246-A has a non-obstante provision which overrides Article 254. Article 246-A does not provide a repugnancy clause. Unlike Article 254 which stipulates that the law made by Parliament on a subject in the Concurrent list shall prevail over conflicting laws made by the State legislature, the constitutional design of Article 246-A does not stipulate the manner in which such inconsistency between the laws made by Parliament and the State legislature on GST can be resolved.* ***The concurrent power exercised by the legislatures under Article 246-A is termed as a ''simultaneous power' to differentiate it from the constitutional design on exercise of concurrent power under Article 246,*** *the latter being subject to the repugnancy clause under Article 254. The constitutional role and functions of the GST Council must be understood in the context of the simultaneous legislative power conferred on Parliament and the State legislatures. It is from that perspective that the role of the GST Council becomes relevant.*

(v) One of the important features of Indian federalism is ''fiscal federalism'. ***A reading of the Statement of Objects and Reasons of the 2014 Amendment Bill, the Parliamentary reports and speeches indicate that Articles 246-A and 279A were introduced with the objective of enhancing cooperative federalism and harmony between the States and the Centre.*** *However, the Centre has a one-third vote share in the GST Council. This coupled with the absence of the repugnancy provision in Article 246-A indicates that recommendations of the GST Council*

cannot be binding. Such an interpretation would be contrary to the objective of introducing the GST regime and would also dislodge the fine balance on which Indian federalism rests. Therefore, the argument that if the recommendations of the GST Council are not binding, then the entire structure of GST would crumble does not hold water. Such a reading of the provisions of the Constitution diminishes the role of the GST Council as a constitutional body formed to arrive at decisions by collaboration and contestation of ideas.

(vi) ***Section 7 of the CGST Act defines the term "supply" with a broad brush and provides for an inclusive definition.***

(vii) This conclusion comports with the philosophy of the ***GST to be a consumption and destinated based tax."***

20. Article 246A read with Article 366(12A) of the Constitution of India has conferred power upon the Parliament and State Legislatures to enact law to levy tax on supply of goods or services or both including sale of goods. The **event of taxation** under the Goods and Services Tax Act **is the supply of goods or services or both.** Section 7, 8 and 9 of the CGST Act/ UPGST Act also show that the tax is to be levied on supply of goods or services or both. Discussions with respect to Article 246A of the Constitution of India, the provisions of Section 7, 8 and 9 of the CGST Act/ UPGST Act, the Statement of Objects and Reasons of The Constitution (101st Amendment) Act, 2016 and the Statement of Objects and Reasons of the CGST/ UPGST Act, leaves no manner of doubt that the word "supply' includes sale also. Thus, the Parliament does not lack legislative competence to enact Section 7 of the CGST Act levying tax on supply of goods or services or both. Likewise, in view of Article 246-A of the Constitution of India, State Legislature does not lack legislative competence to enact Section 7 of the UPGST Act.

Presumption of the Constitutional Validity:-

21. In the case of **Anant Mills Vs. State of Gujarat reported in AIR 1975 SC 1234 (para 20)**, the Hon'ble Supreme Court has held that :-

*"**20. There is a presumption of the constitutional validity of a statutory provision.** In case any party assails the validity of any provision on the ground that it is violative of Article 14 of the Constitution, it is for that party to make the necessary averments and adduce material to show discrimination violative of Article 14. No averments were made in the petitions before the High Court by the petitioners that the assessments before the coming into force of Ordinance 6 of 1969 bad been made by taking into account the rent restriction provisions of the Bombay Rent Act. Paragraph 2B and some other paragraphs of petition No. 233 of 1970 before the High Court, to which our attention was invited by Mr. Tarkunde, also do not contain that averment. No material on this factual aspect was in the circumstances produced either on behalf of the petitioners or the Corporation. The High Court, as already observed, decided the matter merely on the basis of a presumption. It is, in our opinion, extremely hazardous to decide the question of the constitutional validity of a provision on the basis of the supposed existence of certain facts by raising a presumption. The facts about the supposed existence of which presumption was raised by the High Court were of such a nature that a definite*

averment could have been made in respect of them and concrete material could have been produced in support of their existence or non-existence. Presumptions are resorted to when the matter does not admit of direct proof or when there is some practical difficulty to produce evidence to prove a particular fact. When, however, the fact to be established is of such a nature that direct evidence about its existence or non- existence would be available, the proper course is to have the direct evidence rather than to decide the matter by resort to presumption. A pronouncement about the constitutional validity of a statutory provision affects not only the parties before the Court, but all other parties who may be affected by the impugned provision. There would, therefore, be inherent risk in striking down an impugned provision without having the complete factual data and full material before the court. It was therefore, in our opinion, essential for the High Court to ascertain and field out the correct factual position before recording a finding that the impugned provision is violative of article 14. The fact that the High Court acted on an incorrect assumption is also borne out by the material which has been adduced before us in the writ petitions filed under article 32 of the Constitution."

(Emphasis supplied by us)

22. In **Charanjit Lal Choudhary Vs. Union of India and others, AIR 1951 SC 41 (para 10)**, Hon'ble Supreme Court has held that there is presumption that the legislature understands and correctly appreciates the need of its people. In **Union of India Vs. Elphinstone Spinning and weaving Co. Ltd. and Ors., AIR 2001 SC 724 (para 9),** Hon'ble Supreme Court has held that there is presumption that the legislature does not exceed its jurisdiction. In **State of Bihar and others Vs. Smt. Charusila Dasi, AIR 1959 SC 1002 (para 14),** the Hon'ble Supreme Court has laid down the law that there is presumption that the legislature does not intend to exceed its jurisdiction. In **Kedar Nath Singh Vs. State of Bihar, AIR 1962 SC 955 (para 26)**, Hon'ble Supreme Court held that provision should be construed in the manner as will uphold its constitutionality. In **Corporation of Calcutta Vs. Libery Cinema, AIR 1965 SC 1107**, Hon'ble Supreme Court has laid down the law that the provision should be read in the manner as will make it valid. Similar view has been expressed by the Constitution Bench of Supreme Court in **Anandji Haridas and Co. (P) Ltd. Vs. S.P. Kasture and ors., AIR 1968 SC 565 (para 32). In Sunil Batra Vs. Delhi Administration and ors., AIR 1978 SC 1675,** Hon'ble Supreme Court observed that the legislature expresses wisdom of community. In **State of Bihar VS. Bihar Distilleries, AIR 1997 SC 1511 (para 18),** Hon'ble Supreme Court observed that an Act made by legislature represents the will of people and cannot be lightly interfered with. In **Zameer Ahmad Latifur Rehman Sheikh Vs. State of Maharashtra and ors., J.T. 2010 (4) SC 256 (para 34)**, Hon'ble Supreme Court observed that every legally possible effort should be made to uphold the validity. In **Greater Bombay Co-operative Bank Ltd Vs. United Yarn Tex (P) Ltd. and others, (2007) 6 SCC 236 (paras 82 to 85),** Hon'ble Supreme Court observed as under :

*" 82 **The constitutional validity of an Act can be challenged only on two grounds,** viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. In State of A. P. &*

Ors. v. McDowell & Co. & Ors. [(1996) 3 SCC 709], this Court has opined that except the above two grounds, there is no third ground on the basis of which the law made by the competent legislature can be invalidated and that the ground of invalidation must necessarily fall within the four corners of the afore-mentioned two grounds.

83. Power to enact a law is derived by the State Assembly from List II of the Seventh Schedule of the Constitution. Entry 32 confers upon a State Legislature the power to constitute cooperative societies. The State of Maharashtra and the State of Andhra Pradesh both had enacted the MCS Act 1960 and the APCS Act, 1964 in exercise of the power vested in them by Entry 32 of List II of the Seventh Schedule of the Constitution. Power to the enact would include the power to re-enact or validate any provision of law in the State Legislature, provided the same falls in an entry of List II of Seventh Schedule of the Constitution with the restriction that such enactment should not nullify a judgment of a competent court of law. In the appeals / SLPs/petitions filed against the judgment of the Andhra Pradesh High Court, the legislative competence of the State is involved for consideration. Judicial system has an important role to play in our body politic and has a solemn obligation to fulfil. In such circumstances, ***it is imperative upon the courts while examining the scope of legislative action to be conscious to start with the presumption regarding the constitutional validity of the legislation. The burden of proof is upon the shoulders of the the incumbent who challenges it.*** *It is true that it is the duty of the constitutional courts under our Constitution to declare a law enacted by Parliament or the State Legislature as unconstitutional when Parliament or the State Legislaturehad assumed to enact a law which is void, either for want of constitutional power to enact it or because the constitutional forms or conditions have not been observed or where the law infringes the fundamental rights enshrined and guaranteed in Part III of the Constitution.*

84. ***As observed by this Court in CST v. Radhakrishnan in considering the validity of a Statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, objection of the legislation and all other facts which are relevant. It must always be presumed that the legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations.*** *It is also well- settled that the courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. A provision conferring very wide and expansive powers on authority can be construed in conformity with legislative intent of exercise of power within constitutional limitations. Where a Statute is silent or is inarticulate, the Court would attempt to transmutate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. These principles have given rise to rule of "reading down" the provisions if it becomes necessary to uphold the validity of the law.*

85. In State of Bihar & Ors. v. Bihar Distillery Ltd. & Ors. [(1997) 2 SCC

453], this Court indicated the approach which the Court should adopt while examining the validity/constitutionality of a legislation. It would be useful to remind ourselves of the principles laid down, which read: (SCC p.466, para 17):

"The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application."

In the same para, this Court further observed as follows:

"The Court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the legislature and the executive are expected to show due regard and deference to the judiciary. It cannot also be forgotten that our Constitution recognizes and gives effect to the concept of equality between the three wings of the State and the concept of "checks and balances" inherent in such scheme."

(Emphasis supplied by us)

23. In the case of **Promoters and Builders Association Vs. Pune Municipal Corporation (2007) 6 SCC. 143 (para 9),** Hon'ble Supreme Court has held that while exercising legislative function, unless unreasonableness and arbitrariness is pointed out it is not open for the Court to interfere.

Constitutional Validity:-

24. The constitutional validity of an Act can be challenged only on two grounds, viz. (i) lack of legislative competence; and (ii) violation of any of the Fundamental Rights guaranteed in Part III of the Constitution or of any other constitutional provision. Except the above two grounds, there is no third ground on the basis of which the law made by a competent legislature can be invalidated. The ground of invalidation must necessarily fall within the four corners of the aforementioned two grounds. In considering the validity of a Statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, Court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of the legislation and all the other facts which are relevant. It must always be presumed that the legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations. The courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. Where a Statute is silent or is inarticulate, the Court would attempt to transmutate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven.

These principles give rise to rule of "reading down" the provisions if it becomes necessary to uphold the validity of the law. While examining the challenge to the constitutionality of an enactment, the court is to start with the presumption of constitutionality and try to sustain its validity to the extent possible. The court cannot approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. An act made by the legislature represents the will of the people and that cannot be lightly interfered with. It is presumed that the legislature expresses wisdom of the community, does not intend to exceed its jurisdiction and correctly appreciates the need of its own people. In view of these settled principles and the discussions made above on legislative competence and presumption of constitutional validity, we hold that Section 7 of the CGST Act/ UPGST Act does not suffer from lack of legislative competence. In other words, Section 7 of the CGST Act/ UPGST Act is wholly valid.

25. Thus, in view of the forgoing discussions including the law laid down by Hon'ble Supreme Court in various judgments referred above, we do not find any merit in challenge to the constitutional validity of Section 7 of the CGST Act/ UPGST Act. Therefore, the challenge to the constitutional validity of Section 7 of the CGST Act/ UPGST Act is hereby rejected, and we hold as under:-

(i) Article 246-A defines the source of power as well as the field of legislation with respect to goods and services tax obviating the need to travel to the 7th Schedule.

(ii) The provisions of Article 246-A are available both to the Parliament and the State Legislature.

(iii) Article 246-A embodies the constitutional principle of the simultaneous levy as distinct from the principle of concurrence.

(iv) Since the power conferred under Article 246-A is to legislate on the subject "with respect to goods and services tax", therefore, the Parliament is fully competent to enact The CGST Act and the State Legislature is fully competent to enact State GST Act with respect to goods and services tax which includes taxes on supply of goods or services or both.

(v) The Statement of Objects and Reasons to the aforesaid 101st Amendment of the Constitution of India as aforequoted, clearly recorded that the 101st Amendment has been brought **subsuming various Central indirect taxes and levies such as** Central Excise Duty, Additional Excise Duties, Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Service Tax, Additional Customs Duty commonly known as Countervailing Duty, Special Additional Duty of Customs, and Central Surcharges and Cesses so far as they relate to the supply of goods and services **and** of **State Value Added Tax/Sales Tax, Entertainment Tax** (other than the tax levied by the local bodies), **Central Sales Tax** (levied by the Centre and collected by the States), **Octroi and Entry tax, Purchase Tax,** Luxury tax, Taxes on lottery, betting and gambling; and State cesses and surcharges in so far as they relate to supply of goods or services. Thus, overall reading of 101st Amendment to the Constitution of India leaves no manner of doubt that Article 246-A and other relevant provisions were enacted by the Constitution (101st Amendment) Act, 2016 so as to bring the taxes on purchase and sale of goods, duties on excise and entertainment tax etc. under one umbrella by empowering

the Parliament and the State Legislature to enact laws with respect to taxes on supply of goods and services.

(vi) The 101st Amendment to the Constitution of India and the CGST Act, 2017 including its Statement of Objects and Reasons have been well considered by Hon'ble Supreme Court in **Union of India and another Vs. Mohit Mineral Private Ltd., (2019) 2 SCC 599 (Paras 51 and 56)** and it has been held that the words **"with respect to"** used in Article 246-A of the Constitution of India **are words of expansion.** It has been further held that the **power to make the laws under Article 246-A is not general power related to general entry rather it specifically relates to goods and services tax** and the Constitution "101st Amendment" Act, 2017 was passed **to subsume various taxes, surcharges and cesses into one tax.** Thus, the "scope of supply' as provided in Section 7 of the CGST Act which includes sale also, is well within the legislative power of the Parliament conferred under Article 246-A of the Constitution of India.

(vii) The expression "supply" used in Section 7 of the CGST Act/ UPGST Act includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. By sub-Section (2), which opens with a non-obstante clause, such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services. Subject to the provisions of sub-Sections (1) and (2), the Government may on the recommendation of the Council specify by notification, the transactions which are to be treated as supply of goods and not as a supply of services or a supply of services and not as supply of goods. Thus, Section 7 of the CGST Act/ UPGST Act defines the word "supply" with a broad brush and provides an inclusive definition which includes "sale'.

(viii) Article 246A read with Article 366(12A) of the Constitution of India has conferred power upon the Parliament and State Legislatures to enact law to levy tax on supply of goods or services or both including sale of goods. The **event of taxation** under the Goods and Services Tax Act **is the supply of goods or services or both**. Section 7, 8 and 9 of the CGST Act/ UPGST Act also show that the tax is to be levied on supply of goods or services or both. Discussions with respect to Article 246A of the Constitution of India, the provisions of Section 7, 8 and 9 of The CGST Act/ UPGST Act, the Statement of Objects and Reasons of The Constitution (101st Amendment) Act, 2016 and the Statement of Objects and Reasons of the CGST/ UPGST Act, leaves no manner of doubt that the word "supply' includes sale also. Thus, the Parliament does not lack legislative competence to enact Section 7 of the CGST Act levying tax on supply of goods or services or both. Likewise, in view of Article 246-A of the Constitution of India, State Legislature does not lack legislative competence to enact Section 7 of the UPGST Act.

(ix) The philosophy of GST is a consumption and destination-based tax.

(x) The provisions of Section 7 of the CGST Act/ UPGST Act is not ultra vires to the Constitution of India.

26. The judgments relied by the learned counsel for the petitioners have no

relevance on the facts of the present case and the constitutional and statutory provisions in question. Therefore, those judgments are of no help to the petitioners.

Natural Justice:-

27. So far as the challenge to the impugned assessment order is concerned, we find that the copies of all relied upon documents have been given by the Assessing Authority to the petitioner and he has also been allowed to inspect the records. Opportunity of hearing is also reflected from the notices including the notice dated 05.01.2022 in which the date, place and time for appearance has been informed to the petitioner by the Deputy Commissioner, Commercial Tax, Division-17, Ghaziabad (Annexure-25 to the writ petition). The petitioner submitted a detailed reply running in more than 100 pages which has been considered by the respondent No.4 and the impugned assessment order under Section 74 read with Section 122 of the UPGST Act has been passed which runs in about 163 pages. Against the impugned order, the petitioner has a right of appeal under Section 107 of the UPGST Act, 2017. Therefore, for all the reasons aforestated, we do not find any substance in challenge to the impugned assessment order on the ground of alleged breach of principles of natural justice or provisions of Section 75(4) of the CGST Act/ UPGST Act..

28. For all the reasons afore-stated, **the writ petition is dismissed**, leaving it open for the petitioner to challenge the impugned Assessment Order in appeal before the appellate authority, if so advised.

(2022)07ILR A993
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 25.04.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters U/A 227 No. 6686 of 2018

Smt. Raj Shri Agarwal @ Ram Shri Agarwal & Anr. ...Petitioners
Versus
Sri Sudheer Mohan & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ajay Kumar Pandey, Sri Anoop Trivedi, Sri Rishabh Agarwal, Sri Syed Mohammad Abbas Abdy

Counsel for the Respondents:
Sri Namit Srivastava, Sri Kshitij Shailendra, Sri Parvez Alam

Civil Law - Constitution of India, Art. 227 - Code of Civil Procedure, 1908, Section 115 (3) (ii) of C.P.C. as applicable in U.P., Revision - O. 6, R. 17, Amendment of Pleadings - Application for amendment of the petitioners/plaintiffs to incorporate certain facts in the plaint rejected - Held - revision is maintainable against such order u/s 115 (3) (ii) of C.P.C as applicable in the State of U.P. - writ petition under Article 227 of the Constitution of India is not maintainable - Section 115 (3) (ii) of C.P.C. as applicable in Uttar Pradesh clearly states that the order, if allowed to stand would occasion a failure of justice or causes irreparable injury to the party against whom it is made, revision would lie - since the order deciding the amendment application would have a direct bearing on the right of either parties, if it is allowed or rejected - thus the decision on an application under Order 6 Rule 17 of C.P.C. would amount to a case decided and revision would lie (Para 21, 22, 24)

Dismissed. (E-5)

List of Cases cited:

1. Shiv Shakti Co-operative Housing Society, Nagpur Vs Swaraj Developers & Others, (2003) 6 SCC 659

2. Punjab Small Industries & Export Corporation Vs Baldev Raj Ram Murti 2002 SCC Online P & H 814

3. Uttam Chand Kothari Vs Gauri Shankar Jalan & ors. (2005) 1 Gauhati Law Reports 147

4. Rama Shanker Tiwari Vs Mahadeo & ors. 1968 A.W.R. 103 (FB)

5. Sultan Leather Finishers Pvt. Ltd. & ors. Vs A.D.J. Court no.4, Unnao & ors. 2006 (1) AWC 825 (LB)

6. Mukhtar Ahmad Vs Sirajul Haw & ors. 2006 (3) AWC 2182

7. Virudhunagar Hindu Nadargal Dharma Paribalana Sabai & ors. Vs Tuticorin Educational Society & ors. (2019) 9 SCC 538

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Rishabh Agarwal, learned counsel for the petitioners and Sri Kshitij Shailendra, learned counsel for the respondents.

2. The petitioners, by means of the present writ petition under Article 227 of the Constitution of India, have assailed the impugned order dated 21.07.2018 passed by Additional District Judge, Court no.18, Agra in Original Suit No.609 of 2015, by which the application for amendment of the petitioners-plaintiffs to incorporate certain facts in the plaint has been rejected.

3. A preliminary objection has been raised by Sri Kshitij Shailendra, learned counsel for the respondents regarding maintainability of the writ petition under Article 227 of the Constitution of India, inasmuch as according to him, a revision under Section 115 of C.P.C. shall lie against the order of trial Court, therefore, the present writ petition under Article 227 of the Constitution of India is liable to be dismissed being not maintainable.

4. To the aforesaid objection, learned counsel for the petitioners has contended that after amendment in Section 115 of C.P.C. in the year 2002, a proviso has been inserted, the perusal of which shows that if the amendment application is allowed, then it amounts to case decided and only then the revision would lie whereas in the instant case, the amendment application has been rejected, therefore, the order impugned does not fall within the ambit of case decided, hence, the present writ petition under Article 227 of the Constitution of India is maintainable.

5. In support of his case, learned counsel for the petitioners has relied upon the judgement of the Apex court in the case of ***Shiv Shakti Co-operative Housing Society, Nagpur Vs. Swaraj Developers & Others, reported in (2003) 6 SCC 659; Punjab Small Industries and Export Corporation Vs. Baldev Raj Ram Murti, reported in 2002 SCC Online P & H 814 & Uttam Chand Kothari Vs. Gauri Shankar Jalan and Others, reported in (2005) 1 Gauhati Law Reports 147.***

6. To rebut the aforesaid submissions, learned counsel for the respondents has contended that rejecting or allowing the amendment application under Order 6 Rule 17 amounts to disposal of a case decided in a Original Suit and, thus, it being a case decided, the revision against the order impugned is maintainable. Hence, in view

of the fact that effective alternative remedy by way of revision under Section 115 of C.P.C. is available to the petitioners, the present petition under Article 227 of the Constitution of India is not maintainable.

7. In alternative, he submits that even if, without admitting that the argument of counsel for the petitioners is correct that the order impugned does not fall within the ambit of a case decided, even then the revision would lie, as is evident from sub-section (3) of Section 115 of C.P.C. as applicable in Uttar Pradesh inasmuch as conditions stipulated in sub-section (i) & (ii) of sub-section 3 of Section 115 of C.P. C. are independent, and on existence of any of conditions as enumerated in Section 115 (3) (i) & (ii) of C.P.C., the revision would lie and not the writ petition under Article 227 of the Constitution of India. In such view of the fact, it is submitted that the present writ petition is not maintainable.

8. For better appreciation of facts, Section 115 defining revision in the Code of Civil Procedure is reproduced here-in-below:-

"(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

[Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.]

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court."

9. It is also apt to reproduce Section 115 of C.P.C. as applicable in the State of U.P. which have been substituted w.e.f. July, 1st, 2002.

"115. Revision (1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and where the subordinate court has --

(a) exercised a jurisdiction not vested in it by law ; or

(b) failed to exercise a jurisdiction so vested ; or

(c) acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A revision application under sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the district court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district court.

(3)The superior court shall not, under this section, very or reverse any order made except where,--

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding ; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made."

10. An emphasis has been laid by the learned counsel for the petitioners that reading of proviso to Section 115 of C.P.C. of Central Act clearly suggests that revision is barred against any order of the trial Court in a suit unless and until the conditions enumerated in the proviso, namely, where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings exist. Accordingly, he submits that as the rejection of application of amendment in the plaint does not bring the suit to an end, thus, the suit being not decided, the order rejecting the amendment application would not fall within the ambit of case decided. Therefore, the revisioin is barred and petition under Article 227 of the Constitution of India is maintainable.

11. Now, to appreciate the aforesaid argument of learned counsel for the petitioners, it would be apt to compare two sections as incorporated in Central Act of the C.P.C. and its applicability in the State of U.P.

12. From the comparison of proviso of Section 115 of C.P.C. in the Central Act and Section 115 (3) (i) of C.P.C. as applicable in the State of U.P., it is manifest and clear that revision is maintainable against any order if it had been in favour of the party applying for revision would have finally disposed of the suit or other proceeding. Thus, it is manifest that the proviso to Section 115 of Central Act has been adopted by the State of U.P. under sub-section (3) (i) of Section 115 of C.P.C. and are common, but by U.P. Amendment, (ii) to Section 115 (3) has been incorporated which provides that the revision will also lie against any order passed by the trial Court if the conditions elucidated in Section 115 (3) (ii) of C.P.C. exists, i.e., if the order is allowed to stand, it would occasion a failure of justice or cause irreparable injury to the party against whom it is made. So in either of the two contingencies, as referred in Section 115 (3) (i) & (ii) as applicable in U.P., revision is maintainable.

13. The learned counsel for the petitioners has laid emphasis upon paragraph no.32 of the judgement of ***Shiv Shakti Co-operative House Society, Nagpur (supra),*** to buttress his submission, paragraph no.32 is reproduced herein-below:-

"32. A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is 'yes' then the revision is maintainable. But on the contrary, if the answer is 'no' then the revision is not maintainable. Therefore, if the impugned order is interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under Section 115. There is marked distinction in the language of Section 97(3) of the Old Amendment Act

and Section 32(2)(i) of the Amendment Act. While in the former, there was clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32(2)(i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation. "

14. In the opinion of the Court, the said judgement is not applicable in the facts of the present case, inasmuch as it was a case dealing with an issue where application under Order 39 Rule 1 C.P.C. has been rejected, against which revision was preferred and the Apex Court in those facts and circumstances held that no revision is maintainable against the order passed by the trial Court, if the order is interlocutory in nature.

15. So far as the judgement in the case of ***Uttam Chand Kothari (supra)*** is concerned, the said judgement is also not applicable in the facts of the present case inasmuch as it was not considering the case under Section 115 of C.P.C. as applicable to the State of U.P. and further the judgement and arguments raised by the respondents which shall be dealt with in later part of this judgement were also not considered by the Gauhati High Court.

16. Similar is the case in the case of ***Punjab Small Industries and Export Corporation (supra).***

17. Now coming to the judgement of Five Judges Bench of this Court in the case of ***Rama Shanker Tiwari Vs. Mahadeo and others, reported in 1968 A.W.R. 103 (FB)*** relied upon by the learned counsel for the respondents, the Full Bench considered the meaning of the 'case decided' and held that the order allowing or disallowing an application for amendment in pleading is a case decided and is revisable in this Section, if the amendment sought has or is likely to have direct bearing on the rights and obligation of the parties. Paras 23 & 24 of the said judgement is reproduced here-in-below:-

"23. I am, therefore, of opinion that every order granting or dismissing an application for amendment of pleading will not give rise to a case decided revisable u/S. 115 of the Code. An order allowing or disallowing an application for amendment of pleading may however, give rise to a case decided revisable under that Section if the amendment sought has or is likely to have a direct bearing on the rights and obligations of the parties and affects or is likely to affect the jurisdiction of the Court. To this extent the decision in Mst. Suraj Pali's case can, in may opinion, be said to be no longer good law.

24. The opinion of the majority of Judges constituting the Full Bench is that an order passed u/O. VI R.17 of the CPC, either allowing an amendment or refusing to allow an amendment, is a "case decided" within the meaning of that expression in S.115, Code of Civil Procedure."

18. The five Judges Bench judgement concludes the controversy in the instant case, since the order deciding the amendment application would have a direct bearing on the right of either parties, if it is allowed or rejected. Thus, the decision on

an application under Order 6 Rule 17 of C.P.C. would amount to a case decided and revision would lie. The said finding is also supported by the first line of Section 115 (1) which states that " superior Court may revise an order passed in a case decided in an original suit",reading of said line suggests that legislation has envisaged cases where there may be circumstances where an order passed in original suit may amount to a case decided, though the suit has not been decided, and revision is maintainable against the said order.

19. Similarly, para-17 of the judgement reported in **2006 (1) AWC 825 (LB)** in the case of **Sultan Leather Finishers Pvt. Ltd. and others Vs. A.D.J. Court no.4, Unnao and others** being relevant in the context of present case is reproduced herein-below:-

"In one another case in Sambhaunath Digambar Jain v. Mohanlal and Ors. 2003 (9) SCC 219, where the application under Order VI, Rule 17 and Order VIII, Rule 6A of the Code of Civil Procedure was rejected by the trial court declining to permit the defendant to amend the written statement and counter-claim, it was held by Hon'ble Supreme Court that such application can be challenged by invoking revisional jurisdiction.

For convenience paras 3 and 4 of the judgment of Hon'ble Supreme Court in Sambhavnath's case (supra) is reproduced as under :

"The respondents herein filed a suit against the appellant for setting aside the said order of the Registrar. On 13.9.1982, the appellant filed written statement wherein an averment was made that the portion of property where the girl's school was running was the property of the trust. It may be mentioned that the Registrar did not include the said portion of the school as trust property. On 15.9.1982, the appellant filed an application under Order VI, Rule 17 and Order VIII, Rule 6A of the Code of Civil Procedure read with Section 151 of the Code of Civil Procedure and sought to incorporate in its counter-claim the said school as a trust property. On 15.9.1982, the appellant filed an application under Order VI, Rule 17 and Order VIII, Rule 6A of the Code of Civil Procedure read with Section 151 of the Code of Civil Procedure and sought to incorporate in its counter-claim the said school as a trust property by way of an amendment to its written statement. The said application was rejected by the trial court and being aggrieved by the said order, the appellant filed a revision which was dismissed as not maintainable. That is how the parties are before us.

Learned counsel for the appellant has urged that the order passed by the trial court was revisable and view taken by the High Court is erroneous. We are of the view that the High Court for ends of justice ought to have considered the application on merit keeping in view Rule 6A of Order VIII of the Code of Civil Procedure and in accordance with the law. We, therefore, hold that the above order rejecting the application of the appellant by the trial court was revisable. "

20. In this regard, it may also be apt to refer to paragraph-8 of the judgement of this Court reported in **2006 (3) AWC 2182, Mukhtar Ahmad vs. Sirajul Haw and Others,** wherein this Court has quashed the order of revisional Court rejecting the revisioin against the order passed in the amendment application. Paragraph-8 of the said judgement is reproduced herein-below:-

"8. In view of the aforesaid, the District Judge was not correct in holding that a revision against an order rejecting the amendment application is not maintainable. The District Judge was under law obliged to see as to whether the order passed by the court below rejecting the amendment application amounts to case decided or as to whether in the facts of the case revisional authority should vary or reverse the order passed by the court below in view of sub-section (3) of Section 115 of the Civil Procedure Code. It is needless to point out that this Court in the Judgment in Smt. Pushpa alias Pooja v. State of U.P. and Ors. 2005 (3) AWC 2587:AIR 2005 All 187, has taken note of the judgment in the case of Shiv Shakti Co-operative Housing Society, Nagpur v. Swaraj Developers, and has explained the legal proposition laid down by the Hon'ble Supreme Court in the case of Shiv Shakti (supra) in paragraphs 15 and 16 of the said Judgment, which may be reproduced here in below:

"15. The judgment of the Apex Court relied by the counsel for the petitioner in Shiv Shakti Cooperative Housing Society, Nagpur v. Swaraj Developers and Ors. (supra) lays down that the revision is not maintainable against an interlocutory or interim order. The Apex Court while considering provisions of Section 115 of the Code of Civil Procedure, made following observation in paragraph 32: .....(at page 2442 of AIR).

"32. A plain reading of Section 115, as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes" then the revision is maintainable. But on the contrary, if the answer is "no" then the revision is not^ maintainable. Therefore, if the impugned order is of interim nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject-matter of revision under Section 115."

16. As noted above, the order passed under Section 24 disposed of finally the issue of interim maintenance to a spouse during pendency of proceedings. After passing the order under Section 24 of the Act nothing more is required to be done with regard to question of interim maintenance during pendency of proceedings and the fact is that the order passed under Section 24 finally disposes the application for interim maintenance; hence as laid down by the Apex Court in above quoted paragraph the revision shall be maintainable against an order under Section 24 of Hindu Marriage Act, 1955."

21. Section 115 (iii) of C.P.C. as applicable in Uttar Pradesh clearly states that the order, if allowed to stand, results in failure of justice or causes irreparable injury to the party against whom it is made, the revision under Section 115 of C.P.C as applicable in the State of U.P. is maintainable.

22. Viewed from this angle, if any order illegally passed by the Court below on any application is allowed to stand affecting rights of parties, it is obvious that it would cause failure of justice or cause irreparable injury to the party against whom it is made, therefore, if said condition is present, the revision against any order passed by the Court below vide Section 115 (3) (ii) of C.P.C. as applicable in U.P. would lie.

23. The Apex Court in the case of ***Virudhunagar Hindu Nadargal Dharma Paribalana Sabai and Others Vs.***

Tuticorin Educational Society and Others, reported in (2019) 9 SCC 538 that where there is availability of remedy under CPC, normally petition under Article 227 would not lie. Paragraph nos.11, 12 & 13 of the said judgement is reproduced here-in-below:

"11.Secondly, the High Court ought to have seen that when a remedy of appeal under section 104 (1) (i) read with Order XLIII, Rule 1 (r) of the Code of Civil Procedure, 1908, was directly available, the respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In A. Venkatasubbiah Naidu Vs. S. Chellappan & Ors.1, this Court held that "though no hurdle can be put against the exercise of the constitutional powers of the High Court, it is a well recognized principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a constitutional remedy".

12. But courts should always bear in mind a distinction between (i) cases where such alternative remedy is available before civil courts in terms of the provisions of Code of Civil Procedure and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasi-judicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which the respondents 1 and 2 invoked the jurisdiction of the High Court. This is why, a 3 member Bench of this Court, while overruling the decision in Surya Dev Rai vs. Ram Chander Rai, pointed out in Radhey Shyam Vs. Chhabi Nath that "orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts.

13. Therefore wherever the proceedings are under the code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself."

24. Thus, for the reasons given above, the present writ petition under Article 227 of the Constitution of India is not maintainable as remedy by way of revision under Section 115 of C.P.C. is available to the petitioners. It is, accordingly, **dismissed** with no order as to costs.

(2022)07ILR A1000
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE RAJNISH KUMAR, J.

Special Appeal No. 331 of 2022

Satish Kumar Balmiki & Anr. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Vijay Kumar Srivastava, Shailendra Kumar Dubey

Counsel for the Respondents:
C.S.C.

Promotion Rules 2014-Rule 7- provides typing as essential qualification for promotion-Rules 2001 incorporated in promotion Rules 2014-only to extent of hindi typewriting-" knowledge of typewriting" is essential for promotion from Group 'D' employees.

Appeal dismissed. (E-9)

List of Cases cited:

Special Appeal No.173 of 2017; Ved Vrat Tyagi & ors. Vs St. of U.P. & ors.

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

1. Heard, Shri Vijay Kumar Srivastava, learned counsel for the appellants-petitioners and Shri Rajesh Tiwari, learned State Counsel representing the State-respondents.

2. The appellants-petitioners have filed this intra-court Special Appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules assailing the validity of the judgment and order dated 20.04.2022, passed by learned Single Judge in a bunch of writ petitions, the leading Writ Petition being Writ-A No.24026 of 2018;Sushil Kumar and others Versus State of U.P. and others, whereby the writ petitions have been dismissed by learned Single Judge providing therein that the dismissal of the petitions shall not preclude the petitioners from participating in any subsequent recruitment for Group 'C' post against the promotion quota provided they fulfill the essential requirement as mandated under Rule 7 of the Promotion Rules, 2014.

3. The appellants-petitioners are working on various class-IV posts in the department of Medical and Health in the office of the opposite party no.3. The appellants-petitioners, in pursuance of the decision of the Government to fill up class-III posts of Junior Assistants by way of promotion from Class-IV employees, applied for promotion by way of selection. The eligibility list dated 17.07.2018 was prepared, in which the names of the appellants-petitioners figured alongwith other candidates in a composite list of 1325 candidates. By means of a letter dated 17.07.2018, the respondents had fixed the date for typing test between 24.07.2018 and 27.07.2018. It was also provided in the said letter that in case due to some unavoidable reason a candidate could not appear on the dates fixed, he may appear on 28.07.2018. In pursuance thereto the appellants-petitioners appeared in the typing test, result of which was declared on 10.08.2018. The appellants-petitioners were not selected. Therefore the appellants-petitioners approached this court by means of Writ Petition No.24026 (SS) of 2018.

4. Learned counsel for the appellants-petitioners submitted that in terms of relevant Service Rules, namely, "The Uttar Pradesh Government Department Ministerial Cadre Service Rules, 2014" (here-in-after referred to as the Rules 2014) read with "The Uttar Pradesh Subordinate Offices Ministerial Group 'C' Posts of the Lowest Grade (Recruitment by Promotion) Rules, 2001" (here-in-after referred to as the Rules 2001), the appellants-petitioners have been subjected to typing test, but there is no such requirement under the aforesaid Rules, except for the posts of typist or the posts for which typing is essential. However, learned Single Judge rejected the claim of the appellants-petitioners by

placing reliance on Rules 2014 read with Rules 2001, which could not have been done.

5. Learned counsel for the appellants-petitioners vehemently argued that the reliance placed by learned Single Judge on Rules 2014 is highly misplaced because as per Rules 2014, only certain provisions of Rules 2001 are to be followed for making promotion by way of selection. It has further been contended by learned counsel for the appellants-petitioners that Rules 2014 only contemplates the knowledge of typing skill for the posts for which the typing is required, hence the respondents could not have held the typing test for all the posts. Submission is that without considering it the learned Single Judge has dismissed the writ petition, therefore the judgment and order passed by learned Single Judge is not sustainable and liable to be set aside.

6. Learned Standing Counsel representing the State-respondents vehemently opposed the submissions of learned counsel for the appellants-petitioners. He submitted that though typing was not an essential qualification under the Rules 2001, but it has been made the essential qualification under Rule 7 of the Rules 2014 for promotion and Rules 2001 are applicable only for the procedural purposes i.e. as to how the selection is to be made and what should be the criteria and minimum speed for typing. Thus he submitted that learned Single Judge has rightly considered the pleadings and the Rules and dismissed the writ petition. It has been thus submitted that there is no illegality or error in the judgment and order passed by learned Single Judge and hence the Special Appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed.

7. We have considered the submissions of learned counsel for the parties and perused the records available on Special Appeal and the Rules 2014 and Rules 2001.

8. Rules 2014 have been framed under Article 309 of the Constitution of India and in supersession of all existing Rules and Orders on the subject. Rule 7 of Rules 2014 provides three sources of recruitment for the post of Junior Assistant, which is a class III post; 80% of said posts are to be filled in by way of direct recruitment, 15% of the posts are to be filled in by way of promotion from amongst the substantively appointed Group 'D' employees having High School or equivalent qualification and who possess the knowledge of typewriting and 5% posts are to be filled up by making promotion from amongst substantively appointed Group 'D' employees, who have passed the Intermediate or equivalent examination and who possess the knowledge of typewriting. Accordingly apart from qualification of High School and Intermediate or equivalent qualification, one of the essential qualifications prescribed therein is "knowledge of typewriting" for promotion from Group 'D' post. The words "knowledge of typewriting" are followed by "in accordance with the Uttar Pradesh Subordinate Offices Ministerial Group 'C' Posts of the Lowest Grade (Recruitment by Promotion) Rules, 2001 as amended from time to time", which would mean that the knowledge of typewriting has to be read in consonance with the provisions contained in Rules 2001.

9. Rule 7 (1) of the Rules 2014, relevant for consideration in this appeal, is extracted here-in-below:-

"7. Source of recruitment- Recruitment to the various categories of

posts in the service shall be made from the following sources:

(1) *Junior Assistant*-(i) Eighty percent by direct recruitment.

(ii) Fifteen percent by promotion from amongst substantively appointed Group 'D' employees who have passed the High School Examination of the Board of High School and Intermediate Education, Uttar Pradesh or an Examination recognized by the Government as equivalent thereto and who possess the knowledge of typewriting, in accordance with the Uttar Pradesh Subordinate Offices Ministerial 'Group 'C' Post of the Lowest Grade (Recruitment by Promotion) Rules, 2001, as amended from time to time.

(iii) Five percent by promotion from amongst substantively appointed Group 'D' employees who have passed the Intermediate Examination of the Board of High School and Intermediate Education, Uttar Pradesh or an examination recognized by the Government as equivalent thereto and who possess the knowledge of typewriting, in accordance with the Uttar Pradesh Subordinate Offices Ministerial Group 'C' Posts of the Lowest Grade (Recruitment by Promotion) Rules, 2001, as amended from time to time."

10. Rule 18 of Rules 2014 provides that recruitment by promotion for the post of Junior Assistant in the service shall be made in accordance with the provisions of the Uttar Pradesh Subordinate Offices Ministerial Group 'C' Posts of the Lowest Grade (Recruitment by Promotion) Rules, 2001 as amended from time to time. The conjoint reading of the Rules 7(1) and Rule 18 of Rules 2014 clearly indicates that the essential qualifications for promotion from Group 'D' post is High School/Intermediate or equivalent thereto and knowledge of typewriting and for testing the knowledge of typewriting and procedure for selection as prescribed under the Rules 2001, would be applicable. Rule 18 of Rules 2014 is extracted here-in-below:-

"18. Procedure for recruitment by promotion for the post of Junior Assistant- Recruitment by promotion to the posts of Junior Assistant in the service shall be made in accordance with the provisions of the Uttar Pradesh Subordinate Offices Ministerial Group 'C' Posts of the Lowest Grade (Recruitment by Promotion) Rules, 2001, as amended from time to time."

11. Rule 5 of Rules 2001 provided the source of recruitment for promotion, under which 15% posts were to be filled in from the substantively appointed Group 'D' employees who possess the High School or equivalent qualification and 5% posts from the substantively appointed Group 'D' employees who possess the Intermediate or equivalent. The procedure for recruitment for promotion is provided in Rule 8 of Rules 2001. In terms of Sub-rule (1) of Rule 8 for the purpose of recruitment by promotion a Selection Committee has to be constituted in accordance with the provisions of the Uttar Pradesh Constitution of Departmental Promotion Committee for the posts outside the purview of the Public Service Commission Rules, 1992. Sub Rule (2) provides that the recruitment by promotion shall be made on the basis of merit as disclosed by marks obtained in the test for selection through the Selection Committee constituted under sub-rule (1) and the test for selection shall include a simple written test, interview and evaluation of character roll. The maximum marks for all the three have also been provided. Note-2 to Sub-rule (2) of Rule 8 provides that where recruitment by promotion is being made for the post of

Typist or a post for which Hindi Typewriting is essential, there shall be conducted a qualifying test of Hindi Typewriting also, as prescribed by the Government from time to time and to qualify this test a candidate must have a minimum speed of twenty-five words per minute in Hindi Typewriting. As such as per Rule 8(2)-Note-2 where recruitment by promotion is to be made against the post of Typist or against a post for which Hindi Typewriting is essential, a test in Hindi typing shall be conducted by the Selection Committee, which is to be of qualifying nature. Note-2 appended to Rule 8 (2) of Rules 2001 is extracted here-in-below:-

"Note 2- Where recruitment by promotion is being made for the post of Typist or a post for which Hindi Typewriting is essential, there shall be conducted a qualifying test of Hindi Typewriting also, as prescribed by the Government from time to time. To qualify this test a candidate must have a minimum speed of twenty-five words per minute in Hindi Typewriting."

12. When we examine the contention of learned counsel for the appellants-petitioners in the backdrop of the provisions contained in Rules 2014 read with Rules 2001, it is crystal clear that though knowledge of typewriting was not an essential qualification under Rules 2001 for promotion to all Group 'C' posts from Group 'D' posts, but the same has been made an essential qualification under Rules 2014, which is to be tested as per the procedure prescribed under Rules 2001, which specifically provides as to what will be the benchmark to ascertain the eligibility of a candidate for promotion to Group 'C' post from Group 'D' post. According to Note 2, as extracted here-in-above, appended to Rules 8 of Rules 2001, for promotion to the post of Typist or to a post where the knowledge of Hindi typewriting is necessary a test of Hindi typing is to be organized and conducted which is qualifying in nature and in that test a candidate has to perform/acquire speed of 25 words per minute in Hindi Typing test. Thus, under the backdrop of the aforesaid Rules on being examined the submissions of learned counsel for the appellants-petitioners and the respondents, we find that the submissions of learned counsel for the appellants-petitioners are not tenable.

13. A Division Bench of this court, in which one of us (Mr.Justice Devendra Kumar Upadhyaya), was a member in **Special Appeal No.173 of 2017; Ved Vrat Tyagi and 15 others Versus State of U.P. and two others** considering the provisions of Rules 2014 read with Rules 2001, in regard to the identical issue, held as under:-

""If the submission of learned counsel for the petitioners-appellants is examined on the basis of provisions contained in 2014 Rules read with referred 2001 Rules, it is crystal clear that though 2014 Rules provide that 'knowledge of typing' is essential qualification, however, 2001 Rules specifically provides what will be the benchmark to ascertain eligibility of a candidate for promotion from Group D post. According to Note 2, as extracted hereinabove, occuring in Rule 8 (2) of 2001 Rules, for promotion to the post of typist or to a post where knowledge of Hindi typing is essential, a test of Hindi typing has to be organized/conducted which is qualifying in nature and in that test a candidate has to perform/acquire speed of 25 words per minute in Hindi typing test. Thus, if the submission made by the learned counsel for the petitioners-appellants, in the backdrop of the aforesaid discussions, are examined by us in the

light of the 2014 Rules read alongwith 2001 Rules, same are not found to be tenable."

14. We also notice that under Rules 2001 the definition of Ministerial Group 'C' post of the Lowest grade is given in Rule 4(f), which is extracted below:-

"(f) 'Ministerial Group 'C' Posts of the Lowest Grade' shall refer to the Ministerial group 'C' posts of the lowest scale of pay, excluding the posts belonging to the Stenographer cadre, Accounts cadre or the posts of technical nature in the subordinate offices which are filled both by direct recruitment and by promotion and which are outside the purview of the Public Service Commission, Uttar Pradesh;"

15. According to the aforesaid definition in Rules 2001,the Ministerial Group 'C' post of the lowest grade excludes the posts belonging to the Stenographer cadre, Accounts cadre or the posts of technical nature in the subordinate offices. However, under the Rules 2014 Ministerial Group 'C' post of the Lowest Grade has not been defined and the definition of 'Service' has been given under Rule 5 ((i), according to which 'Service' means the Uttar Pradesh Government Department Ministerial Cadre Service. The same is extracted below:-

"(i) 'service' means the Uttar Pradesh Government Department Ministerial Cadre Service;"

16. In view of above, Rules 2014 does not have any such classification of Group 'C' posts and Stenographer etc. as was in Rules 2001. In this view also the submissions of learned counsel for the appellants-petitioners that the "knowledge of typewriting" is required for the post of Stenographer or the post for which Hindi typing is essential only, is misconceived and not tenable and now the "knowledge of typewriting" is essential for promotion from Group 'D' employees.

17. After considering the Rules, learned Single Judge has categorically held that the Rule 7 of the Promotion Rules 2014 provides that typing is essential qualification mandated for promotion and the criteria/speed as prescribed in Rules 2001 has been incorporated in promotion Rules 2014 only to the extent of Hindi typewriting, therefore, the reference of promotion Rules 2001 is for a limited purpose i.e. typing speed and in so far as the essential qualification for promotion is concerned the promotion Rules 2014 is unambiguous by mandatorily providing that typing knowledge is an essential qualification.

18. We are in agreement with the findings recorded by the learned Single Judge for the reasons stated above. We do not find any illegality or error in the judgment and order dated 20.04.2022 passed by the learned Single Judge in the Bunch of writ petitions, leading being writ -A No.24026 of 2018. The Special Appeal is misconceived and lacks merit.

19. The Special Appeal is, accordingly, **dismissed.** No order as to costs.

(2022)07ILR A1005
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ A No. 6713 of 2017

Nasreen Fatima ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Niyaz Ahmad Khan, Sri Mansoor Ahmad, Sri Mohd. Abrar Khan, Sri Radha Kant Ojha (Senior Adv.)

Counsel for the Respondents:
C.S.C., Maqsood Ahmad Beg, Sri B.P. Singh Somwanshi

Recommendation of the Committee of Management -to accord financial approval to the appointment of the Petitioner -on the post of Principal -refused-without affording opportunity of hearing-on the basis-that experience in recognized but unaided institution -not considered-wrong.

W.P. allowed. (E-9)

List of Cases cited:

1. Mohd. Altaf (1) & ors. Vs U.P. Public Service Commission & anr. reported in (2008) 14 SCC 139

2. Writ-A No. 11100 of 2014 (Dr. Sanjay Kumar Singh & anr. Vs St. Of U.P. Thru Secy. & anr.)

3. Writ-A NO. 14349 of 2014 (Dr. Om Prakash Pandey Vs St. of U.P. & anr.

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

1. Supplementary counter affidavit filed on behalf of the respondent-Committee of Management in Court today is taken on record.

2. Heard Mr. Radha Kant Ojha, learned Senior Advocate assisted by Mr. Mansoor Ahmad, Mr. Maqsood Ahmad Beg and Mr. B.P. Singh Somwashi, learned counsel for the respondent-Committee of Management and the learned Standing Counsel for the State-respondents.

3. By means of the present writ petition, the petitioner has prayed for quashing the order dated 4th September, 2015 passed by the Joint Director of Education, Allahabad Division, Allahabad (now Prayagraj) i.e. respondent no.3 as well as for quashing the communication letter of the District Inspector of Schools, Fatehpur dated 7th January, 2016. Petitioner has also prayed that a direction be issued to the respondents to make payment of salary of the petitioner w.e.f. 12th August, 2015 to till date including the arrears and also pay the salary regularly as and when it becomes due.

4. By means of the letter-cum-order dated 4th September, 2015, respondent no.3 has informed the Manager of Inter College Dhauli, Fatehpur that the recommendation of the Committee of Management to accord financial approval to the appointment of the petitioner on the post of Principal of the said institution has been refused by the Regional Level Committee. In the said letter/order, it has been mentioned that on an opinion being obtained, it has been informed by the U.P. Secondary Education Services Selection Board, Allahabad vide his letter dated 11th August, 2015 that the teachers working in recognized unaided institutions are treated to be part-time teachers due to which their experience is not accepted to be valid. Therefore, it is not possible for the Regional Level Committee to accord financial approval to the appointment of the petitioner on the post of Principal of the institution, as she possesses teaching experience certificate from an unaided institution. The same information has been sent by the District Inspector of Schools, Fatehpur to the Manager of the Inter College, Pauli, District Fatehpur vide his letter dated 7th January, 2016, which is also under challenge in the present writ petition.

5. Relevant facts as borne out from the records of the present writ petition, are as follows:

Intermediate College, Pauli, District Fatehpur is an institution duly recognized by the Board of secondary Education of the State of Uttar Pradesh. As the said institution is in the grand-in-aid list of the State Government, the teachers and other employees of the said institution including the Principal are getting their salary from State exchequer under the provisions of U.P. High School and Intermediate Colleges (Payment of Salary to the Teachers and Other Employees) Act, 1971. As the vacancy of the post of Principal occurred in the institution, the Committee of Management of the said institution applied for permission to advertise the said post. However, the Committee of Management of the institution was informed that as the institution has been conferred the minority status, no prior permission for publication of the post of Principal of the institution is required. Therefore, an advertisement was accordingly made in two daily news papers, namely, one in Hindi, namely, Amar Ujala and second in English, namely, Northern Indian Patrika on 25th March, 2015, which were having adequate circulations. Pursuant to the said advertisement, various prospective candidates sent their applications forms through registered post. Petitioner, who possessed the degrees of High School (in the year 1994), Intermediate (in the year 1996), B.A. (in the year 1999), M.A. (in the year 2004 and B.Ed. (in the year 2011) examinations and also teaching experience of six years, six months and nine days w.e.f. 2nd July, 2008 to that date, from Ganesh Shanker Vidyarthee Balika Intermediate College, Sultanpur Gosh, Fatehpur, also applied in pursuance of the aforesaid advertisement through registered post. The photo copies of the degrees and teaching experience certificate of the petitioner have been enclosed along with the supplementary counter affidavit filed in the Court today. After receipt of the application forms of various prospective candidates, the Committee of Management sent a letter to the Regional Joint Director of Education on 5th May, 2015 to nominate an Expert for holding the selections of the post of Principal of the institution, the Regional Joint Director of Education inturn vide letter dated 4th June, 2015 nominated two retired officers, namely, Shyam Narain Rai and Ramesh Mishra as an expert. The Committee of Management opted Mr. Shaym Narain Rai, retired Joint Director of Education, Allahabad Region, Allahabad as an Expert for selection of the principal of the institution. The Committee of Management issued letters dated 5th June, 2015 by registered post to all the prospective candidates requiring them to appear in the interview, which was to be held on 28th June, 2015 in the campus of the institution. The petitioner appeared in the said interview. In the interview which was held on 28th June, 2015, total 13 persons participated including the petitioner. The result of the said interview was declared by the Selection Committee on the same day i.e. 28th June, 2015 in which the petitioner was placed at serial no.1. On the said result, the signatures of the expert appointed by the Regional Joint Director of Education, namely, Shyam Narain Rai along with other members of the Selection Committee was also appended, a copy of which has been enclosed as Annexure-4 to the writ petition. On 29th June, 2015, a meeting was convened by the Committee of Management, wherein the said result

declared by the selection committee was accepted and on the basis of same, the petitioner was selected for the post of Principal of the institution. Accordingly, the Committee of Management submitted the relevant papers, on 1st July, 2015 before the Regional Joint Director of Education, Allahabad for financial approval to the appointment of the petitioner as principal of the institution. As no objection was raised by the concerned authority, in view of provisions of Chapter-I, Rule 17 (2) (g) of the U.P. Intermediate Education Act, 1921, the Committee of Management offered appointment letter to the petitioner on 2nd August, 2015 for the post of Principal of the institution. Pursuant to the said appointment letter, the petitioner joined on 12th August, 2015 as principal of the institution, a copy of the joining letter has been enclosed as Annexure-6 to the writ petition. The petitioner was discharging her duties as principal of the institution continuously to the utmost satisfaction of the education authorities. After some time, pursuant to the letter of the Regional Joint Director of Education, Allahabad Region, Allahabad dated 4th September, 2015, the District Inspector of Schools vide letter dated 7th January, 2016 communicated the Committee of Management of the Institution that relying on the opinion given by the Secretary, U.P. Secondary Education Services Selection Board, Allahabad, the Regional Level Committee has refused to accord financial approval to the appointment of the petitioner on the post of Principal of the institution. It is against these letters/orders, that the present writ petition has been filed.

6. Questioning the aforesaid orders/letters of the Regional Joint Director of Education and the District Inspector of Schools, following submissions have been advanced by the learned counsel for the petitioner:

(i) The order dated 4th September, 2015 has been passed by the Regional Level Committee on the basis of opinion given by the Secretary, U.P. Secondary Education Services Selection Board, Allahabad, when as a matter of fact, the provisions of U.P. Education Services Selection Board Act, 1982 is not applicable to the petitioner's institution, which is a minority institution.

(ii) The order impugned dated 4th September, 2015 has been passed by the Regional Level Committee without giving any notice well as without affording any opportunity of hearing either to the petitioner or the manager of the institution, hence, the same hits Article 14 and 16 of the Constitution of India, as the same has been made in violation of principles of natural justice.

(iii) The Committee of Management has preferred appeal against the order of the Regional Level Committee dated 4th September, 2015 but the petitioner has no concern with the same, after expiry of one month of the submissions of the relevant papers qua the appointment of the petitioner as required under Chapter-II Rule 17 (2) (g) of the U.P. Intermediate Education Act, 1921, the financial approval is deemed to be given in favour of the petitioner.

(iv) Appendix-A as referred in Regulation-1 of Chapter-II of the Regulations framed under the U.P. Intermediate Education Act, 1921 does not speak about the experience from **"aided"** institution, it only speaks of experience from "recognized" institution. It is not disputed by the learned Standing Counsel for the State-respondents any where that the petitioner is having teaching experience

of "unaided" institution but the same is **"recognized"** institution. Hence, the petitioner possesses correct and valid teaching experience, as per the aforesaid provisions and nothing is wrong in the same. Neither the word "aided" nor "unaided" is mentioned in the aforesaid provisions.

(v) While passing the order impugned, the Regional Joint Director of Education has erred in law in obtaining opinion of the Secretary, Secondary Education Services Selection Board, who has no authority to give any opinion to a principal of a minority institution recognized under the provisions of U.P. Intermediate Education Act, 1921.

(vi) The State education authorities are habitual to harass the minoirity institutions like the petitioner's institution for the reasons best known to them.

On the cumulative strength of the aforesaid, learned counsel for the petitioner submits that the order impugned dated 4th September, 2015 passed by the Regional Level Committee, Allahabad Region, Allahabad refusing to accord financial approval to the appointment of the petitioner for the post of principal cannot be legally sustained and is liable to be quashed.

7. On the other-hand, learned Standing Counsel for the State-respondents and the learned counsel for the respondent-Committee of Management submit that on the opinion given by the Secretary, U.P. Secondary Education Services Selection Board that as in the unaided institutions, only short term post of assistant teachers are sanctioned, therefore, the experience gained by such teachers from the said institutions cannot be counted or admitted, the Regional Level Committee has taken a decision not to accord financial approval to the appointment of the petitioner on the post of Principal of the institution, as the petitioner has gained teaching experience from Ganesh Shankar Vidyarthee Balika Intermediate College, Sultanpur Ghos, which is a recognized but not aided institution, hence the same is legal and valid.

Learned Standing Counsel for the State-respondents and the learned counsel for the respondent-Committee of Management further submit that Pauli Intermediate College, Pauli is a recognized minority institution and is an aided institution taking grant-in-aid from the State Government, therefore the provisions of U.P. Act No. 2 of 1921 of U.P. Act No. 24 of 1071 are fully applicable over the institution. The experience of teachers working under privately managed recognized institution cannot be counted/admitted, inasmuch as in such institutions, only short terms posts have been sanctioned. As the petitioner has possessed teaching experience certificate of a private managed institution, therefore, the Regional Level Committee has rightly not accorded financial approval to the appointment of the petitioner as Principal for payment of salaries from the State exchequer.

Lastly, it has been submitted by the learned Standing Counsel for the State-respondents that after retirement of Sri Surendra Prakash Mishra, who was working as officiating principal of the institution on 30th June, 2014, Mohd. Aafan is working as officiating principal of the said institution from 1st July, 2014.

In view of the aforesaid submissions, learned Standing Counsel for the State-respondents submits that there is no illegality or infirmity in the decision

taken by the Regional Level Committee dated 4th September, 2015, which has been communicated to the Committee of Management by the Regional Joint Director of Education vide letter dated 4th September, 2015 as well as by the District Inspector of Schools, vide letter dated 7th January, 2016.

8. This Court has considered the submissions made by the learned counsel for the parties and have gone through the records of the present writ petition including the counter affidavits, supplementary counter affidavit and rejoinder affidavits filed on behalf of the State-respondents, respondent-Committee of Management and the petitioner respectively.

9. Article 30 of the Indian Constitution gives right of minorities to establish and administer educational institutions, which consists of provisions that safeguard various rights of the minority community in the country keeping in mind the principle of equality as well. Article 30(1) says that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Article 30(1A) deals with the fixation of the amount for acquisition of property of any educational institution established by minority groups. Article 30(2) states that the government, which gives aid, should not discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

10. Judged in the aforesaid legal background, this Court has no hesitation to hold that Section 16E (1) (2) and Section 16FF and Regulations 17 to 19 of Chapter II of the Regulations framed under the U.P. Intermediate Education Act, 1921 which lay down the procedure for selection of principal and teachers in minority institutions are basically provisions for furtherance of fair administration of the minority institution and not to its detriment. These provisions have stood the test of time for decades together.

11. For ready reference, Section Section 16 E (1) and (2) and Section 16FF and Regulations-17 to 19 are quoted below:

"[16-E. Procedure for selection of teachers and heads of institutions.---- Subject to the provisions of this Act, the Head of institution and teachers of an institution shall be appointed by the Committee of Management in the manner hereinafter provided.

(2) Every post of Head of institution or teacher of an institution shall except to the extent prescribed for being filled by promotion, be filled by direct recruitment after intimation of the vacancy to the Inspector and advertisement of the vacancy containing such particulars as may be prescribed, in at least two newspapers having adequate circulation in the State.

.....

Section 16 FF:- Saving as to minority institutions (1) Notwithstanding anything in Sub-section (4) of Section i6-E and Section 16-P, the Selection Committee for the appointment of a Head of Institution or a teacher of an institution established and administered by a minority referred to in Clause (1) of Article 30 of the Constitution of shall consist of five members (including its Chairman) nominated by the Committee of Management:

Provided that one of the members of the Selection Committee shall- (a) In the case of appointment of an Institution, be an expert selected by the Committee of Management from a panel of experts prepared by the Director; (b) in the case of appointment of a teacher, be the Head of the institution concerned.

(2) The procedure to be followed by the Selection Committee referred to in Sub-section (1) shall be such as may be prescribed.

(3) No person selected under this section shall be appointed unless-

(a) in the case of the Head of an institution the proposal or appointment has been approved by the Regional Deputy Director of Education; and

(b) in the case of a teacher such proposal has been approved by the Inspector.

(4) The Regional Deputy Director of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualifications prescribed and k otherwise eligible.

(5) Where the Regional Deputy Director of Education or the Inspector, as the case may be, does not approve of candidate selected under, this section, the Committee o Management may, within three weeks from the date of receipt of such disapproval, make a representation to the Director it the case of Head of Institution, and to the' Regional Deputy Director of Education in the case of a teacher.

(6) Every, order passed by the Director or the Regional Deputy Director of Education on a representation under Sub-section (5 shall be final.

Chapter II of the Regulations Framed under U.P. Intermediate Education Act, 1921.

Regulation 17: The procedure for filling up the vacancy of the head of the Institution and teachers by direct recruitment in any recognized institution referred to in Section 16-FF shall be as follows;

(a) After the management has determined the number of vacancies to be filled up by direct recruitment, the posts shah be advertised by the manager of the institution in at least one-Hindi and one English newspaper having adequate circulation in the State giving particulars as to the nature (i.e. whether temporary/permanent) and number of vacancies, descriptions of post (i.e. Principle or Headmaster, Lecture or L.T., C.T, or J.T.C.B.T.C. grade teacher including the subject or subjects in which the lecturer or teacher is required), scale of pay and other allowances, experience required, minimum qualification and age prescribed, if any for the post and prescribing a date which should ordinarily be less than two 'weeks form the date of advertisement by which the applications shall be received by the Manager. A copy of the advertisement shall be simultaneously sent to the Inspector concerned.

Notes:- (1) All vacancies in the posts of teachers and the head of institution existing at the time of advertisement shall be advertised. (2) No new post shall be advertised unless sanction of the appropriate authority for the creation thereof has been received by the management.

(a) All applications shall be made in the form prescribed by the management and shall contain all necessary particulars about qualifications, teaching experience and other activities and be accompanied by certified copies, of all the necessary certificates and testimonials. The management may charge cost of tl a

application form not exceeding the amount referred 10 in Clause (2) of the Regulation 10.

(b) An application by a person employed in an institution and applying for a post elsewhere or in tie same institution shall not be withheld by his employer but shall be forwarded to the authority concerned immediately.

(c) All applications received form the candidates shell be serially numbered and entered in a register and particulars of the candidates noted under appropriate columns, The Candidates to be called for interview shall be sever for each post (with the prior permission of the head of the institution). The Manager shall intimate by registered post all the members of the Selection Committee as well as such candidates as are called fir interview, the date, time and place of selection at lea-it ten days before it is held. The Selection Committee will hold the selection accordingly.

If on account of any unavoidable reason the expert selected by the Committee of Management under Clause (a) of the proviso to Sub-section (1) of Section 16-FF is unable to attend the selection on the date fixed, the meeting of the Selection Committee shall , a postponed.

(d) The provisions of Clauses (e) and (f) of Regulation 10 and those of Regulations 11, 12, and 16 shall mutatis mutandis apply to selections made under this regulation.

(e) A panel of experts consisting of fifteen or more persons selected form category (a) referred to in Regulation 14 shall be drawn by the Director for each region and be sent to the Regional Deputy Director of Education concerned. The Regional Deputy Director of Education shall out of the said panel communicate the names of three experts in sealed cover to the management through its manager as soon as he receives any request for supply of names of experts from him. The regional panel of experts shall, however, remain valid until it is replaced by a new one.

(f) Chairman of the Selection Committee after conducting interview of all the candidates for any post will get a note prepared in two copies on the proceedings of the selection which will mention the names of the selected candidates and names of two more candidates of waiting list. Chairman and other members of Selection Committee will sign on notes, so prepared, and mention their full name, designation arid address. Chairman would immediately forward a copy of this note and a copy of statement referred to in Clause (f) of Regulation 10 to the Regional Dy. Director of the Inspector, as the case may be, for approval as required under Selection 16FF.Regional Dy. Director or Inspector, as the case may be, within one month of the date of receipt of concerned records, will give his. decision thereon and, failing to do so, it will be deemed to be approved].

Regulation 18: (1) Within fifteen days of the receipt of-the recommendation of the Selection Committee constituted under Sub-section (1) or (2) of Section 16-F, and in case of an institution referred to iii Section 16-FF, the approval of the authority specified therein, the Manager shall, on authorization under resolution of the Committee of Management, issue an order of appointment by registered post to the candidate in the form given in Appendix 'B' requiring the candidate to join duty within ten days of the receipt of such order failing which the appointment of the candidate will be liable to cancellation.

(2) In case of promotions and ad hoc appointments also forma-order of

promotion or appointment in the form as near a possible to the form referred to in Clause (1) shall be issued to the person concerned under the signature of the Manager.

(3) A copy of every order referred to in Clauses (1) aid (2 shall be sent to the Inspector and in case of appointment of the head of institution a copy thereof shall also be sent to the Regional Deputy Director of Education.

Regulation 19: Where any person is appointed as, or any promotion is made on any post of head of institution or ; teacher in contravention of the provisions of this chapter or against any post other Khan a sanctioned post the Inspector shall decline to pay salary and other allowance, if any, to such person where the institution is covered by the provisions of the V.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act 1971, and in other cases shall decline to give any grant for the salary and allowances in respect of such person."

12. From bare reading of the aforesaid provisions as well as the records of the present writ petition, it is an admitted position that the selection of the petitioner for appointment on the post of Principal in the institution has been made after following all procedures, which have been quoted herein above.

13. The only question, which arises for consideration before this Court as to whether the petitioner has possessed the teaching experience certificate, as prescribed under the relevant provisions or not.

14. For appreciating the said question, it is worthwhile to reproduce Appendix-A of Chapter II of the Regulations framed under the U.P. Intermediate Education Act, 1921, as qualification for the post of Principal or head of non-Government recognized Higher Secondary Schools, has been prescribed in aforesaid Appendix A, which reads as follows:

"APPENDIX A

(In reference to Regulation 1 of Chapter II)

Minimum eligibilities for appointment of Heads and teachers in non-Government recognised Higher Secondary Schools.

1. Degree and diploma in concerned subject of any University established or regulated by or under any Central Act, Provincial Act or State Act, which is considered to be a University under Section 3 of the University Grants Commission Act, 1956, or of any such institution specially empowered by any Act of Parliament shall be recognised for the purpose of minimum qualifications prescribed under it.

2. Under it in reference to prescribed qualifications the word "trained" means post graduate training qualification such as L.T., B.T., B. Ed., B. Ed. Sc. or M. Ed. of any University or institution as specified in the earlier para or any equivalent (Degree or Diploma). It also includes departmental A.T.C. and C.T. with minimum teaching experience of 5 years'. J.T.C./B.T.C. Grae teacher shall also be considered to be. C.T. if he has worked in C.T. Grade at least for 5 years'.

Essential Qualifications

Sl. No.	*Name of the post*	*Essential Training Experience*	*Age*	*Desirable qualfications*
2		*3*	*4*	*5*
1	*Head of the*	***(1) trained M.A.***	*Minimu*	

institution	***or M.Sc. or M.Com or M.Sc. (Ag) or any equivalent Post-graduate or any other degree which is awarded by corporate body specified in above-mentioned para one and should have at least teaching experience of four years in classes 9-12 in any training institute or in any institution or university specified in above-mentioned para one or in any degree college affiliated to such university or institution, recognized by board or any institution affiliated from Boards of other State or such other institutions whose examinations recognised by the board, or should the conditions is also that he/she should not be below 30 years of age.*** ***or*** *(2) First or second class postgraduate degree along with teaching experience of ten years in intermediate classes of any recognized institutions or third class post-graduate degree*	*m 30 years*	*with teaching experience of fifteen years, or (3) Trained post-graduate diploma-holder in science. The condition is that he has passed this diploma course in first or second class and have efficiently worked for 15 or 20 years respectively after passing such diploma course.*

Notes: (1) Assistant teachers having at least second class postgraduate degree and specified teaching experience of ten years in intermediate classes of a recognised institution may be exempted from training qualifications, (as per the provisions contained in the Act.)

(2)Teaching experience includes teaching prior to or after teaching or both.

(3)Higher classes means classes from 9 to 12 and experience of teaching these classes is admissible for the post of Headmaster of intermediate college."

15. The aforesaid Appendix provides three alternative qualifications. The first being Trained M.A. or M. Sc. or M. Com. or M. Sc. (Ag) or any equivalent post graduate or any other degree which is awarded by corporate body specified in above mentioned para one and should have at least teaching experience of four years in class 9 to 12 in any training institute or in any institution. The second qualification which has been provided for is that the candidate should have 10 years teaching experience of Intermediate classes of any recognized institution with first or second class Postgraduate degree or third class

Postgraduate degree with 15 years teaching experience. Third qualification, which has been provided for is Postgraduate Diploma holders in Science with the condition that he has passed diploma course in first or second class and has served meritoriously for 15 years or 20 years respectively in any recognized institution after passing such diploma course. These are three alternative qualifications provided for being appointed on the post of Principal under Appendix-A of Chapter- II of U.P. Intermediate Education Act, 1921

16. Therefore, whatever qualifications are prescribed under Appendix-A for the post of Principal apply equally for ad hoc appointment as well as for regular appointment. Merely because a teacher imparts education in one of the recognized but unaided institution (self financed institution), after he satisfies statutorily prescribed qualifications, it cannot be said that he is not a member of the cadre of teacher to be considered for appointment on the post of Principal/Headmaster. From perusal of entire Appendix-A, it is clear that the words **"unaided or aided"** have not been mentioned any where. Only the word **"recognized"** has been mentioned therein. Neither in the impugned decision made by the Regional Level Committee nor in the counter affidavits and supplementary counter affidavit filed on behalf of the State-respondents and respondent-Committee of Management nor it has been placed before this Court, by learned counsel for the respondents, as to in which provisions of law, it has been prescribed for appointment on the post of head of the institution/principal of a non-government higher secondary school **that the candidate concerned must possess the teaching experience certificate of a recognized and aided institution,** when as a matter of fact, in Appendix-A, it has only been prescribed that the candidate **concerned must possess teaching experience certificate of any recognized institution.**

17. In view of the aforesaid, this Court is of the considered opinion that as per Clause (1) of the Appendix-A as referred to in Regulation-1 of Chapter II of the Regulations framed under the U.P. Intermediate Education Act, 1921, the petitioner has possessed the requisite qualification of trained M.A. i.e. M.A. B.Ed. and teaching certificate of a **"recognized"** institution of more than six years. Therefore, the impugned decision taken by the Regional Level Committee appears to be bad in eyes of law and the same is liable to be quashed on this ground alone.

18. Apart from the above, this Court will also examine the issue which has been taken in the impugned decision of the Regional Level Committee, which has been taken in light of the opinion given by the Secretary, U.P. Secondary Education Services Selection Board, Allahabad that as the petitioner has obtained teaching experience certificate from Ganesh Shankar Vidyarthi Balika Intermediate College, Sultanpur Ghosh, Fatehpur, which is a recognized but a self-financed institution, in which posts of part time teachers are sanctioned, therefore, on the basis of said certificate, the appointment of the petitioner for the post of Principal of the institution cannot be approved of.

19. Even otherwise, the Apex Court in the case of **Mohd. Altaf (1) & Others Vs. U.P. Public Service Commission & Another** reported in (2008) 14 SCC 139, has held that apparently there being no

restriction in the statutory rules to the effect that teaching experience must be that of a recognized institution of the U.P. Board of High School and Intermediate Education, without prejudice to the contentions, list of such candidatures also should be prepared and submitted to the Supreme Court. Paragraph no. 6 of the said judgment of the Apex Court, which is relevant, are being quoted herein below:

"6. It is to be stated that the aforesaid Rules nowhere prescribe that teaching experience should be that of a teacher in government college or government-aided or unaided college or institution. Teaching experience may be from any Higher Secondary School or High School or from an institute having Intermediate or higher classes. Further, a Lecturer having three years' teaching experience in CT/LT training college is also eligible."

20. A learned Single Judge of this Court vide judgment and order dated 24th February, 2014 passed in Writ-A No. 11100 of 2014 (Dr. Sanjay Kumar Singh And Another Vs.State Of U.P. Thru Secy. And Another) has opined as follows:

"As per the eligibility criteria the experience could be as Head of a Higher Secondary or normal School or in teaching Intermediate or higher classes or as a lecturer in CT or LT training college. It is also the case of the petitioner that she had appended a certificate duly issued by the College and counter signed by Deputy Registrar, Chaudhary Charan Singh University, Meerut to which the Degree College was affiliated. It is also case of the petitioner that her application form was also duly signed by the Secretary of the institution and also Deputy Registrar of the University.

According to the counsel for the petitioner experience as required under the Rules is for teaching Intermediate or higher classes in a recognised institution. There is no requirement of teaching in an aided institution or government institution. Reliance has been placed upon number of decisions of this Court and also the Apex Court in the case of-

1. Mohd. Altaf (1) and others vs. U.P. Public Service Commission and another, reported in (2008)14 Supreme Court Cases 139,

2. Mohd. Altaf (3) and others vs. U.P. Public Service Commission and another, reported in (2008) 14 Supreme Court Cases 146, and

3. Dr. Deepak Bhatiya and others vs. State of U.P. and others, reported in 2010(1) AWC 48,

to the effect that ***teachers who have experience in an unaided institution or non governmental institution, but have been regularly teaching, cannot be excluded as the qualifications no where prescribes that experience should be in aided institution or government institution."***

21. The same learned Single Judge vide judgment and order dated 7th March, 2014 passed in Writ-A NO. 14349 of 2014 (Dr. Om Prakash Pandey Vs. State of U.P. & Another, has noticed as follows:

"The learned Single Judge has found that the Apex Court in the case of Mohd. Altaf & Ors. vs. Public Service Commission & Anr. In Civil Appeal No.961- 962 of 1999 as also in Contempt Petition (c) No.372/2002 in Civil Appeal No.962/1999, Shamim Khanam vs. K.B. Pandey and another, had taken a view that

teachers working in self-financed institution cannot, as a class, be excluded from consideration. The judgment of the Apex Court was followed by this Court in the case of Dr. Deepak Bhatia vs. State of U.P. and others, 2010(5) ESC 3498 and this Court has held that no distinction can be made in respect of the education recognised by U.P. Board of Secondary Education or the institutions recognised by the C.B.S.E. Or the I.C.S.E. Boards and experience earned by the candidates in self-financed institution are to be taken into consideration."

Another Single Judge while deciding Writ Petition No. 29000 of 2013 Dr. Madhulika Singh Vs. State of U.P. and others has held as under:

"The issue relating to experience in a self financed Intermediate college has already been resolved by the decision of this court in the case of Dr. Deepak Bhatiya and others Vs. State of U.P. and others, writ petition no. 2842 of 2010, decided on 15.7.2010. A copy of the said judgment is annexure 10 to the writ petition.

Apart from this, the ratio of the decision in the case of Dr. Madhulika Singh the petitioner herself in writ petition no. 14582 of 2012 relies on the ratio of a Supreme Court decision in relation to experience.

The petitioner's experience certificate of teaching in a Girls Degree College is on record and her appointment order in the degree college dated 23.1.2004 is Annexure 5 to the writ petition.

A perusal of the said appointment order indicates that the petitioner was appointed on a fixed honoraria basis after approval of the Vice Chancellor of the University. In such circumstances, the said appointment cannot be said to be an appointment either de-hors the rules or not in accordance with law so as to disentitle the petitioner to get the said period of experience counted for the purpose of selection.

The petitioner has described herself as a full time teacher supported by a certificate from the institution. Payment of a fixed honoraria is not necessarily an indicator of full time or part-time experience. Receipt of emoluments are not a substitute for experience.

A teacher getting a fixed salary at times is more devoted towards performance than those who have secured permanent berths. The experience of a teacher in a particular subject can be gauged by performance and the status of involvement in the institution, and not on some subjective assumption. However the genuineness of such experience, like in the present case, would also have to be assessed by the nature of engagement. In the present case the petitioner claims her status of a teacher in a degree college upon approval by the Vice Chancellor of a recognized University.

So far as her experience as a teacher in an Intermediate College is concerned, that experience has also to be examined in accordance with the modes of appointment in an unaided Inter College.

In both cases payment of honoraria cannot be the criteria of rejection of experience. Merely because a teacher has received lower emoluments, though working on an equivalent post, cannot be the ground to reject a candidature. The judgments referred to hereinabove have to be taken into account that relies on the Apex Court decision in the case of Mohd. Altaf and

others Vs. U.P. Public Service Commission and another reported in 2008(14) SCC 139; 2008 (14) SCC 144; 2008 (14) SCC 146 and 2002 (93) FLR 1208.

It is expected that the Board shall now consider the matter more objectively. Thus the reasons given in the impugned order dated 13.3.2013 cannot be sustained. The impugned order is quashed.

The writ petition is allowed with a direction to the respondent Board to consider the experience of the petitioner in the light of observations made hereinabove and pass an appropriate order within six weeks."

22. Lastly, this Court finds substance in the submission made by the learned counsel for the petitioner that the impugned decision has been taken by the Regional Level Committee refusing to accord financial approval to the appointment of the petitioner on the post of principal without affording any opportunity of hearing to the petitioner and the respondent-Committee of Management, which has offered appointment letter to the petitioner. Therefore, the same hits Article 14 and 16 of the Constitution of India, as the same has been made in violation of principles of natural justice.

23. Thus, for the parameter and reasons noted above, this Court is of the considered opinion that the impugned decision taken by the Regional Level Committee, Prayagraj/Allahabad Region, Prayagraj dated 4th September, 2015, which has been communicated by the Regional Joint Director of Education, Prayagraj/Allahabad Region, Prayagraj vide letter dated 4th September, 2015 as also by the District Inspector of Schools, Fatehpur vide letter dated 7th January, 2016 to the respondent-Committee of Management cannot be legally sustained and is hereby quashed. This matter is remitted back to the Regional Level Committee, Prayagraj/Allahabad Region, Prayagraj for decision afresh qua financial approval to the appointment of the petitioner on the post of the principal of the institution of which relevant papers have been sent by the respondent-Committee of Management. While deciding this matter afresh, the Regional Level Committee, Prayagraj/Allahabad Region, Prayagraj shall pass a reasoned and speaking order, in accordance with the provisions of U.P. Intermediate Education Act, 1921 and its rules and regulations framed thereunder as also in light of the observations made above, preferably within three months from the date of production of a certified copy of this order.

24. The present writ petition is allowed subject to the observations made above.

(2022)07ILR A1018
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.07.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Crl. Revision No. 275 of 2021

State of U.P. ...Revisionist
Versus
Rakesh Kumar Verma ...Opp. Party

Counsel for the Revisionist:
G.A.

Counsel for the Opp. Party:
Gyanendra Kumar, Sunil Kumar Singh

Criminal Law - Criminal Procedure Code, 1973 - Section 321 - Withdrawal from prosecution - Principles - Court, while considering the application u/s 321 CrPC, is required to consider whether the withdrawal from prosecution would further cause of justice or not and,

whether it would be in the interest of justice to allow the withdrawal from prosecution - application should show that the Public Prosecutor has applied his independent mind, on the basis of the material placed before him, including the evidence collected by the prosecution during the course of investigation - It is not required for the Public Prosecutor to give in detail reasoning in the application regarding analysis of every evidence available on file - If, the Public Prosecutor is of considered opinion that success of the prosecution appears to be weak and, the withdrawal from prosecution would further the cause of justice and it would be in the public interest, it cannot be said that the Public Prosecutor has not applied his independent mind (Para 24)

Government took a decision giving permission to the Public Prosecutor to withdraw from prosecution - Public Prosecutor filed application u/s 321 CrPC in good faith and, after careful consideration of the material placed before him & considering the evidence collected by the prosecuting agency which appears to be weak and success of the prosecution is not bright - learned Special Judge rejected the application on the ground that the Public Prosecutor did not St. that how the evidence collected by the investigating agency was of weak quality - Held present case has political overtone, case got registered in relation to the political activity of the accused - nature of offence, allegedly committed by the accused is of trivial in nature - Government had taken a decision to withdraw from prosecution and had given consent to the Public Prosecutor - Application filed u/s 321 CrPC by the Public Prosecutor shows that he applied his independent mind and considered facts, material and evidence in the case - application filed u/s 321 CrPC by the Public Prosecutor is allowed (Para 23, 25)

Allowed. (E-5)

List of Cases cited:

1. Bansi Lal Vs Chandan Lal & ors. (1976) 1 SCC 421

2. Sheonandan Paswan Vs St. of Bihar & ors. (1983) 1 SCC 438

3. St. of Punjab Vs U.O.I.ia & ors. (1986) 4 SCC 335

4. S.K. Shukla & ors. Vs St. of U.P. & ors. (2006) 1 SCC 314

5. Vijaykumar Baldev Mishra alias Sharma Vs St. of Maharashtra (2007) 12 SCC 687

6. Rahul Agarwal Vs Rakesh Jain & anr. (2005) 2 SCC 377

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

1. Heard Mr. Anurag Varma, learned Additional Government Advocate, on behalf of revisionist-State, as well as Mr. Sunil Kumar Singh, learned counsel for respondent, and gone through the entire record.

2. This criminal revision under Section 397(1)/497 CrPC has been filed on behalf of the State having been aggrieved by the order dated 10th January, 2020 passed by the Special Judge, M.P. M.L.A./Additional Sessions Judge, Court No. 5, Pratapgarh in Criminal Case No.2 of 2017, arising out of Crime/FIR No.0356 of 2016, under Section 143, 341 and 186 IPC lodged at Police Station Raniganj, District Pratapgarh, rejecting the application filed by the Public Prosecutor under Section 321 CrPC.

3. The learned trial Court has rejected the said application on the ground that the Public Prosecutor filed the application after the State Government passed an order for withdrawal from prosecution in the said case. The Public Prosecutor, in the application, had not mentioned that what facts and evidence he had considered to

come to conclusion to that effect and, he had only mentioned that the order passed by the Government for withdrawing from prosecution was completely legal and in the interest of justice and, he agreed with the decision of the Government having been satisfied himself and from perusal of the record.

4. The facts of the case are that on 11.09.2016, when Sub-Inspector, Mr. Prakash Narain Yadav, In-charge of Police Station Raniganj, District Pratapgarh along with a few constables and driver of the jeep were on duty for maintaining peace in town Raniganj, Dr. R.K. Verma, M.L.A. from Vishwanathganj Constituency, Pratapgarh, along with his supporters, named in the FIR, and around 150 other supporters were sitting on National Highway, staging a protest and, they had blocked the National Highway. They were raising slogans and, were not allowing vehicles to ply on the National Highway. It was said that despite efforts made by the police officers/officials to remove the blockage from the National Highway, the accused, named in the FIR, and supporters of the M.L.A. did not agree and, they became aggressive and, demanded that higher officials should come on the site. It was also said that due to blockage of National Highway there was a jam on both sides of the Highway for kilometers as a result thereof passengers had to face great difficulties, ambulances, carrying patients, were not allowed to ply. This resulted in disturbances of public order. Considering the situation, higher officials, along with force, came there, however, Dr. R.K. Verma and his supporters continued to block the National Highway from 13.10 hours to 19.30 hours on 11.09.2016. It was further said that Dr. R.K. Verma and his supporters had committed offence under Sections 143, 341 and 186 IPC, which should be registered. On the said complaint, the FIR came to be registered.

5. In the present case the complainant is police official. The police, after investigating the offence, filed charge sheet on which cognizance was taken and the accused were summoned by the learned trial Court.

6. It appears that the Government had taken a decision vide Order No.44 WC/Sat-Nyay-5-2018-337 WC/2017 dated 19th March, 2018 whereby the Public Prosecutor had been given permission to withdraw from prosecution.

7. Pursuant to the aforesaid decision of the State Government, the Public Prosecutor had moved application dated 06.04.2018 under Section 321 CrPC to withdraw from prosecution. In the application under Section 321 CrPC the Public Prosecutor had stated that he had applied his independent mind on the facts, evidence and record of the case. It was further stated that after perusing record of the case in detail, the Public Prosecutor was in agreement with the decision taken by the Government to withdraw from prosecution and, found the decision of the Government wholly legal and in the interest of justice. It was further stated that from perusal of the evidence collected against the accused, the Public Prosecutor was of the opinion that evidence was very weak and success of the prosecution was doubtful and, it would be appropriate to withdraw from prosecution and, therefore, the application was filed in the interest of justice and in public interest.

8. As mentioned above, the learned Special Judge, vide its impugned order, has rejected the application under Section 321

CrPC on the ground that the Public Prosecutor did not state that how the evidence collected by the investigating agency was of weak quality. The Public Prosecutor had stated that he was in complete agreement with the decision taken by the Government to withdraw from prosecution, which would show that the Public Prosecutor had applied his independent mind and, decision to move the application under Section 321 CrPC had been taken by him in compliance of the decision taken by the Government, allowing him to move application for withdrawal from prosecution.

9. On behalf of the revisionist, Mr. Anurag Varma, learned Additional Government Advocate, has submitted that the question, which requires to be considered, is whether the Public Prosecutor, while moving the application under Section 321 CrPC, is required to mention in detail his analysis and reasoning for reaching to conclusion that the evidence collected by the prosecution is weak and success of the prosecution appears to be remote and doubtful or it would suffice for him to say that he has perused the case diary, material and evidence collected by the prosecution and, in his view it would be in the interest of justice and in public interest to withdraw from prosecution

10. Section 321 CrPC, as amendment made by the State of Uttar Pradesh, would read as under:-

"S. 321. **Withdrawal from prosecution**. The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, *on the written permission of the State Government to that effect (which shall be filed in Court*) with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,-

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:

Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case hag hot been appointed by the Central Government, he shall not, unless he hag been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."

11. Thus, an application under Section 321 CrPC can be moved by the Public Prosecutor in the State of Uttar Pradesh only on written permission of the State Government to that effect.

12. The scope of Section 321 Cr.P.C., ambit of power and manner in which it has

to be exercised by the Public Prosecutor have been dealt with in several decisions by the Supreme Court. Only a few decisions rendered by the Supreme Court would be apt to quote here to throw light on the scope of Section 321 Cr.P.C. and ambit and manner of exercise of the power by the Public Prosecutor under the aforesaid section. Ultimate authority to allow withdrawal from prosecution vests with the Court and the guiding consideration must always be interest of administration of justice when deciding the question whether prosecution should be allowed to be withdrawn or not.

13. In **Bansi Lal Versus Chandan Lal and others (1976) 1 SCC 421**, the Supreme Court has held in para-5 which, on reproduction, reads as under:-

"5.....Therefore when the Additional Sessions Judge made the impugned order, there was no material before him to warrant the conclusion that sufficient evidence would not be forthcoming to sustain the charges or that there was any reliable subsequent information falsifying the prosecution case or any other circumstance justifying withdrawal of the case against the respondents. Consenting to the withdrawal of the case on the view that the attitude displayed by the prosecution made it "futile" to refuse permission does not certainly serve the administration of justice. If the material before the Additional Sessions Judge was considered sufficient to enable him to frame the charges against the respondents, it is not possible to say that there was no evidence in support of the Prosecution case. The application for stay of the proceeding made before the committing Magistrate cannot also be said to falsify the prosecution case. If the prosecuting agency brings before the court sufficient material to indicate that the prosecution was based on false evidence, the court would be justified in consenting to the withdrawal of the prosecution, but on the record of the case, as it is, we do not find any such justification....."

14. In **Balwant Singh and others Versus State of Bihar (1977) 4 SCC 448**, the Supreme Court, while considering the role of the Public Prosecutor while moving an application for withdrawal from prosecution, has dealt upon the consideration which must weigh for moving such an application. The Public Prosecutor must keep in mind the administration of justice inasmuch as he is discharging the statutory responsibility and while discharging the statutory responsibility the only factor, which should be considered, is administration of justice and nothing else. Relevant portion of paragraph-2 is reproduced hereinbelow:-

"2. .....The statutory responsibility for deciding upon withdrawal squarely vests on the public prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side. The Criminal Procedure Code is the only matter of the public prosecutor and he has to guide himself with reference to Criminal Procedure Code only. So guided, the consideration which must weigh with him is, whether the broader cause of public justice will be advanced or retarded by the withdrawal or continuance of the prosecution. As we have already explained, public justice may be a much wider conception than the justice in a particular case. Here, the Public Prosecutor is ordered to move for withdrawal....."

15. In **Sheonandan Paswan Versus State of Bihar and others (1983) 1 SCC 438,** the Supreme Court has held that before an application is moved under

Section 321 Cr.P.C., the Public Prosecutor needs to apply his mind to the facts of the case independently, without being influenced by outside factors. Relevant paragraphs, on reproduction, read as under:-

"85. In our opinion, the object of Section 321 Cr.P.C. appears to be to reserve power to the Executive Government to withdraw any criminal case on larger grounds of public policy such as inexpediency of prosecutions for reasons of State; broader public interest like maintenance of law and order; maintenance of public peace and harmony, social, economic and political; changed social and political situation; avoidance of destabilization of a stable government and the like. And such powers have been, in our opinion, rightly reserved for the Government; for, who but the Government is in the know of such conditions and situations prevailing in a State or in the country? The Court is not in a position to know such situations.

134. The statutory responsibility for deciding upon withdrawal squarely rests upon the Public Prosecutor. It is non-negotiable and cannot be bartered away. The court's duty in dealing with the application under Section 321 is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent un-influenced by irrelevant and extraneous or oblique considerations as the court has a special duty in this regard inasmuch as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from prosecution. The court's duty is to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice."

16. The Supreme Court has also dealt with in a catena of decisions the manner in which an application for withdrawal from prosecution moved by the Public Prosecutor needs to be considered by the Court.

17. In State of Punjab Versus Union of India and others (1986) 4 SCC 335, the Supreme Court has held that while granting permission to the Public Prosecutor for withdrawal from prosecution, the Court needs to be satisfied itself that the Public Prosecutor has properly exercised statutory function and has not attempted to interfere with the normal course of justice for ulterior purposes. The administration of criminal justice should be the touchstone on which the application under Section 321 Cr.P.C. needs to be decided. Relevant portion of paragraph-1, on reproduction, reads as under:-

"1. ..... The ultimate guiding consideration while granting a permission to withdraw from the prosecution must always be the interest of administration of justice and that is the touchstone on which the question must be determined whether the prosecution should be allowed to withdraw. The Public Prosecutor may withdraw from the prosecution of a case not merely on the ground of paucity of evidence but also in order to further the broad ends of public justice, and such broad ends of public justice may well include appropriate social, economic and political purposes."

18. Similar views have been reiterated in **Sheonandan Paswan Versus State of Bihar and others (1987) 1 SCC 288** by the

Supreme Court. Paragraph-73, on reproduction, reads as under:-

"73. Section 321 gives the Public Prosecutor the power for withdrawal of any case at any stage before judgment is pronounced. This presupposes the fact that the entire evidence may have been adduced in the case, before the application is made. When an application under Section 32I Cr.P.C. is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. To contend that the court when it exercises its limited power of giving consent under Section 32I has to assess the evidence and find out whether the case would end in acquittal or conviction, would be to rewrite Section 321 Cr.P.C. and would be to concede to the court a power which the scheme of Section 321 does not contemplate. The acquittal or discharge order under Section 321 are not the same as the normal final orders in criminal cases. The conclusion will not be backed by a detailed discussion of the evidence in the case of acquittal or absence of prima facie case or groundlessness in the case of discharge. All that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The court, after considering these facets of the case, will have to see whether the application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given. In this case, on a reading of the application for withdrawal, the order of consent and the other attendant circumstances, I have no hesitation to hold that the application for withdrawal and the order giving consent were proper and strictly within the confines of Section 321 Cr.P.C."

19. In **S.K. Shukla and others Versus State of U.P. and others (2006) 1 SCC 314**, the Supreme Court has held that the Public Prosecutor cannot work like a post box. He needs to act objectively being an officer of the Court and it is always open to the Court to reject the prayer if it is not guided in the interest of administration of justice. Relevant portion of paragraph-32, on reproduction, reads as under:-

"32. .....The Public Prosecutor cannot act like a postbox or act on the dictates of the State Government. He has to act objectively as he is also an officer of the court. At the same time the court is also not bound by that. The courts are also free to assess whether a prima face case is made or not. The court, if satisfied, can also reject the prayer."

20. In **Vijaykumar Baldev Mishra alias Sharma Versus State of Maharashtra (2007) 12 SCC 687** the Supreme Court has held as under:-

"12. Section 321 of the Criminal Procedure Code, 1973 provides for withdrawal from prosecution at the instance of the public prosecutor or Assistant public prosecutor. Indisputably therefor the consent of the Court is necessary. Application of mind on the part of the Court, therefore, is necessary in regard to the grounds for withdrawal from the prosecution in respect of any one or more of the offences for which the appellant is tried. The provisions of TADA could be attracted only in the event of one or the other of the four 'things' specified in Nalini (supra) is found applicable and not otherwise. The Review Committee made recommendations upon consideration of all relevant facts. It came to its opinion upon considering the materials on record. Its recommendations were based also upon the legality of the charges under TADA in the fact situation obtaining in each case. It

came to the conclusion that in committing the purported offence, the appellant inter alia had no intention to strike terror in people or any section of the people and in fact the murder has been committed only in view of group rivalry and because the parties intended to take revenge, the provisions of the TADA should not have been invoked.

13. The Public Prosecutor in terms of the statutory scheme laid down under the Code of Criminal Procedure plays an important role. He is supposed to be an independent person. While filing such an application, the public prosecutor also is required to apply his own mind and the effect thereof on the society in the event such permission is granted."

21. In **Rahul Agarwal Versus Rakesh Jain and another (2005) 2 SCC 377**, the Supreme Court has held that while considering an application moved under Section 321 Cr.P.C., the Court should consider all relevant circumstances and find out whether the withdrawal from prosecution advances the cause of justice. The withdrawal can be permitted only when the case is likely to end in an acquittal and continuance of the case would only cause severe harassment to the accused. Relevant para-10 is extracted hereunder:-

"10. From these decisions as well as other decisions on the same question, the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal of prosecution. The discretion under Section 321, Code of Criminal Procedure is to be carefully exercised by the court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the State for redressing their grievance. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished. Punishing the person who perpetrated the crime is an essential requirement for the maintenance of law and order and peace in the society. Therefore, the withdrawal of the prosecution shall be permitted only when valid reasons are made out for the same."

22. This Court vide judgment and order dated 12th December, 2013 passed in writ petition bearing Writ Petition No. 4683 (M/B) of 2013 "Ms. Ranjana Agnihotri and others Versus Union of India' while dealing the scope, power and ambit under Section 321 Cr.P.C. has held in paras-116 and 117 which, on reproduction, read as under :-

"116. In view of above, the Public Prosecutor is the final authority to apply mind and take a decision whether an application for withdrawal of a criminal case is to be moved or not. For that, option is open to him to receive necessary instructions or information from the Government to make up mind on the basis of material made available. The Public

Prosecutor cannot act like post box or at the dictate of the State Government. He has to act objectively as he is also an officer of the court. It is also open for the appropriate Government to issue appropriate instruction to him but he has to act objectively with regard to the withdrawal of cases. But the instruction sent by the government shall not be binding and it is the Public Prosecutor who has to take a decision independently without any political favour or party pressure or like concerns. The sole object of the Public Prosecutor is the interest of administration of justice. Power conferred on Public Prosecutor to take independent decision for the interest of administration of justice is not negotiable and cannot be bartered away in favour of those who may be above him on administrative side. He is stood to be guided by letter and spirit of Code of Criminal Procedure only and not otherwise. Neither the Public Prosecutor nor the Magistrate can surrender their discretion while exercising power at their end.

117. Similarly, the Court has duty to protect the administration of criminal justice against possible abuse or misuse by the executive by resort of the provisions contained in Section 321 Cr.P.C. The court has to record a finding that the application moved by Public Prosecutor is in the interest of administration of justice and there is no abuse or misuse of power by the Public Prosecutor or the Government. In case an application is allowed, it must be recorded by the Court that the application has been moved in good faith to secure the ends of justice and not in political or vested interest. The court has final say in the matter and the decision should be free and fair with independent exercise of mind in the interest of public policy and justice. It must ensure that the application is not moved to thwart or stifle the process of law or suffers from such improprieties or illegalities as to cause manifest injustice if consent is given."

23. In the present case, from reading of contents of the application moved by the Public Prosecutor, it is evident that the Public Prosecutor filed application under Section 321 CrPC in good faith and, after careful consideration of the material placed before him. The Public Prosecutor has stated in the application that he has considered the evidence collected by the prosecuting agency which appears to be weak and success of the prosecution is not bright. It has been further submitted that the application has been moved in good faith, in the interest of justice as well as in public interest. The present case, in which the application has been moved, has political overtone. The case got registered in relation to the political activity of the accused. The nature of offence, allegedly committed by the accused is of trivial in nature. The prosecution has remained pending for quite some time before the Court. In view thereof, the Government had taken a decision to withdraw from prosecution and had given consent to the Public Prosecutor, after considering the material, as mentioned above, to move application.

24. The Court, while considering the application under Section 321 CrPC, is required to consider whether the withdrawal from prosecution would further cause of justice or not and, whether it would be in the interest of justice to allow the withdrawal from prosecution. The application should show that the Public Prosecutor has applied his independent mind, on the basis of the material placed before him, including the evidence

collected by the prosecution during the course of investigation. It is not required for him to give in detail reasoning in the application regarding analysis of every evidence available on file. If, he is of considered opinion that success of the prosecution appears to be weak and, the withdrawal from prosecution would further the cause of justice and it would be in the public interest, it cannot be said that the Public Prosecutor has not applied his independent mind.

25. Considering the law on the subject as well as the facts and circumstances of the case, this Court does not agree with the finding recorded by the trial Court that the Public Prosecutor had not applied his independent mind, but he was guided by the State Government decision to withdraw from prosecution and, the impugned finding does not appear to be correct one. The application dated 06.04.2018 under Section 321 CrPC filed by the Public Prosecutor would suggest that the had applied his independent mind and considered facts, material and evidence in the case. This Court is of the considered view that the view of the trial Court is not correct one and, therefore, the impugned order dated 10.01.2020 is hereby set-aside. The revision stands allowed. The application dated 06.04.2018 filed under Section 321 CrPC by the Public Prosecutor is allowed.

(2022)07ILR A1027
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.07.2022

BEFORE

THE HON'BLE OM PRAKASH-VII, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Government Appeal No. 2580 of 1985

The State of U.P. ...Appellant
Versus
Saheb Singh & Ors. ...Respondents

Counsel for the Appellant:
Sri A.G.A., Sri Vinay Singh

Counsel for the Respondents:
Sri S.K. Agarwal, Sri Alok Ranjan Mishra, Sri Keshav Sahai, Sri Narendra Singh Chahar, Sri G.S. Chaturvedi (Senior Adv.)

Criminal Law - Indian Penal Code. 1860 - Section 302-Accused attacked informant's brother due to old enmity-witness ran towards the place of incidence-injured succumbed to death-PW-1, PW-2 and PW-4 proved version of F.I.R.-Pw-5 proved dying declaration-day light occurrence- no material contradictions-corroborated by medical evidence-non examination of I.O. will not vitiate the prosecution case-accused constituted unlawful assembly and attacked on deceased with common intention and knowledge-prosecution has succeeded to prove guilt beyond doubt -impugned judgment and order of acquittal deserves interference.

Appeal allowed. (E-9)

List of Cases cited:

1. Yogesh Singh Vs Mahabeer Singh & ors. AIR 2016 SC 5160

2. St. of U.P. Vs Jagdeo & ors. (2003) 1 SCC 456

3. Munigadappa Meenaiah Vs St. of Andhra Pradesh (2008) 11 SCC 661

4. Brahma Swarup & ors. Vs St. of U.P., 2004 (2) JIC 827 (All)

5. Hardev Singh & ors. Vs Harbhej Singh & ors. 1996 (4) Crimes 216 (SC)

6. St. of U.P. Vs Naresh & ors. (2011) ACR 370

7. Surjit Singh Alias Gurmit Singh Vs St. of Pun. 1993 Supp (1) SCC 208

8. Majju & anr. Vs St. of M.P. 2002 SCC (Cri) 597

9. Subodh Nath & anr. Vs St. of Tripura (2013) 4 SCC 122

10. Marwadi Kishor Parmanand & anr. Vs St. of Gujarat (1994) 4 SCC 549

11. Hayat Singh Bora Vs St. of Uttarakhand [2012 (77) ACC 615]

12. St. of U.P. Vs Shane Haidar & ors. 2015 (1) J.Cr.C. 775

13. Rohtash Kumar Vs St. 25 of Har., Criminal Appeal No. 896 of 2011

14. Bipin Kumar Mondal Vs St. of W. B.l (2010) 12 SCC 91

15. Uma Shankar Vs St. of U.P. [2015 (89) ACC 421]

16. Paras Yadav & ors. Vs St. of Bihar, 1999 (2) SCC 126

17. St. Through Reference Vs Ram Singh & ors., Death Sentence Reference No. 6/2013,

18. Pakala Narayana Swami v. King Emperor [(1938-39) 66 IA 66:AIR 1939 P.C. 47]

19. St. of Raj. Vs Bhup Singh (1997) 10 SCC 675

20. Sudhakar Vs St. of M.P., (2012) 7 SCC 569

21. Lakhan Vs St. of M.P. (2010) 8 SCC 514

22. Meharaban & ors. Vs St. of M. P., (1996) 10 SCC 615

23. St. of Rajasthan V. Champa Lal, (2009) 12 SCC 571

24. St. of M.P.Vs Dal Singh & ors., (2013) 14 SCC 159

25. Gulzari Lal Vs St. of Har., (2016) 4 SCC 583

26. Vithal Vs St. of Mah., 2007 Cr.L.J. 317

27. Ashabai & anr. Vs St. of Mah., (2013) 2 SCC 224

28. Dhanaj Singh alias Shera & ors. Vs St. of Pun., 2004 Cri.L.J., 1807

29. Ram Gulam Chaudhury & ors.Vs St. of Bihar, AIR 2001 SC 2842

30. Behari Prasad & ors. Vs St. of Bihar, (1996) 2 SCC 317

31. Ganga Singh Vs St. of Madhya Pradesh, (2013) 7 SCC 278,

32. Abhilakh Singh Vs St. of U.P., [2013 (82) A.C.C. 110]

33. Krishna Mochi & ors. Vs St. of Bihar, 2002 (2) J.Cr.C., 123

34. Sahabuddin Vs St. of Assam, 2013 Cr.L.J. 1252

35. Bakhsis Singh Vs St. of Pun., AIR, 1957 SC 904

36. Narendra Nath Khaware Vs Parasnath Khaware, (2003) 5 SCC 488

37. Shivappa & ors. Vs St. of Karn., 2008 CRI. L.J. 2992,

38. Hardev Singh Vs Harbhej Singh & ors. 1996 (4) Crimes 216

(Delivered by Hon'ble Narendra Kumar Johari, J.)

1. The present government appeal has been filed by the State seeking leave to appeal against the judgment and order dated 22.06.1985, passed by learned IIIrd Additional Sessions Judge, Meerut in S.T. No.577/1983 (State Vs. Sahab Singh and others), arising out of Case Crime No. 4 of 1983, under Sections 147, 148, 323, 324, 307, 302 IPC, Police Station Chhaprauli, District Meerut. By the impugned judgment and order, learned trial court acquitted the

accused-respondents Sahab Singh, Charan Singh, Dharamvir, Dhara Singh and Shri Pal for the offence punishable under Sections 323/149, 302/149, 147 IPC.

2. In brief, the case of the prosecution was that the informant Mahak Singh lodged an F.I.R. in Police Station Chhaprauli, District Meerut on 12.01.1983 at 18.10 hours stating that informant along with his brother Satyapal Singh was returning from his sugar cane field on 12.01.1983 at about 3.00 P.M. On the way, as he reached near the sugarcane field of Zilley Singh, the accused persons Sahab Singh, Charan Singh, Dharamvir, Dhara Singh and Shri Pal, who were hidden in the sugar cane harvest of Zilley Singh's field, came out from the filed caught Satyapal Singh and started assaulting him. All the accused persons had beaten him badly using the weapons Lathies and Kharpali (a sharp edged weapon). Informant, who was also returning from his field and following Satyapal Singh from some distance, seeing the occurrence, ran towards them by raising alarm to rescue his brother. Looking his activities accused Saheb Singh attacked on him with Danda. Having heard the voice of informant, Ranvir, Chandan and Baljeet, who were present in their fields, moved towards the place of occurrence to save them. As the witnesses reached on the spot, accused persons made their escape good. The accused persons had attacked on his brother, due to old enmity.

3. Injured/victim Satyapal was brought from the place of occurrence to his house by bullock cart and thereafter to Police Station by bus. The police registered F.I.R. on the basis of above written Tehreer, scribe by Krishna Pal Singh. The Investigating Officer, considering the serious condition of injured, recorded the statement of Satya Pal Singh under Section 161 Cr.P.C. at Police Station. Thereafter, the injured Satyapal Singh was sent to Chaprauli Hospital for treatment. Since the doctor was not available there, hence the injured moved to Primary Health Center, Baraut from Chaprauli, but on the way, injured Satyapal Singh succumbed to his injuries. Injured Mahak Singh got medically examined at Primary Health Center, Baraut at about 10.10 P.M.

4. Pursuant to the F.I.R., investigation of the case was entrusted to Station Officer Rajendra Singh, who prepared the Inquest report, send the dead body of Satyapal Singh for Post Mortem, inspected the spot, sketched the site map and recorded statement of the witnesses under Section 161 Cr.P.C. The Investigating Officer also collected the blood stained and plain soil from the place of occurrence. On the pointing out of the accused Sahab Singh, the Investigating Officer recovered three blood stained lathies from the Gher of his residential house, prepared the Fard and submitted the police report under Section 173 (2) Cr.P.C. before the Court concerned against all the accused persons.

5. Learned trial court framed the charges under Section 323 read with 149, 302 read 149 and 147 IPC against accused persons, who denied and abjured the charges, pleaded not guilty and preferred the trial.

6. On behalf of the prosecution Mahak Singh as PW 1, Chandan Singh as PW 2, Pheru as PW 3, Baljit as PW 4, Kalu Ram S/o Hardan Singh as PW 5, Dr. T. Raj Sharma as PW 6, Dr. V.P. Gupta as PW 7, Constable Sohanpal Singh as PW 8, Constable Budh Prakash as PW 9, R.S. Kaushik as PW 10 and constable Sukhpal

Singh as PW 11 have recorded their evidence.

7. PW 1, Informant Mahak Singh, has corroborated the F.I.R. version in his evidence and submitted that he was the eye witness of the occurrence. At the time of attack, accused Dhara Singh was having Kharpali in his hand and other accused persons were carrying Lathies. They started beating Satya Pal with the weapons which were carried by them in their hands. At that time, he was approximately 25 steps behind his brother. Having seen the occurrence he shouted the voice for help. After sustaining the injuries, Satya Pal had fallen down. Informant also received injuries of Lathi/Danda and had fallen down on earth due to his injuries. After occurrence, Mahipal carried them at his residence by bullock cart. Informant dictated his application to Krishna Pal and handed over the application/Tehreer to Police. They were sent by Police to Chaprauli Hospital for treatment but the doctor was not available there. Thereafter, they were carried to Baraut Hospital. On the way, injured Satya Pal succumbed to the injuries sustained by him. At Baraut Hospital, informant got medically examined. The witness also discribed about the motive of occurrence that approximately 8 months prior to the occurrence his brother Satya Pal was coming with bullock cart. Accused Dhara Singh was also coming behind him by a tractor and was trying to overtake the bullock cart of Satya Pal but he could not succeed. Due to the above reason some quarrel took place between accused Dhara and Satya Pal and for the aforesaid reason accused Dhara developed the enmity with Satya Pal. Co-accused persons Sahab Singh, Dharamvir and Charan Singh are the sons of accused Dhara Singh and Shri Pal is his nephew.

8. PW 2 Chandan Singh has stated in his oral evidence that on the date of occurrence, upon hearing the voice of informant, he reached on the spot and had seen that accused Dhara, with Kharpali and other accused persons with lathies were beating Satya Pal. When Mahak Singh (informant) intervened and tried to rescue his brother, he was also beaten by lathies. The injured Satya Pal was taken to his village by bullock cart.

9. PW 3 Feru deposed that approximately 7-8 months prior to the murder of Satyapal, the witness was going towards his field with Ranveer. On the way, he saw that Satyapal was coming with Buggi (bullock cart), behind him accused Dhara was coming by his tractor. Satyapal had carried paddy in his bullock cart. Dhara was saying to give him pass but Satyapal refused as the passage was as narrow as there was no proper room to overtake the bullock cart. Due to the reason some hot talk took place in between them and also they scuffled. The witness PW 3 and Ranveer interfered and mediated to subside the dispute. Thereafter, both the persons moved towards the village abusing one another.

10. Witness PW 4 Baljeet Singh deposed that on the date of occurrence when the accused persons were beating Satyapal by Khaprali and lathies, the witness reached on the spot. He had also seen that accused Sahab Singh gave lathi blow to Mahak Singh also. He also stated that Satyapal had received several injuries which have caused profused bleeding.

11. Kalu Ram who had been examined by the prosecution as PW-5 has stated that on 12.01.1983 Investigating Officer/S.I. had recorded the statement of

injured Satyapal in his presence. He further stated that injured had described the details of occurrence, name of accused persons and weapons to S.I. who recorded the statement and read over the same to injured. The witness further had stated that he also signed the statement as witness. The witness PW 5 had verified his signature on dying declaration and proved the same.

12. PW 6 Dr. T. Raj Sharma deposed and proved the Post Mortem Report of deceased Satyapal. This witness had conducted autopsy of deceased Satyapal. He had found approximately 10 injuries on the body of deceased Satyapal and stated that all the injuries sustained by deceased were sufficient, in normal course, to cause death. The incised wounds have been caused by Kharpali and contusions as a result of Lathi blows.

13. As according to the postmortem report, in autopsy the injuries found on the body of deceased Satya Pal were as under :-

"(i) Multiple contusion in right side of arm, forearm and in palm in area of 58 cm. x 16 cm. extended from 9 cm. below right shoulder joint to base of all the fingers with fracture of radial bone.

(ii) Multiple incised wound in dorsal surface right arm in area of 8 cm. x 1.5 cm. measuring from 2 cm. x .5 cm x muscle deep to 1 cm. x .5 cm. x muscle deep just above the right elbow joint.

(iii) Multiple contusion in back of right side of gluteal region in area of 36 cm. x 30 cm. at the middle of right gluteal region.

(iv) Multiple contusion in back and front of right side thigh leg and foot in area of 50 cm. x 18 cm., 30 cm. below the right hip joint.

(v) Multiple incised wound in front of right side of leg in area of 7 cm. x 2 cm. measuring from 2.5 cm. x 0.5 cm. into bone deep to 1.5 cm. X .5 cm. into muscle deep 10 cm. above the right ankle joint.

(vi) Multiple contusion in back and front of left side of leg and ankle in area of 24 cm. x 18 cm., 8 cm. below the left knee joint.

(vii) Multiple incised wound in front of left leg in area of 10 cm. x 3 cm. measuring from 2 cm. x .5 cm. x bone deep to 1 cm. x .5 cm. x muscle deep, nine cm. above the left ankle joint.

(viii) Multiple contusion in back of left side of gluteal region in area of 30 cm. x 16 cm. at the middle of left gluteal region.

(ix) Multiple contusion with traumatic swelling in dorsal surface of left forearm hand palm in area of 28 cm. x 10 cm. 5 cm. below the left elbow joint to base of all the fingers of left palm.

(x) Incised wound in dorsal of left forearm .5 cm. x .5 cm. x muscle deep at the level of left elbow joint."

14. PW 7 Dr. V.P. Gupta proved the injury report of informant Mahak Singh and stated that he had inspected the injuries of Mahak Singh and had prepared his medical examination report.

15. The medical examination report of injured Mahak Singh evidents that he had undergone medical examination on 12.01.1983 at 7:10 p.m. at P.H.C., Baraut, where following injuries had been found on his body:-

"1. Red contusion upon right forearm middle on flexor aspect 3 cm. x 2 cm. It is 14 cm. above from merist of right.

2. Abrasion on right deltoid region 3 cm. x .5 cm. long. It is 8 cm. below from top of right shoulder.

3. Lenear abrasion on back middle on both sides 11 cm. x 1 cm. long. It is transverse in line. It is 19 cm. below from top of reverth and clavicle vertibre."

As according to the Doctor's opinion, the injuries were simple in nature and caused by some hard object. The duration of injuries were fresh.

16. PW 8 Constable Sohanpal Singh stated that he had prepared the Chik report and G.D. entry on the basis of Tehrir given by informant Mahak Singh at Police Station Chhaprauli.

17. PW 9 Constable Budh Prakash deposed that he had carried the dead body along with relevant papers to doctor for post mortem.

18. PW 10 S.I. Shri R.S. Kaushik deposed that he had prepared the inquest report of the deceased and sent the dead body to P.H.C. Bagpat for post mortem through constable Budh Prakash and Veersen.

19. PW -11 Constable Sukhpal Singh, in absence of Investigating Officer, proved the investigation proceedings, (which were carried by Investigating Officer Rajendra Singh), the hand writing of Constable Sohan Pal (who had prepared the Chik report and made the G.D. entry) and the recovery memos of three blood stained lathies and soils blood stained as well as plain.

20. After conclusion of prosecution evidence, the trial court recorded the statements of accused persons under Section 313 Cr.P.C., in which the accused persons denied their implication in the offence, stated that the witnesses had given false evidence against them. They further stated that they had been implicated in the case due to Partiandi of the village. They denied the facts mentioned in the F.I.R., oral as well as documentary evidence of prosecution. They also denied the factum of recovery of lathies. No oral evidence has been produced as defence witness, in support of their defence.

21. After considering the facts and circumstances as well as the evidence on record, learned Trial court acquitted the accused persons from the charges levelled against them. Aggrieved by the acquittal of accused persons, the prosecution preferred the instant appeal before this Court.

22. Learned A.G.A. submitted that the trial court has committed material illegality in acquitting the accused/respondents from the charges. Learned trial Court did not appreciate the evidence in accordance with the legal principles. The prosecution had succeeded in proving the guilt of accused persons, that too, without any shadow of doubt. There were injured witness as well as eye witness account of the occurrence. There was consistency in prosecution evidence. Since Satya Pal had died before the medical treatment, therefore, his statement under Section 161 Cr.P.C. deserve to be treated as his dying declaration, and was liable to be considered as trustworthy. The F.I.R. version is supported by the statement of reliable witnesses as well as documentary evidence including medical evidence. In the light of evidence of eye witnesses, if the Investigating Officer has not come forward to record his evidence, that can not cause any adverse effect on the prosecution case.

Learned trial court has wrongly interpreted the above points and acquitted the accused persons from the charges. Hence, the judgment and order passed by the trial court, being based on surmises and conjuncture, is liable to be set aside and instant appeal deserves to be allowed. The accused persons be punished for the crime committed.

23. In reply, learned counsel for the accused-respondents, referring the findings of trial court, submitted that the prosecution witnesses were not reliable. There were discrepancies in documentary as well as oral evidence of witnesses. Motive of the occurrence has not been proved. There is subsequent improvement in the prosecution evidence. Dying declaration has not been recorded in accordance with law. The manner, by which, it was recorded by the Investigating Officer makes it inadmissible in evidence. The Investigating Officer has not been produced by prosecution to adduce his evidence and the Chik writer has not completed his cross examination. The evidence of PW 11 was not admissible. Taking into consideration the above inherent defects, the trial court has rightly acquitted the accused persons as the prosecution had failed to prove the charges of offence against the accused persons. There is no illegality or infirmity in the judgment of the trial court. The instant appeal has no force and is liable to be dismissed.

24. We have heard the arguments of both the sides and perused the record thoroughly. The appellate court is competent and has jurisdiction to reassess the evidence on record in the light of facts and circumstances of the case.

25. The FIR of the occurrence has been lodged at Police Station Chhaprauli, District Meerut on 12.01.1983 at 18:10 hours for the offence which took place on the same day at 3:00 p.m. The distance from the place of occurrence to police station has been shown as 6 miles. It has also been shown that after the occurrence, the injured persons were brought at his residence by bullock cart first. As according to evidence of PW-1 the distance from place of occurrence to his residence was approximately 6-4 furlong, then after that by Bus the victim was brought to Police Station. Taking into consideration the severity of injuries, distance and mode of transportation, in the absence of any evidence otherwise, it can be concluded that the FIR of the offence was lodged with due promptness and without any unnecessary/undue delay.

26. Learned A.G.A. has submitted that prosecution had produced 11 witnesses, out of them, 5 were the witnesses of fact. Apart from that, the documentary evidence produced by prosecution, all were able to prove the case against accused persons without any shadow of doubt, but learned trial Court failed to consider the prosecution evidence in accordance with law.

27. In reply, learned counsel for the accused-respondents has submitted that witness PW-1 Mahak Singh is the real brother of deceased Satya Pal. He is family member as well as highly interested witness, therefore, learned trial court has rightly concluded that his testimony is not reliable.

28. As according to fact and evidence on record, the witness PW 1 although is real brother of deceased Satya Pal, yet at the time of occurrence, his presence alongwith Satya Pal is not doubtful. The FIR of the occurrence

as well as all the prosecution witnesses have categorically shown his presence at the place of occurrence. The statement of PW 1, so far as his presence, role of accused persons and injuries sustained by him and Satya Pal are concerned, have been corroborated by oral evidences of witnesses PW 2, PW 3 and PW 7 along with his injury report and post mortem report of Satyapal, which have been proved as Exts. Ka-3 and Ka-4. Witness PW-1 had stated in his examination-in-chief that when he tried to rescue his brother, he was also beaten by Lathi Danda. He fell down in drain (Naali) due to his injuries. Doctor had medically examined him in Baraut Hospital at about 8'O clock. Witness PW 4 Baljit, who had reached at the place of occurrence hearing the alarm of PW 1 was the eye witness of occurrence. He had stated in his chief examination as well as in cross-examination that when he reached on spot he had seen that the accused at the spot had beaten Satyapal, when Mahak Singh raised an alarm to save his brother, thereafter, he too was beaten by accused Sahab Singh. The witness PW-7 Dr. V.P. Gupta, who had examined him after the occurrence and had prepared his medical examination report, has proved the same in his evidence. The witnesses PW 1, PW 4 and PW 7 had been cross-examined by counsel for defence in length but nothing otherwise could be revealed. The FIR itself, which has promptly been registered, also contains the fact that when informant Mahak Singh tried to save his brother Satya Pal, accused Sahab Singh beaten him by wooden stick (Danda). Nothing is on record which may prove that informant had not received the aforesaid injuries during the course of occurrence.

29. So far as the evidentiary value of such a relative eye witness is concerned, the Hon'ble Apex Court in the case of ***Yogesh Singh Vs. Mahabeer Singh & Others AIR 2016 SC 5160*** the Hon'ble Supreme Court has held in para 28, which reads as under :-

"28. A survey of the judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52) : (AIR 2015 SC (Supp) 1991)."

30. In the case of ***State of U.P. Vs. Jagdeo & Others (2003) 1 SCC 456***, the Apex Court has held in para 7, which reads as under :-

"7. There are three eye-witnesses of the incident, that is, P.W.1 Ramraj son of the deceased Ram Lachhan, P.W.2 Firangi and P.W.4 Sudama, who is an injured witness and whose son Rajendra is the other deceased. The High Court doubted the evidence of these eye-witnesses merely on the ground that they had motive in supporting the prosecution case. Legally speaking, we are unable to

accept this reasoning. Most of the times eye-witnesses happen to be family members or close associates because unless a crime is committed in a public place, strangers are not likely to be present at the time of occurrence. Ultimately, eye-witnesses have to be persons who have reason to be present on the scene of occurrence because they happen either to be friends or family members of the victim. ***The law is long settled that for the mere reason that an eye- witness can be said to be an interested witness, his/her testimony need not be rejected.*** *For the interest which an eye-witness may have, the court can while considering his or her evidence exercise caution and give a reasonable discount, if required. But this surely cannot be reason to ignore the evidence of eye-witnesses.* ***The High Court was clearly in error in not considering the evidence of eye-witnesses at all in the present case for the reason that they were interested witnesses. As seen earlier, one of the eye-witnesses in an injured person who received injuries in the incident itself.*** *He was rather seriously injured. If he was not present at the time of occurrence, wherefrom he received the injuries, would be an obvious question. In fact, P.W.4 is also the father of the deceased Rajendra. It is common in villages that male members of a family sleep together in the open during summer season. Sleeping near the tube-well is understandable because that would lend some coolness to the atmosphere. The High Court totally ignored the other aspect of the evidence of the eye-witnesses. That is, the evidence was consistent and the version of the witnesses tallied with each other. In our view, there was no reason to discard the evidence of the eye-witnesses. This evidence is clinching and it clearly implicates the accused persons. There is no reason to doubt the veracity of the evidence of at least P.W.1 and P.W.4 and that is sufficient to convict the accused persons."*

31. In the case of ***Munigadappa Meenaiah Vs. State of Andhra Pradesh (2008) 11 SCC 661***, the Apex Court has held in para 10, which reads as under:-

"10. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version.

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

32. Also in the case of ***Brahma Swarup & Others Vs. State of U.P., 2004 (2) JIC 827 (All)*** this Court has expressed the same view.

33. In the case of ***Hardev Singh & Others Vs. Harbhej Singh & Others 1996 (4) Crimes 216 (SC)***, the Hon'ble Supreme Court has held that the evidence of close relations who testified facts relating to occurrence be not rejected merely on ground that they happened to be relatives. Evidence of such witnesses be scrutinized very carefully.

34. In the case of ***State of U.P. Vs. Naresh & Others (2011) ACR 370***, the Apex Court has held that mere relationship

cannot be a factor to affect credibility of a witness. Evidence of a witness cannot be discarded solely on the ground of his relationship with victim of offence. Contrary to the same the finding of trial Court is perverse.

35. In the case of ***Surjit Singh Alias Gurmit Singh Vs. State of Punjab 1993 Supp (1) SCC 208*** the Hon'ble Apex Court has held in para 9, which reads as under:-

"9. To be fair to the learned counsel for the appellant, we may mention that he ventured to argue that the evidence regarding the marrying of the crime bullet shells with the pistol recovered was not convincing, mor so when the .303 pistol, the alleged crime weapon, was recovered from Gurmit Singh, co-accused. It is noteworthy that Gurmit Singh, co-accused, stands convicted under the Arms Act for being in possession of that pistol. This aspet of the case cannot be a substitute to the eyewitness account or the plea taken by the appellant. Had the presence of the two witnesses, that is, Jaswinder Kaur PW5 the Taljit Singh PW2 at the scene of the occurrence been doubted, the recovery of the weapon of offence and its connection with the empty shells recovered at the spot would have assumed some significance. When the two eyewitnesses are natural witnesses of the crime, one being the young wife who would normally be in the company of the husband at 10.30 p.m. on a summer night and the other the newphew of the deceased who had suffered grievous injuries in the occurrence and was thus a stamped witness, not much importance is to be attached to this aspect of the case. The venture is futile."

36. In the case of Majju & Another Vs. State of M.P. 2002 SCC (Cri) 597, the Apex Court has held in para 5, which reads as under :-

"5. The counsel for the appellants contended that the evidence adduced by the prosecution was interested and therefore, it cannot be relied upon. It is important to note that the witnesses examined on the side of the prosecution were ***all injured in the incident. PW6 Ramchandra Sustained a grievous injury, in the sense that he lost one of his teeth. The other witnesses also sustained injuries. That is proved by the various medical certificates issued by the doctor who examined them. Therefore, the presence of these witnesses at the place of occurrence cannot be suspected. All these witnesses gave evidence to the effect that when they along with deceased Bihari Lal were coming from the temple after performing some ceremony, the accused surrounded and attacked them. We do not find any infirmity in the evidence of these witnesses."***

37. In the case of ***Prithvi (Minor) Vs. Mam Raj & Others (2004) 13 SCC 279***, the Apex Court held that the fact that eyewitness sustained serious injuries in the incident in question the Hon'ble Apex Court held that giving credence to the prosecution story that he was at the spot when the offence was committed.

38. The informant Mahak Singh (P.W. 1) was an injured witness, who had received three injuries soon after the occurrence had gone to Police Station along with the injured Satya Pal, his medical examination has been done promptly and has been proved by witness PW 7. There is no evidence regarding any deliberations or any conspiracy before lodging the FIR, against accused persons leaving real assailant/culprit, if any. Five

persons have been named in the FIR as accused persons assigning role to attack on deceased and informant with Lathi, Danda and Kharpali. The deceased Satya Pal had received ten injuries. No suggestion has been given by counsel for defence to witness PW 1 in his cross examination indicating the fact showing any deliberation of PW 1 with any other person to implicate the accused persons falsely.

39. Although witness P.W. 1 is real brother of deceased yet there is no discrepancy in his evidence on the point of occurrence. A close scrutiny of evidence of P.W. 1 indicates that there is no discrepancy in his statement on the material points. Neither any contrary evidence has been produced nor any such contradiction has been pointed out in prosecution evidence, which may prove the facts otherwise or may place the ground to disbelieve the testimony of injured witness PW 1. Hence, in the facts and circumstances of the case, the statement of witness PW 1, who is injured eye witness, is trustworthy and reliable. The contrary finding of the trial court on the above point is perverse and against the evidence on record.

40. Learned counsel for the accused-respondents has argued that prosecution witnesses were failed to prove the prosecution case against the accused-respondents. The statements of prosecution witnesses are not corroborating the prosecution version rather there are contradictions and improvements. The FIR as well as statement of injured Satya Pal, which was recorded by the I.O. under Section 161 Cr.P.C. had not shown that amongst accused persons who had carried Lathis and who had carried Kharpali, this fact is subsequent development. The statement of PW 1 that accused Dhara had attacked Satyapal by Kharpali, that too is improvement, hence, learned trial court rightly concluded it improvement and discrepancy, accordingly, the statement of PW 1 is not admissible.

41. It reveals from the record that at the time of submission of written Tahreer for FIR, the informant and Satya Pal both were having injuries on their body. Satya Pal had received a number of grievous and fatal injuries including incised wounds, which had resulted excessive bleeding. At that time his general condition also was not good. The fact is also on record that within few hours from recording his statement under Section 161 Cr.P.C. the injured was expired before getting any medical aid, hence in such a situation, omission of all the detail is not unnatural. His injuries were corroborated by his post mortem report. The informant was of tender age with rustic background, therefore, in such panic situation, the omission to mention the kind of weapons, which were carried by each of the accused persons in their hands is quite probable. Although, in his cross-examination, he had explained that he had dictated scribe to mention the aforesaid fact in Tehreer that accused Dhara was carrying Kharpali in his hand and he do not know why the scriber has not mentioned the said fact in FIR. The law is well settled that FIR is not a chronicle of the exhaustive details of occurrence. A prompt FIR does not require to have mention each and every details of occurrence. The purpose of FIR is to request for initiation of investigation, it cannot be encyclopedia. In the case State of U.P. Vs. Munesh, 2013 Cr.L.J., 194, in paragraph no. 13, Hon'ble Apex Court has held as under:-

"13. Though it is stated that all the details as spoken to by Pws 1, 2 and 3 were not mentioned in the FIR, as rightly observed by the trial Court, ***FIR is not an***

encyclopedia. *It is just an intimation of the occurrence of an incident and it need not contain all the facts related to the said incident."*

42. In the case of ***State of U.P. Vs. Harban Sahai and Others, 1998 SCC (Crl) 1412***, the legal principles has been laid down in paragraph no. 8, which is as follows:-

*"**8**. The aforesaid criterion is the result of a strained reasoning. It is understood that Kanta without sharp projection at the end would be a mere stick or lathi. If the nephew of the deceased mentioned in the FIR that the assailants were armed with lathis and guns there is no reason to conclude that the information when he gave first information had ruled out the possibility of Kanta being used by the assailants.* ***FIR is not a chronicle of the exhaustive details of the occurrence, nor is it a catalogue of everything including minor particulars of the events which took place.*** *Picking out an insignificant discrepancy regarding description of one of the weapons for jettisoning an otherwise sturdy account of the eyewitness is not a commendable approach in the evaluation of evidence."*

43. In the case of ***Stae of U.P. Vs. Naresh and Others, [2011] A.C.R. 370***, it has been held by Hon'ble Apex Court in paragraph no. 26, which is as follows:-

"26. The High Court has also fallen into error in giving significance to a trivial issue, namely, that in respect of the morning incident all the accused had not been named in the complaint/NCR.

It is settled legal proposition that ***FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy.*** *The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has falsely been implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from this. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. [Vide: Rohtash v. State of Rajasthan, (2006) 12 SCC 64; and Ranjit Singh & Ors. v. State of Madhya Pradesh, JT 2010 12 SC 167]."*

44. The co-ordinate Bench of this Court in the case of ***Mata Baksh Singh Vs. State of U.P., 1978 Cri.L.J. N.O.C., 63 (All.)***, has held that FIR is not an encyclopedia of the details of the crime. It is not necessary that it should set out the minor details of the occurrence.

45. In the present case, the FIR is prompt, the prosecution version as mentioned in the FIR, is supported by medical evidence as well as oral evidence of witnesses, PW-1, PW-2, PW-4 and PW-5. There is no substantial inconsistency in their deposition. Therefore, in the light of aforesaid trustworthy and supporting evidence of prosecution, the view taken by learned trial court contrary to the same, is bad in the eyes of law, the above omission in the FIR and in statement of Satyapal is neither subsequent development, nor fatal for prosecution case.

46. Learned counsel for the accused-respondents has further submitted that witness PW 1 in his statement had stated that he had not gone Chhaprauli alongwith injured Satypa Pal rather he joined him at Baraut while going Baraut for medical treatment. The above part of the statement of witness creates doubt on his testimony regarding occurrence, injuries, dying declaration and FIR, why not he joined Satya Pal when he was going Chhaprauli from Police Station. Prosecution is silent on this point.

47. In reply, learned A.G.A. has submitted that according to the fact of the case and evidence available on record, there is no inconsistency that witness PW-1 received injuries in occurrence and went Police Station with Satya Pal. In Police Station there might have been many reasons for his not joining Satya Pal when he was going Chhaprauli for medical treatment. One probability is that he had to receive copy of the FIR and injury letter to doctor for medical (injury memo) or there might have non-availability of room in vehicle carrying Satya Pal to Chhaprauli. As it may be, but the witness PW-1 has not been cross-examined by defence regarding his non-joining Satya Pal, for Chhaprauli. The injuries of both the persons have been proved by medical evidence. Therefore, if informant had not joined injured Satya Pal when he was going Chapprauli for medical treatment. It does not make prosecution story and role played by accused persons doubtful. The argument of A.G.A. on above point has force.

48. Learned counsel for the accused-respondents further submitted that witness PW-2 was not the eye witness and was not present at the time of genesis of occurrence rather he reached on the place of occurrence, thereafter, at that time according to PW-2, accused had given 5-6 Lathi blows to Satya Pal, therefore, he had not seen the occurrence and his testimony is not trustworthy.

49. In reply, learned A.G.A. had submitted that the evidence of witness PW-2 should be read as a whole. If in reply of a particular question, the witness had stated that the injured had already received Lathi blows it does not give way to conclusion that the witness was not eye witness. The witness PW-2 had stated that he reached on spot hearing alarm of informant, he was at the distance at 20-30 Laththa from accused persons, he had seen that Satya Pal was lying on earth and accused were beating him. He had also narrated the action of accused persons that accused persons had not assaulted Satya Pal on his head and mouth. Satya Pal had received injuries on his body part below his neck. The injuries caused by Kharpali were on hand and leg of deceased. The part of this statement is corroborated by port-mortem report of deceased, therefore, only on the above part of statement, the entire evidence of witness PW-2 cannot be discarded. The argument of learned A.G.A. is forceful.

50. Learned counsel for the accused-respondents has further submitted that PW-4 had admitted that he had not told I.O. in his statement under Section 161 Cr.P.C. that accused Dhara Singh was carrying Kharpali in his hand but the witness had stated in his examination-in-chief that accused Dhara Singh was having Kharpali in his hand. Thus there is contradiction, which is fatal for prosecution case.

51. Taking into consideration the evidence as a whole, it reveals that the above omission in statement under Section

161 Cr.P.C. is not material. All the accused persons had constituted unlawful assembly and attacked on Satya Pal with common object. The witness has neither denied the presence of accused Dhara Singh at the place of occurrence nor specified that he was not assaulting on Satya Pal. The witness has stated in Court about role of accused Dhara Singh in his evidence. The injuries of Satya Pal indicate that he had received the injuries of sharp edged weapon also. The Doctor had opined that the incised wound has been caused by weapon like Kharpali. Other witnesses also specified the role of Dhara in their statements, therefore, mere omission to mention nature of weapon in hand of a particular accused Dhara in statement under Section 161 Cr.P.C. is not sufficient to discard the entire evidence of witness PW 4, particularly, when the evidence of PW-4 is corroborated by other evidence of prosecution. Witnesses PW-2 and PW-4 are eye witnesses of the occurrence, who reached on the place of occurrence hearing alarm of injured Mahak Singh and seen the occurrence. The above witnesses had been cross-examined in length by learned counsel for defence, but no substantial contradictions could be brought on record.

52. So far as the evidentiary value of the witness PW 1, an injured eye witness account is concerned, the oral testimony of above witness is supported by medical evidences. His presence on place of occurrence is certified. Regarding such an injured witness, in the case of ***Majju & Another Vs. State of M.P. 2002 SCC (Cri) 597***, the Apex Court has held in para 5, which reads as under :-

"5. The counsel for the appellants contended that the evidence adduced by the prosecution was interested and therefore, it cannot be relied upon. It is important to note that the witnesses examined on the side of the prosecution were ***all injured in the incident. PW6 Ramchandra Sustained a grievous injury, in the sense that he lost one of his teeth. The other witnesses also sustained injuries. That is proved by the various medical certificates issued by the doctor who examined them. Therefore, the presence of these witnesses at the place of occurrence cannot be suspected. All these witnesses gave evidence to the effect that when they along with deceased Bihari Lal were coming from the temple after performing some ceremony, the accused surrounded and attacked them. We do not find any infirmity in the evidence of these witnesses."***

53. There is no discrepancy in the statements of prosecution witnesses on material points. If some deviation in narration of facts are found, those are at the fringe and that too are bound to occur due to the reason that there was time gap in recording the evidence of witnesses, and the mental capacity/mentality of witnesses, who are illiterate and rustic. By perusal of evidence of witnesses as a whole it depicts that despite some minor discrepancies the witnesses have substantially supported the case of prosecution as mentioned in FIR. Finding of the Trial Court recorded in the impugned judgment and order on the above point is perverse and against the evidence on record. In the case of ***Subodh Nath And Another Vs. State of Tripura (2013) 4 SCC 122***, the Apex Court has held in para 16 that :-

"16. Once we find that the eye witness account of PW-13 is corroborated by material particulars and is reliable, we cannot discard his evidence only on the ground that there are some discrepancies

in the evidence of PW-1, PW- 2, PW-13 and PW-19. As has been held by this Court in State of Rajasthan v. Smt. Kalki and Another, ***in the deposition of witnesses there are always normal discrepancies due to normal errors of observation, loss of memory, mental disposition of the witnesses and the like.*** *Unless, therefore, the discrepancies are "material discrepancies" so as to create a reasonable doubt about the credibility of the witnesses, the Court will not discard the evidence of the witnesses. Learned counsel for the appellants is right that the prosecution has not been able to establish the motive of the appellant no.1 to kill the deceased but as there is direct evidence of the accused having committed the offence, motive becomes irrelevant. Motive becomes relevant as an additional circumstance in a case where prosecution seeks to prove the guilt by circumstantial evidence only."*

54. In the case of ***Marwadi Kishor Parmanand And Another Vs. State of Gujarat (1994) 4 SCC 549***, the Apex Court has held in para 31, which reads as under:-

"31. The evidence of a witness deposing about a fact has to be appreciated in a realistic manner having due regard to all the surrounding facts and circumstances prevailing at or about the time of occurrence of an incident. ***Some contradictions and omissions even in the evidence of a witness who was actually present and had seen the occurrence are bound to occur even in the natural course****. It is a sound rule to be observed that where the facts stated by an eyewitness substantially conform to and are consistent on material points from the facts stated earlier to the police either in FIR or case diary statements and are also consistent in all material details as well as on vital points there would be no justification or any valid reason for the court to view his evidence with suspicion or cast any doubt on such evidence. In the present case as discussed above we find that the solitary witness Ranchhodbhai, PW 1 is a wholly reliable witness and his evidence in itself, without any further corroboration is enough to sustain the conviction of the two appellants for the crime they are charged with, but we find that the evidence of the sole eyewitness Ranchhodbhai finds corroboration on material aspects from the evidence of Jayantilal PW 6, Makkar PW 8, Dr Nathani PW 1 0, Dr Avasia PW 1 1, Dr Joshi PW 12 and the Head Constable Moolchand PW 18. Thus the corroboration is also not lacking in the present case and there was hardly any ground or any possibility of taking the view which is unfortunately taken by the learned trial Judge. In our considered opinion the trial court clearly fell in serious error in rejecting the truthful version made by the sole eyewitness PW 1 whose evidence does not suffer from any infirmities, much less the unwarranted criticism made by the trial court. The High Court was therefore, in exercise of its powers under Sections 378 and 386, Criminal Procedure Code, fully justified to reverse the erroneous findings recorded by the trial court. We find ourselves wholly in agreement with the view taken by the High Court and the conclusions recorded by it. Consequently the appeal deserves to be dismissed."*

55. In the case of ***Shivappa & Others Vs. State of Karnataka (Supra)***, the Hon'ble Supreme Court has held that some discrepancies are bound to occur in the oral statements of witnesses because

of the sociological background of the witnesses as also the time gap between the date of occurrence and the date on which they give their depositions in court.

56. In the case of ***Hayat Singh Bora Vs. State of Uttarakhand [2012 (77) ACC 615]*** Uttarakhand High Court has held that variation in the testimony of witnesses if found natural, do not affect prosecution story where direct evidence is supported by medical evidence.

57. So far as the witnesses, who belong to village background and are illiterate, are concerned, it has been held in paras 34 and 39 by this Court in the case of State of ***U.P. Vs. Shane Haidar And Others 2015 (1) J.Cr.C. 775***, which reads as under:-

*"34. After an overall assessment of all the witnesses, produced by prosecution, we are of the firm view that all the witnesses are throughout cogent and consistent while deposing in court. All the f**actual witnesses are rustic villagers, who are bound to get confused during their cross-examination. PW-2 is an injured witness, which fact is evident from his injury report, duly proved by the Doctor.** Apart from some minor contradictions nothing has been elicited in their statements to cause a shadow of doubt on their credibility.*

39. On a close scrutiny of the evidence, available on record we find that the trial judge has discarded the testimony of witnesses on flimsy and unjustifiable grounds without keeping in mind that the witnesses are rustic villagers. The apex court in the case of State of U.P. v. Krishna Master and others (2010) 12 Supreme Court Cases 324 has held as under:-

A rustic witness, who is subjected to fatiguing, taxing and tiring cross-examination for days together, is bound to get confused and make some inconsistent statements. Some discrepancies are bound to take place if a witness is cross-examined at length for days together. Therefore the discrepancies noticed in the evidence of a rustic witness who is subjected to gruelling cross-examination should not be blown out of proportion. To do so is to ignore hard realities of village life and give undeserved benefit to the accused who have perpetrated heinous crime."

58. Therefore, such a variation which does not touch the pith and substance of the prosecution version or do not throw light towards a different fact is not fatal for prosecution case. The finding of learned trial court contrary to it is against the intention of law.

59. Learned counsel for the accused-respondents has further submitted that motive of the occurrence has not been shown in the FIR, therefore, the findings of trial court that the prosecution witnesses have shown the motive to commit offence for the first time in their oral evidence, amounts improvement, hence their statements are not trustworthy, is just and proper.

60. Legally it cannot be concluded that since motive of crime is not established by prosecution, hence the evidence of witnesses are liable to be rejected. The motive of occurrence which has been shown by the prosecution is that before few months from the date of occurrence, a dispute on the point of overtaking of vehicle took place between deceased and Dhara. While accused Dhara was coming by his tractor behind the Buggi of Satya Pal. The passage was narrower, hence, Satya Pal was not providing room for tractor to overtake his Buggi. Both the persons were residents of same village and were going in same direction. Witness PW-3

had admitted that it was an usual and common incident. Witness also interfered and facilitated by mediation to terminate the dispute on spot. Witness PW-3 further stated that there are partibandi of two groups in the village, but he does not know who belongs to which party. The accused persons in their statement under Section 313 Cr.P.C. had not given any detail regarding the enmity due to the reason of such partibandi. Therefore, it cannot be presumed that the occurrence in question was the result of clash due to partibandi leading to any false implication of accused persons. The factum of partibandi has not been proved by any cogent evidence. No evidence of any other previous enmity with accused persons or with anybody has been brought on record or proved. The deceased was a young boy of 26 years age whereas accused Dhara Singh was of 70 years old. Other accused persons Sahab Singh, Charan Singh and Dharamvir Singh were sons of Dhara. Accused Shripal was nephew of Dhara Singh. Witness PW 3 narrating the motive had stated in his evidence that Dhara was trying to overtake his tractor from the Buggi of Satya Pal. Satya Pal was not providing way to tractor, on the above point, during the course of dispute, after oral altercation, they grappled one another. Satya Pal slammed Dhara Singh to the ground. Although the matter was settled at that time yet it might have been the reason that accused persons were feeling insulted/enmity with Satya Pal, which was raising day by day and culminated in the shape of attack on Satya Pal by the accused persons. Always the motive remains in the mind of the assailant which is not fathamable by other persons/prosecution.

61. So far as the requirement to prove the motive of offender is concerned, according to principle of law, where there is direct evidence regarding the commission of offence, motive losses its importance. It need not to be proved by prosecution. In the case of ***Rohtash Kumar Vs. State of Haryana, Criminal Appeal No. 896 of 2011***, it has been held by the Hon'ble Apex Court in para 21 that :-

"21. ***The evidence regarding the existence of a motive which operates in the mind of the accused is very often very limited, and may not be within the reach of others.*** *The motive driving the accused to commit an offence may be known only to him and to no other. In a case of circumstantial evidence, motive may be a very relevant factor. However, it is the perpetrator of the crime alone who is aware of the circumstances that prompted him to adopt a certain course of action, leading to the commission of the crime. Therefore, if the evidence on record suggests adequately, the existence of the necessary motive required to commit a crime, it may be conceived that the accused has in fact, committed the same. (Vide: Subedar Tewari v. State of U.P. & Ors., AIR 1989 SC 733; Suresh Chandra Bahri v. State of Bihar, AIR 1994 SC 2420; and Dr. Sunil Clifford Daniel v. State of Punjab, (2012) 11 SCC 205)."*

62. In the case of Bipin Kumar Mondal Vs. State of West Bengal (2010) 12 SCC 91, the Apex Court has held in paras 22 and 26, which reads as under:-

"22. ***In fact, motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited him to commit a particular crime.***

23. While dealing with a similar issue, this Court in State of U.P. v. Ksihanpal held as under: (SCC p. 88, para 39)

39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. ***It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available,*** *because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."*

63. In the case of ***Uma Shankar Vs. State of U.P. [2015 (89) ACC 421],*** this Court has held in para 44, which reads as under:-

"44. It is ***pertinent to mention here that where there is eye witness account the motive looses its importance.*** *Motive may be the reason to commit the offence but at the same time motive may also be a reason to falsely implicate the accused. Motive for committing the offence although is of futile nature but as per prosecution this was the reason due to which the present offence was committed by the accused. It may be mentioned here that some time offences are committed on the basis of futile motive. Therefore, motive assigned by the prosecution merely on the basis that it was futile in nature, the prosecution case cannot be disbelieved specially when one day before for that reason an altercation had taken place between the accused and deceased. The reason for falsification taken by the accused is not supported by any evidence. Merely the plea, until and unless same is supported by any believable evidence, cannot take place the piece of evidence. Thus we are of the view that although motive assigned by the prosecution is of futile nature but was sufficient to commit the present offence. Thus point no. 2 is answered as above."*

64. Motive always originate in the mind of accused, therefore, in present case, if the motive of occurrence has not been mentioned in the FIR it makes no adverse effect in the case of prosecution. The finding of learned trial court, contrary to the same, is against the settled law.

65. Learned A.G.A. has submitted that there was dying declaration of deceased on record, which is reliable and sufficient to prove the occurrence and role of the accused persons, but learned trial Court erred with material illegality and irregularity in not placing reliance on it and as such the impugned judgment is perverse.

66. In reply, learned counsel for the accused-respondents submitted that prosecution had shown that before his death injured Satya Pal had given his statement in police station. The above statement was recorded by the I.O. under Section 161 Cr.P.C. After the death of Satya Pal, the prosecution is claiming the above statement of Satya Pal as his dying declaration. The above dying declaration is not in accordance with Police Manual. The statement has been recorded by the police officer, which is not permissible. No certificate of doctor has been procured regarding the mental condition of Satya Pal, that whether he was able to understand the nature of question and was able to reply the same. The aforesaid dying declaration

has not been recorded by the Magistrate as it requires under the law. It was not in the form of question and answer. At the time of recording the statement in police stations so many persons were coming in and were going out from there, therefore, authenticity and reliability of dying declaration is highly doubtful. In such case, learned trial Court rightly disbelieved the dying declaration due to above lackness.

67. On the above point, it reveals from record that the I.O. has recorded the statement of deceased under Section 161 Cr.P.C. as a general course. The I.O. had not recorded the statement of Satya Pal as dying declaration, hence there is no violation of any rules and regulations directing the mode of recording of a dying declaration. The witnesses PW-1 and PW-5 had stated in their evidence that the injured Satya Pal in his statement had given the details of occurrence and weapon to I.O. Both the witnesses have not been cross-examined by defence on the point of any poor mental condition of injured Satya Pal, hence the statement of witnesses are not to be disbelieved that Satyapal was able to record his statement with his understanding.

68. In the case of ***Paras Yadav and Others Vs. State of Bihar, 1999 (2) SCC 126***, Hon'ble Apex Court has held in paragraph nos. 8 and 9 that:-

"8. It has been contended by the learned Counsel for the appellants that the Investigating Officer has not bothered to record the dying declaration of the deceased nor is the dying declaration recorded by the doctor. The doctor is also not examined to establish that the deceased was conscious and in a fit condition to make the statement. It is true that there is negligence on the part of Investigating Officer. On occasions, such negligence or omission may give rise to reasonable doubt which would obviously go in favour of the accused. But in the present case, the evidence of the prosecution witnesses clearly establishes beyond reasonable doubt that the deceased has conscious and he was removed to hospital by bus. ***All the witnesses deposed that the deceased was in a fit state of health to make the statements on the date of incident. He expired only after more than 24 hours. No justifiable reason is pointed out to disbelieve the evidence of the number of witnesses who rushed to the scene of offence*** *at Ghogha Chowk. Their evidence does not suffer from any infirmity which would render the dying declarations as doubtful or unworthy of the evidence. In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused. Itmay be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. For this purpose, it would be worthwhile to quote the following observations of this Court from the case of Ram Bihari Yadav v. State of Bihar and others, (SCC pp. 523-24, para 13).*

"In such cases, the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice."

9. In this view of the matter with regard to Paras Yadav, in our view, there

is no reason to disbelieve the oral dying declaration as deposed by the number of witnesses and as recorded in the farbdeyan of deceased Sambhu Yadav. The farbdeyan was recorded by the Police Sub-Inspector on the scene of occurrence itself, within a few minutes of the occurrence of the incident. Witnesses also rushed to the scene of offence after hearing hulla gulla. The medical evidence as deposed by p.w. 11 also corroborates the prosecution version. Hence, the courts below have rightly convicted Paras Yadav for the offence punishable under Section 302 I.P.C."

69. The Delhi High Court in the case of ***State Through Reference Vs. Ram Singh and Others, Death Sentence Reference No. 6/2013***, has held that in ***Pakala Narayana Swami v. King Emperor [(1938-39) 66 IA 66:AIR 1939 P.C. 47]*** Lord Atkin held that circumstances of the transaction which resulted in the death of the declarant will be admissible if such circumstances have some proximate relation to the actual occurrence. The test laid down by Lord Atkin has been quoted in the judgment of Fazal Ali, J. in Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116 : 1984 SCC (Cri) 487] and His Lordship has held that Section 32 of the Evidence Act is an exception to the rule of hearsay evidence and in view of the peculiar condition in the Indian society has widened the sphere to avoid injustice. His Lordship has held that where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statements would clearly fall within the four corners of Section 32 and, therefore, admissible and the distance of time alone in such cases would not make the statement irrelevant. On the aforesaid touchstone, we have no hesitation in concluding that the statement made by injured Satya Pal to I.O. under Section 161 Cr.P.C. showing the cause of his death is admissible as dying declaration.

70. In the case of **State of Rajasthan Vs. Bhup Singh (1997) 10 SCC 675**, Hon'ble Apex Court has held that it is not necessary to record dying declaration in the form of question and answer. In paragraph nos. 10 and 11 of the case, it has been held as under:-

"10. Assuming that the deceased gave her statement in her own language, the dying declaration would not vitiate merely because it was recorded in a different language. We bear in mind that it is not unusual that courts record evidence in the language of the court even when witnesses depose in their own language. Judicial officers are used to the practice of translating the statements from the language of the parties to the language of the court. Such translation process would not upset either the admissibility of the statement or its reliability, unless there are other reasons to doubt the truth of it.

11. Nor would a dying declaration go bad merely because the magistrate did not record it in the form of questions and answers. It is axiomatic that what matters is the substance and not the form. Questions put to the dying man would have been formal and hence the answers given are material. Criminal courts may evince interest in knowing the contents of what the dying person said and the questions put to him are not very important normally. That part of the statement which relates to the circumstances of the transaction which resulted in his death gets the sanction of admissibility. ***Here it is improper to throw such statement overboard on a pediantic***

premise that it was not recorded in the form of questions and answers. *(Vide Ganpat Mahadeo Mani Vs. State of Maharashtra (1993 Supp. (2) SCC 242)."*

71. In the case of **Sudhakar Vs. State of Madhya Pradesh, (2012) 7 SCC 569**, in paragraphs 16, 17, 18, and 20, it has been held by Hon'ble Apex Court that:-

"16. We may, now, refer to some of the judgments of this Court in regard to the admissibility and evidentiary value of a dying declaration. In Bhajju v. State of M.P. [(2012) 4 SCC 327], this Court clearly stated that Section 32 of the Evidence Act was an exception to the general rule against admissibility of hearsay evidence. Clause (1) of Section 32 makes the statement of the deceased admissible, which has been generally described as dying declaration. The court, in no uncertain terms, held that: (SCC p.336, para 24)

"24...It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence."

The dying declaration, if found reliable, could form the basis of conviction. This principle has also earlier been stated by this Court in Surinder Kumar v. State of Haryana (2011) 10 SCC 173 wherein the Court, while stating the above principle, on facts and because of the fact that the dying declaration in the said case was found to be shrouded by suspicious circumstances and no witness in support thereof had been examined, acquitted the accused. However, the Court observed that when a dying declaration is true and voluntary, there is no impediment in basing the conviction on such a declaration, without corroboration.

17. In the case of Chirra Shivraj v. State of Andhra Pradesh [(2010) 14 SCC 444], the Court expressed a caution that a mechanical approach in relying upon the dying declaration just because it is there, is ***extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye*** *to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by other persons and where these ingredients are satisfied, the Court expressed the view that it cannot be said that on the sole basis of a dying declaration, the order of conviction could not be passed.*

18. In Laxman v. State of Maharashtra [(2002) 6 SCC 710], the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows: (SCC pp. 713-14 para 3)

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see

*that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that t**he deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion.** But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case.* **What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind.** *Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."*

*20. The 'dying declaration' is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as **dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration."***

72. In the case of **Lakhan Vs. State of Madhya Pradesh, (2010) 8 SCC 514**, in paragraph no. 9, the Hon'ble Apex Court has held as under:-

"9. The doctrine of dying declaration is enshrined in the legal maxim "Nemo moriturus praesumitur mentire", which means "a man will not meet his Maker with a lie in his mouth". The doctrine of Dying Declaration is enshrined in Section 32 of the Evidence Act, 1872 (hereinafter called as, " Evidence Act") as an exception to the general rule contained in Section 60 of the

Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases."

73. In the case of **Meharaban and Others Vs. State of M. P., (1996) 10 SCC 615**, in paragraph no. 7, the Hon'ble Apex Court has held as under:-

"7. Shri Bachawat's other criticism relating to the evidence is regarding some improvements and exaggerations. It is known that what the court has to adjudge is the substratum of the case and, in doing so, grain has to be separated from chaff. It is settled law that some improvements here and some exaggerations there or some minor discrepancies in the evidence do not hurt the prosecution case. As to the core of the present case the same being dying declaration of Ranjit Singh we are fully satisfied, and so, the decision of this Court in Jagga Singh v. State of Punjab, 1994 Supp.(3) SCC 463, which has been referred by Shri Bachawat, has no application, as in that case the dying declaration had not inspired confidence, whereas one at hand does. We have said ***so because the evidence of PW.4 Dr.Das. who had done post-mortem, does not in any way show if Ranjit Singh was not in a position to speak,*** *because his evidence in the cross-examination is that the head injury sustained by Ranjit Singh might or might not have resulted in loss of consciousness. His further statement is that the deceased might have expired at about 10 or 11 am, long before which he had been contacted by the aforesaid PW.s."*

74. In the case of **State of Rajasthan V. Champa Lal, (2009) 12 SCC 571**, in paragraph nos. 9 and 10, the Hon'ble Apex Court has held as under:-

"9. In fact in Dalip Singh v. State of Punjab [(1979) 4 SCC 332 : 1979 SCC (Cri) 968] it was observed as follows: (SCC pp. 334-35, para 8)

"8. There were two dying declarations of Ram Singh--one oral and the other written--which was recorded by the Assistant Sub-Inspector of Police, PW 28 on 12-12-1975. The oral dying declaration was made to PW 11 Tara Singh. Neither of the dying declarations was relied upon by the High Court because he had named Baldev Singh also. We may also add that although a dying declaration recorded by a police officer during the course of investigation is admissible under Section 32 of the Evidence Act in view of the exception provided in sub-section (2) of Section 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a Magistrate or by a doctor. As observed by this Court in Munnu Raja v. State of M.P. [(1976) 3 SCC 104 : 1976 SCC (Cri) 376] the practice of the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged. We do not mean to suggest that such dying declarations are always untrustworthy, but what we want to emphasise is that better and more reliable methods of recording a dying declaration of an injured person should be taken recourse to and the one recorded by the police officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method.

(underlined [Ed.: Herein italicised.] for emphasis)

In Dalip Singh case [(1979) 4 SCC 332 : 1979 SCC (Cri) 968] it was categorically observed that in case there was no time or facility available to the prosecution for adopting any better method the dying declaration can be taken into consideration. In fact in the present case that is the categorical statement of PW 20. As rightly contended by learned counsel for the State, the High Court discarded the statement even without indicating any reason. It is to be noted that Jora Ram (PW 20) categorically stated that it was not possible to get a Magistrate to record the dying declaration. The High Court disbelieved him without even recording any reason therefor. The dying declaration was recorded in the presence of a doctor (PW 13). In addition, the evidentiary value of the evidence of PWs 7, 9 and 10 has not been considered in its proper perspective.

10. In Ramawati Devi v. State of Bihar [(1983) 1 SCC 211 : 1983 SCC (Cri) 169] it was observed as follows: (SCC pp. 214-15, para 7)

"7. In our opinion neither of these two decisions relied on by the appellant is of any assistance in the facts and circumstances of this case. These decisions do not lay down, as they cannot possibly lay down, that a dying declaration which is not made before a Magistrate, cannot be used in evidence. A statement, written or oral, made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, becomes admissible under Section 32 of the Evidence Act. Such statement made by the deceased is commonly termed as dying declaration. There is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances of the case. In the instant case, the dying declaration has been properly proved. It is significant to note that in the course of cross-examination of the witness proving the dying declaration, no questions were put as to the state of health of the deceased and no suggestion was made that the deceased was not in a fit state of health to make any such statement. The doctor's evidence also clearly indicates that it was possible for the deceased to make the statement attributed to her in the dying declaration in which her thumb impression had also been affixed. In the instant case, it cannot also be said that there is no corroborative evidence of the statement contained in the dying declaration. The evidence of PWs 1, 4, 5 and 8 clearly corroborates the statement recorded in the dying declaration. We do not find any material on record on the basis of which the testimony of these witnesses can be disbelieved. It may also be noticed that none of these witnesses including the police officer who recorded the statement could be attributed with any kind of ill feeling against the accused. The High Court has elaborately dwelt on this aspect and has carefully considered all the materials on record and also the arguments advanced on behalf of the appellant. We are in agreement with the view expressed by the High Court and in our opinion the High Court was right in upholding the conviction of the appellant."

75. In the case of **State of Madhya Pradesh Vs. Dal Singh and Others, (2013) 14 SCC 159**, in paragraph nos. 14, 15, 18 and 20, Hon'ble Apex Court has held as under:-

"14. In Mafabhai Nagarbhai Raval v. State of Gujrat, AIR 1992 SC 2186, this Court dealt with a case wherein a question arose with respect to whether a person suffering from 99 per cent burn injuries could be deemed capable enough for the purpose of making a dying declaration. The learned trial Judge thought that the same was not at all possible, as the victim had gone into shock after receiving such high degree burns. He had consequently opined, that the moment the deceased had seen the flame, she was likely to have sustained mental shock. Development of such shock from the very beginning, was the ground on which the Trial Court had disbelieved the medical evidence available. This Court then held, that the doctor who had conducted her post-mortem was a competent person, and had deposed in this respect. Therefore, unless there existed some inherent and apparent defect, the court could not have substituted its opinion for that of the doctor's. Hence, in light of the facts of the case, the dying declarations made, were found by this Court to be worthy of reliance, as the same had been made truthfully and voluntarily. ***There was no evidence on record to suggest that the victim had provided a tutored version,*** *and the argument of the defence stating that the condition of the deceased was so serious that she could not have made such a statement was not accepted, and the dying declarations were relied upon. A similar view has been re-iterated by this Court in Rambai v. State of Chhatisgarh, (2002) 8 SCC 83.*

15. In Laxman v. State of Maharashtra, AIR 2002 SC 2973, this Court held, that a dying declaration can either be oral or in writing, and that any adequate method of communication, whether the use of words, signs or otherwise will suffice, provided that the indication is positive and definite. There is no requirement of law stating that a dying declaration must necessarily be made before a Magistrate, and when such statement is recorded by a Magistrate, there is no specified statutory form for such recording. Consequently, the evidentiary value or weight that has to be attached to such a statement, necessarily depends on the facts and circumstances of each individual case. What is essentially required, is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind, and where the same is proved by the testimony of the Magistrate, to the extent that the declarant was in fact fit to make the statements, then even without examination by the doctor, the said declaration can be relied and acted upon, provided that the court ultimately holds the same to be voluntary and definite. Certification by a doctor is essentially a rule of caution, and therefore, the voluntary and truthful nature of the declaration can also be established otherwise.

18. In Govindappa v. State of Karnataka (2010) 6 SCC 533, it was argued that the Executive Magistrate, while recording the dying declaration did not get any certificate from the medical officer regarding the condition of the deceased. This Court then held, that such a circumstance itself is not sufficient to discard the dying declaration. Certification by a doctor regarding the fit state of mind of the deceased, for the purpose of giving a dying declaration, is essentially a rule of caution and therefore, the voluntary and truthful nature of such a declaration, may also be established otherwise. Such a dying declaration must be recorded on the basis that normally, a person on the verge of

death would not implicate somebody falsely. Thus, a dying declaration must be given due weight in evidence.

20. The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case."

76. In the case of **Gulzari Lal Vs. State of Haryana, (2016) 4 SCC 583**, in paragraph nos. 22, 23 and 21, Hon'ble Apex Court has held as under:-

"22. Further, clarity on the issue may be established by the judgment of this Court in Paras Yadav v. State of Bihar [(1999) 2 SCC 126], wherein this Court addressed the question regarding the dying declaration that was not recorded by the doctor and where the doctor had not been examined to say that the injured was fit to give the statement. It has been held by this Court as under: (SCC p. 130 para 8)

"8....In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not."

23. In reference to the position of law laid down by this Court, we find no reason to question the reliability of the dying declaration of the deceased for the reason that at the time of recording his statement by Head Constable, Manphool Singh (PW-7),he was found to be mentally fit to give his statement regarding the occurrence. Further, evidence of Head Constable Manphhol Singh (PW-7) was shown to be trustworthy and has been accepted by the courts below. The view taken by the High Court does not suffer from any infirmity and the same is in order.

21.We find no infirmities with the statements made by the deceased and recorded by the Head Constable Manphool Singh (PW-7). A valid dying declaration may be made without obtaining a certificate of fitness of the declarant by a medical officer. The law regarding the same is well-settled by this Court in Laxman v. State of Maharashtra, (1985) 2 SCC 61."

77. In the case of **Vithal Vs. State of Maharashtra, 2007 Cr.L.J. 317**, in paragraph no. 10, Hon'ble Apex Court has held as under:-

"10. Dying declarations which were four in number were made before different authorities including a magistrate. The Executive Magistrate Shashikant was examined as PW-6. The learned Trial Judge was not correct in discarding the said dying declaration. It is now well-settled that a dying declaration if found to be acceptable, the same need not be described to be in question and answer form."

78. In the case of **Ashabai and Another Vs. State of Maharashtra, (2013) 2 SCC 224**, in paragraph no. 15, Hon'ble Apex Court has held as under:-

"15. About the evidentiary value of dying declaration of the deceased, it is

relevant to refer Section 32 (1) of the Evidence Act, 1872, which reads as under:-

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) ***when it relates to cause of death****.- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.*

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

It is clear from the above provision that the statement made by the deceased by way of a declaration is admissible in evidence under Section 32 (1) of the Evidence Act. It is not in dispute that her statement relates to the cause of her death. In that event, it qualifies the criteria mentioned in Section 32 (1) of the Evidence Act. There is no particular form or procedure prescribed for recording a dying declaration nor it is required to be recorded only by a Magistrate. As a general rule, it is advisable to get the evidence of the declarant certified from a doctor. In appropriate cases, the satisfaction of the person recording the statement regarding the state of mind of the deceased would also be sufficient to hold that the deceased was in a position to make a statement. It is settled law that if the prosecution solely depends on the dying declaration, the normal rule is that the courts must exercise due care and caution to ensure genuineness of the dying declaration, keeping in mind that the accused had no opportunity to test the veracity of the statement of the deceased by cross-examination. As rightly observed by the High Court, the law does not insist upon the corroboration of dying declaration before it can be accepted. The insistence of corroboration to a dying declaration is only a rule of prudence. When the Court is satisfied that the dying declaration is voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in that event, there is no impediment in convicting the accused on the basis of such dying declaration. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated and assess independently on its own merit as to its evidentiary value and one cannot be rejected because of certain variation in the other."

79. A dying declaration enjoys almost a sacrosanct status as a piece of evidence coming with it does from the mouth of victim. No one at the point of death is presumed to tell lie. Clause (i) of Section 32 of the Evidence Act provides that statements made by a person as to cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, are themselves relevant fact. If the general condition of victim is poor and there is no time to call the magistrate to record the dying declaration, or call to doctor to certify the fit condition of victim and only

I.O. is available. Then in that case, he can also record the dying declaration of victim and in such a scenario it is not necessary to record the same in the form of question answer or according to any specific formate, as the substance/fact matters not the formate. Therefore, the facts mentioned to I.O. in his statement may be it was recorded under the provisions of 161 Cr.P.C., is relevant and shall be treated as dying declaration of victim. Since the accused persons have no opportunity to confront/cross examine to maker, hence it is upon the court to scrutinize/examine the same with extreme cautions. In present case, the injuries on victim's body although were not on vital parts but the incised wounds were sufficient to cut the blood vessels, responsible to supply blood in vital organs, even there were hope of survival, hence the I.O. recorded his statement under Section 161 Cr.P.C. not as dying declaration. The statement was recorded soon after the occurrence. The facts narrated by Satyapal is supported and corroborated by other ocular as well as medical evidences. No cross examination has been done by defence with doctor regarding his mental condition. There was no evidence of any dictation or tutor to victim. Although it has been argued that so many persons were coming in and were going out at the time of recording statement of witness, but it has to be kept in mind that on the reply of specific question, the witness PW-5 has stated in his cross-examination that at the time of recording his statement Satya Pal was lying on earth, so many persons from public were entering into Police Station, therefore, witness also entered inside the Police Thana. Police were not permitting to enter inside the police station. Many persons were coming back from Police Station after seeing the victim. The witness again replied that when he entered inside the Police Station, I.O. was recording the statement of Satya Pal. The witness was standing near the door. Satya Pal was inside the Thana premises. In the above part of his evidence, the witness has not thrown any light towards any such fact that any relative or friend or police person or anybody else was trying to tutor the victim regarding the occurrence. No any specific question has been put to witness PW-5 also by counsel for defence on above point. The witness has duly proved the execution of recording the statement of injured. On the basis of above discussion, it is concluded that the dying declaration of Satyapal is true and trustworthy. In the absence of any cogent ground/reason, the conclusion of learned trial Court, regarding tutoring injured witness Satya Pal is bad in the eye of law.

80. The judgment of Hon'ble Apex Court cited by learned counsel for the accused-respondents in the case of Balak Ram Vs. State of U.P. (1975) 3 SCC 219 on the point of dying declaration is not applicable in present case as the facts of the cases are different.

81. Learned trial Court has also concluded that the statement of witness PW-5 under Section 161 Cr.P.C. has not been recorded by I.O., therefore, the statement of PW-5 be not considered. Learned counsel for the accused-respondents submits that to test the truthfulness/veracity of witness, the confrontation of witnesses as mentioned in Section 145 of the Evidence Act is necessary.

82. In the above context, the provisions of Section 162 of Cr.P.C. and Section 145 of the Evidence Act are reproduced as under:-

*"**162. Statements to police not to be signed: Use of statements in evicdence.-** (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter Provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:*

*Provided that when any witness is called for the prosecution in such inquiry or trial **whose statement has been reduced into writing** as aforesaid, any part of his statement, **if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided** by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross- examination.*

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.

Explanation.- An omission to state a fact or circumstance in the statement referred to in sub- section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

***Section 145 of Evidence Act.** Cross-examination as to previous statements in writing.--A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."*

83. According to the above provisions the earlier statement of witness "**may be**" confronted, it does not makes it mandatory. In absence of any previous statement, the conclusion drawn by learned trial court is not justified. The statement of witness, which has been recorded in Court is relevant. On one side, it has been mentioned that statement of witness PW-5 has not been recorded under Section 161 Cr.P.C. hence his statement is not admissible, on other hand, on the basis of evidence of witness PW-5, learned trial Court concluded that there is possibility of tutoring the witness/victim Satya Pal. Hot and cold cannot be blown simultaneously.

84. Learned counsel for the accused-respondents has submitted that the I.O. has not conducted the fair investigation. He has not recorded the statement of witness PW-5 Kallu Ram and has not appeared in Court to prove the material collected in investigation and dying declaration of Satya Pal.

85. It reveals from the record that the I.O. has not appeared before the trial Court to give his statement despite several attempts of learned trial Court. Learned trial Court has held in impugned judgment that I.O. has wilfully omitted to appear in

Court for recording his evidence, although at that time he was posted at Vigilance Department, Lucknow and he has deliberately avoided to appear in Court as witness, therefore, the entire investigation has become doubtful as he was a necessary witness.

86. The above conclusion of Trial Court law is not just and proper. In accordance with law, in general, if there is any laches of I.O. in conducting the investigation, the prosecution case should not be suffered. There was no role of victim in such act of I.O. The reason may be possible that the I.O. might have been fallen in collusion with accused persons and just to provide them undue benefit, he did not appear in Court to record his evidence. In the case of **Dhanaj Singh alias Shera and others Vs. State of Punjab, 2004 Cri.L.J., 1807,** in paragraph nos. 5, 6 and 7, Hon'ble Apex Court has held as under:-

5. In the case of ***a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect;*** *to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See Karnel Singh vs. State of M.P.: (1995) 5 SCC 518).*

6. In Paras Yadav and Ors. v. State of Bihar: (1999) 2 SCC 126 it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand on the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

7. As was observed in Ram Bihari Yadav v. State of Bihar and Ors.: (1998) 4 SCC 517, if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the Law enforcing agency but also in the administration of justice. The view as again re-iterated in Amar Singh v. Balwinder Singh and Ors., : (2003) 2 SCC 518. As noted in Amar Singh's case (supra) it would have been certainly better if the fire arms were sent to the Forensic Test Laboratory for comparison. But the report of the Ballistic Expert would be in the nature of an expert opinion without any conclusiveness attached to it. When the direct testimony of the eye-witnesses corroborated by the medical evidence fully establishes the prosecution version failure or omission of negligence on part of the IO cannot affect credibility of the prosecution version."

87. In the case of **Ram Gulam Chaudhury and OthersVs. State of Bihar, AIR 2001 SC 2842**, in paragraph no. 30, Hon'ble Apex Court has held as under:-

"30. In our view, ***in this case also non-examination of the Investigating Officer has caused no prejudice at all****. All that Mr. Mishra could submit was that the examination of the Investigating Officer would have shown that the occurrence had taken place not in the courtyard but outside on the road.* ***The Investigating Officer was not an eye witness.*** *The body had already been removed by the Appellants. The*

Investigating Officer, therefore, could not have given any evidence as to the actual place of occurrence. There were witnesses who have given credible and believable evidence as to the place of occurrence. Their evidence cannot be discarded merely because the Investigating Officer was not examined. The non-examination of the Investigating Officer has not lead to any prejudice to the Appellants. We, therefore, see no substance in this submission."

88. In the case of **Behari Prasad and Others Vs. State of Bihar, (1996) 2 SCC 317**, in paragraph no. 23, Hon'ble Apex Court has held as under:-

"23. It, however, appears to us that the entire case diary should not have been allowed to be exhibited by the learned Additional Sessions Judge. In the facts of the case, it appears to us that the involvement of the accused in committing the murder has been clearly established by the evidences of the eye witnesses. Such evidences are in conformity with the case made out in F.I.R. and also with the medical evidence. ***Hence, for non examination of Investigating Officer, the prosecution case should not fail. We may also indicate here that it will not be correct to contend that if an Investigating Officer is not examined in a case, such case should fail on the ground that the accused were deprived of the opportunity to effectively cross examine the witnesses for the prosecution and to bring out contradictions in their statements before the police****. A case of prejudice likely to be suffered by an accused must depend on the facts of the case and no universal straight jacket formula should be laid down that non examination of Investigating Officer per se vitiates a criminal trial. These appeals, therefore, fail and are dismissed. The appellants who have been released on bail should be taken into custody to serve out the sentence."*

89. In the case of **Ganga Singh Vs. State of Madhya Pradesh, (2013) 7 SCC 278**, in paragraph no. 17, Hon'ble Apex Court held as under:-

"17. We are also unable to accept the submission of Mr. Mehrotra that the investigation by the police is shoddy and hasty and there are defects in the investigation and therefore benefit of doubt should be given to the appellant and he should be acquitted of the charge of rape. The settled position of law is that the prosecution is required to establish the guilt of the accused beyond reasonable doubt by adducing evidence. Hence, if the prosecution in a given case adduces evidence to establish the guilt of the accused beyond reasonable doubt, the court cannot acquit the accused on the ground that there are some defects in the investigation, but if the defects in the investigation are such as to cast a reasonable doubt in the prosecution case, then of course the accused is entitled to acquittal because of such doubt. In the present case, as we have seen, the evidence of PW-5 as corroborated by the evidence of PW-2 and the FIR establish beyond reasonable doubt that the appellant has committed rape on PW-5 and thus the appellant is not entitled to acquittal."

90. On the above point, in the case of **Abhilakh Singh Vs. State of U.P., [2013 (82) A.C.C. 110]**, in paragraph no. 27, the co-ordinate Bench of this Court has held as under:-

"27. Learned counsel for the appellant has then vehemently argued that the

prosecution has not examined investigating officer in the case, so the accused had been prejudiced in his defence. It is true that the investigating officer had not been examined in the case. It is always desirable for prosecution to examine I.O. However, as stated earlier non-examination of I.O. does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of eye-witnesses. If the presence of the eye-witnesses on the spot is established and the guilt of the accused is also proved by their trustworthy testimony, non-examination of I.O. would not be fatal to the case of prosecution.[Vide - Raj Kishore Jha vs. State of Bihar, 2003(47) ACC 1068 (SC), Ram Gulam Chowdhary versus State of Bihar, 2001(2) JIC 986 (SC), Bahadur Naik versus State of Bihar, JT 2000 (6) SC 226, Ambika Prasad versus State of Delhi Administration, JT 2000 (1) SC 273, Behari Prasad versus State of Bihar, JT 1996 (1) SC 93 and Ram Deo versus State of U.P., 1990(2) JIC 1393 (SC). Perusal of the order-sheet of the trial Court clearly show that it had taken all out efforts to procure the attendance of investigating officers in this case and even after defence evidence, the other Presiding Officer again passed orders for summoning the investigating officers, but the local police did not cooperate with the Court for reasons best known to them. Sometimes, the trial Courts feel themselves helpless when they do not get cooperation from the local administration in getting the witnesses served. It is not the task of the Court alone to decide cases without active help of the police wherever it is required in administration of justice. In the circumstances, where the administration or local police are not co-operative, the Courts are required to decide the cases on the basis of evidence available in the record of the case. However, it would not provide a lever to the accused to get rid of the charges levelled against them as the Court would impart its duty in an unbiased manner balancing the interest of accused and the victim or his/her family. In the instant case, the record shows that both the investigating officers have retired, so they could not be examined. In the light of the law referred above, we are, therefore, not impressed with the argument that for non-examination of the investigating officer, the accused should be acquitted."

91. In the case of **Krishna Mochi and Others Vs. State of Bihar, 2002 (2) J.Cr.C., 123**, in paragraph 80, Hon'ble Apex Court has held as under:-

"80. It has been also contended that Inspector Ram Japit Kumar, who was one of the investigating officers, has not been examined. The alleged occurrence had taken place on 12.2.1992 and in the same night on the basis of fard-beyan of the informant recorded by PW.33, as stated above, Inspector of Police Ram Janam Singh drew the formal First Information Report. From the evidence of this witness, it would appear that the Superintendent of Police, Gaya directed Inspector Ram Japit Kumar to investigate this case and so long he did not take charge of the investigation, this witness was entrusted to commence the investigation under verbal orders of the Superintendent of Police, Gaya. PW 33, thereafter, inspected the place of occurrence and seized blood stained earth, empties and reminiscence of bomb explosion. This witness further stated that as till 17th February, 1992 Inspector Ram Japit Kumar did not make himself available for taking over investigation of the case, he requested Superintendent of Police to give necessary direction whereupon the

investigation was entrusted to one Suresh Chandra Sharma (PW.17) who, at that time, was posted as Inspector, Chandauti Police Station and PW.33 made over charge of the case to PW.17 on 19.2.1992, who, after completing investigation which was supervised by the Superintendent of Police himself, submitted chargesheet. From the above facts it would be plain that as Inspector Ram Japit Kumar had neither taken over charge of the investigation of the case at any point of time, much less investigated the same, no adverse inference can be drawn against the prosecution on account of his non-examination and non-furnishing of explanation for his not taking over charge of investigation. Thus, he having not conducted any investigation, the evidence of Inspector Ram Japit Kumar could not be of any avail either to the prosecution or the defence. That apart, it is well settled that non-examination of any witness would not affect the prosecution case, but in a given case non-examination of a material witness may affect the same. Reference in this connection may be made to the decision of this Court in the case of Masalti (supra). It is well settled that non-examination of investigating officer is not fatal for the prosecution unless it is shown that the accused has been prejudiced thereby. In the case on hand, in any view of the matter, it could not be pointed out that the defence has been prejudiced in any manner by non- examination of Inspector Ram Japit Kumar."

92. It will be proper that if learned Trial Court concludes that I.O. in collusion with accused persons has withheld his evidence and deliberately has not appeared in Court despite service of summons, hence learned trial Court has rightly directed that the concerned authorities can take action against the act of officer, which was a right approach, but another part of finding of trial court that in non-examination of I.O., the accused persons should be awarded benefit by rejecting the prosecution case, only on the above score is bad in the eye of law. It is duty of the Court to assess the evidence on record to achieve the target of fair trial.

93. So far as the collusive behaviour of I.O. is concerned, in the case of **Sahabuddin Vs. State of Assam, 2013 Cr.L.J. 1252**, in paragraph nos. 27, 29 and 30, Hon'ble Apex Court has held as under:-

"27. The investigating officer has conducted investigation in a suspicious manner and did not even care to send the viscera to the laboratory for its appropriate examination. As already noticed, in his statement, PW 11 has stated that viscera could not be examined by the laboratory as it was not sent in time. There is a deliberate attempt on the part of the investigating officer to misdirect the evidence and to withhold the material evidence from the court.

29. In our considered view, the doctor has also failed to discharge his professional obligations in terms of the professional standards expected of him. He has attempted to misdirect the evidence before the court and has intentionally made it so vague that in place of aiding the ends of justice, he has attempted to help the accused.

30. In our considered view, action should be taken against both these witnesses. Before we pass any direction in this regard, we may refer to the judgment of this Court in Gajoo [(2012) 9 SCC 532 : (2012) 3 SCC (Cri) 1200 : (2012) 2 SCC (L&S) 782] , where the Court had directed an action against such kind of evidence and witnesses: (SCC pp. 540-41 & 543-44, paras 20-22)

"20. In regard to defective investigation, this Court in Dayal Singh v.

State of Uttaranchal [(2012) 8 SCC 263 : (2012) 4 SCC (Civ) 424 : (2012) 3 SCC (Cri) 838 : (2012) 2 SCC (L&S) 583] while dealing with the cases of omissions and commissions by the investigating officer, and duty of the court in such cases, held as under: (SCC pp. 280-83, paras 27-30 & 33-36)

'27. Now, we may advert to the duty of the court in such cases. In Sathi Prasad v. State of U.P. [(1972) 3 SCC 613 : 1972 SCC (Cri) 659] this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in Dhanaj Singh v. State of Punjab [(2004) 3 SCC 654 : 2004 SCC (Cri) 851] , held: (SCC p. 657, para 5)

"5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective."

28. Dealing with the cases of omission and commission, the Court in Paras Yadav v. State of Bihar [(1999) 2 SCC 126 : 1999 SCC (Cri) 104 : AIR 1999 SC 644] enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

29. In Zahira Habibullah Sheikh (5) v. State of Gujarat [(2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of Bentham, who states that witnesses are the eyes and ears of justice. The Court issued a caution that in such situations, there is a greater responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that: (SCC p. 398, para 42)

"42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure a fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interest of the individual accused. In this Courts have a vital role to play."

(emphasis in original)

30. With the passage of time, the law also developed and the dictum of the Court emphasised that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects

the community as a whole and is harmful to the society in general.

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33. In Ram Bali v. State of U.P. [(2004) 10 SCC 598 : 2004 SCC (Cri) 2045] the judgment in Karnel Singh v. State of M.P. [(1995) 5 SCC 518 : 1995 SCC (Cri) 977] was reiterated and this Court had observed that: (Ram Bali case[(2004) 10 SCC 598 : 2004 SCC (Cri) 2045] , SCC p. 604, para 12)

"12. ... In the case of a defective investigation the court has to be circumspect [while] evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective."

34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a "fair trial", the court should leave no stone unturned to do justice and protect the interest of the society as well.

35. This brings us to an ancillary issue as to how the court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour of the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In Kamaljit Singh v. State of Punjab [(2003) 12 SCC 155 : 2004 SCC (Cri) Supp 343 : 2004 Cri LJ 28] , the Court, while dealing with the discrepancies between ocular and medical evidence, held: (SCC p. 159, para 8)

"8. It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out."

36. Where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.

"34. ... The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by

[examining] the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert's opinion is accepted, it is not the opinion of the medical officer but [that] of the court."

(See Madan Gopal Kakkad v. Naval Dubey [(1992) 3 SCC 204 : 1992 SCC (Cri) 598 : (1992) 2 SCR 921] SCC pp. 221-22, para 34.)'

(emphasis supplied)

21. The present case, when examined in light of the above principles, makes it clear that the defect in the investigation or omission on the part of the investigating officer, cannot prove to be of any advantage to the accused. No doubt the investigating officer ought to have obtained serologist's report both in respect of Ext. 2 and Ext. 5 and matched it with the blood group of the deceased. This is a definite lapse on the part of the investigating officer which cannot be overlooked by the Court, despite the fact that it finds no merit in the contention of the accused.

22. For the reasons aforerecorded, we dismiss this appeal being without any merit. However, we direct the Director General of Police, Uttarakhand, to take disciplinary action against Sub-Inspector Brahma Singh, PW 6, whether he is in service or has since retired, for such serious lapse in conducting investigation. The Director General of Police shall take [a] disciplinary action against the said officer and if he has since retired, the action shall be taken with regard to deduction/stoppage of his pension in accordance with the service rules. The ground of limitation, if stated in the relevant rules, will not operate as the inquiry is being conducted under the direction of this Court."

94. In the case of **Bakhsis Singh Vs. State of Punjab, AIR, 1957 SC 904**, in paragraph no. 9, Hon'ble Apex Court has held as under:-

"9. The non-production of Sucha Singh who is stated in the dying declaration and in the statement of Narvel Singh PW 12 to have witnessed the occurrence was commented upon by counsel as a very serious omission. The Public Prosecutor stated at the trial that he was giving up Sucha Singh as he had been won over. Therefore, if produced, Sucha Singh would have been no better than a suborned witness. He was not a witness "essential to the unfolding of the narrative on which the prosecution was based" and if examined the result would have been confusion, because the prosecution would have automatically proceeded to discredit him by cross-examination. No oblique reason for his non-production was alleged, least of all proved. There was therefore no obligation on the part of the prosecution to examine this witness: See Abdul Mohammad v. Attorney-General of Palestine [AIR 1945 PC 42] ; Stephen Servaratne v. King [AIR 1936 PC 289] ; Habeed Mohammad v. State of Hyderabad [(1945) SCR 475] . In the circumstances the court would not interfere with the discretion of the prosecutor as to what witnesses should be called for the prosecution and no adverse inference under Section 114 of the Evidence Act can be drawn against the State."

95. In the case of ***Narendra Nath Khaware Vs. Parasnath Khaware, (2003) 5 SCC 488***, in paragraph no. 7, Hon'ble Apex Court has held as under:-

"7. Coming to the merits of the appeal, we find that the High Court disposed of the appeal in a very casual and cavalier manner. Before the High Court, it was an

appeal against acquittal involving seven accused persons and the offence they were charged with was under Sections 148 and 302 IPC read with Section 149 IPC. The High Court being the court of first appeal, was required to consider and reappreciate the evidence on record. We fail to appreciate the manner in which the High Court disposed of the appeal on the basis of some general observations without making any effort to go into the evidence on record. The learned counsel appearing for the appellant before us particularly drew our attention to the evidence of PW 1, the complainant, who is also the father of the deceased. The complainant was an injured eyewitness. Therefore, there could not be any doubt about his presence on the spot. It was the grievance of the complainant that the accused party were influential people and they had managed to ensure that the prosecuting agency adopts a lackadaisical approach in investigation. This has led the complainant to file a protest petition before the Additional Chief Judicial Magistrate complaining the manner in which investigation in the case was being carried out. In fact this explains the non-examination of the investigating officer as a witness in the case. Regarding the observation of the High Court that other witnesses were not examined, the counsel submitted that at the time of actual occurrence only the complainant and his son Diwakar Khaware were present. The others came on the spot after the injuries had already been caused on the victim party. Diwakar Khaware having died at the spot, the complainant was the only eyewitness of the murder. The evidence of the complainant is corroborated by the medical evidence as well as by PWs 2, 3 and 4. The approach of the courts below on the other hand was of finding fault with the prosecution case, that is, non-examination of the investigating officer and non-examination of Ramdhani Jha etc. The prosecution case was thrown overboard on such grounds. We have been taken through the statement of the complainant -- PW 1. The statement shows that at the time of the actual occurrence only the complainant and deceased Diwakar Khaware were present. Diwakar Khaware having died on the spot, the complainant was the only actual eyewitness. Ramdhani Jha etc. came on the spot, maybe immediately after the event, and were therefore not eyewitnesses of the incident. So far as the non-examination of the investigating officer is concerned, it is settled law that the same is not fatal to the prosecution case. It has been often found that in order to help the accused party, specially in case where investigating officers are won over for whatever consideration, the investigating officers absent themselves and do not appear as witness in court. Another factor which had weighed with the courts below is the absence of blood on the spot. This was explained as wholly of no consequence in the facts of the present case where there is no doubt about the actual occurrence having taken place and about the spot where it took place. It is also emerging from the record that the courtyard where the incident took place was open to sky and it was a rainy day. Therefore, as argued by the learned counsel for the appellant, the bloodstains might have been washed away."

96. In the present case, witnesses PW-1, PW-2 and PW-4 have proved the FIR version. Witness PW-5 proved the dying declaration of deceased Satya Pal. There are no material contradictions on the point of occurrence rather they are corroborated each other substantially. In such a scenario, if the occurrence is proved by trustworthy

other witnesses of prosecution as well as corroborated by medical evidence, then in that case the non-examination of I.O. will not vitiate the prosecution case. In the light of other trustworthy evidence of prosecution, it also do not cause any prejudice to accused person.

97. Learned counsel for the accused respondents has further submitted that the witness PW-8 has not been confronted with Dak Bahi (dispatch register) and has not been properly cross-examined, therefore his evidence is not admissible, hence learned trial Court has rightly held that the chik FIR has not been proved.

98. In reply, learned A.G.A. has submitted that witness PW-8 is formal witness, who had written the chik report in official record. Cross-examination of witness indicates that a specific question was asked regarding the entry of special report in G.D., the witness replied that he may reply after perusal of Dak Bahi that when chik report was sent from Police Station. Learned A.G.A. also pointed out towards the order sheet of the trial Court which indicates that since that very day, Dakbahi was not available, therefore the trial Court summoned the Dakbahi and the evidence of PW-8 was continued. Learned Trial Court has mentioned in his judgment that after 23.04.1985, the witness PW-8 left/resigned the service, therefore, he could not come in Court again for further cross-examination. Learned A.G.A. further submitted that if the cross-examination of PW-8 is not completed, if so, it will not be a ground to disbelieve the prosecution case, which has been proved by the other cogent evidence of prosecution. If the witness left his service and did not come in Court to complete his cross-examination, the victim had not played any role in it. The argument advanced by learned A.G.A. seems forceful.

99. Record reveals that during the pendency of present appeal, one of the accused-respondent Dhara Singh has died, therefore, the appeal has been abated against him. Other respondents are living/surviving.

100. The accused-respondents in their statement under Section 313 Cr.P.C., in reply of the question that why they have been prosecuted, the accused persons replied that due to partibandi they have been implicated in the case. The defence could not point out any fact of such partibandi, which could show that both the parties (informant and accused persons) were belonging to any rival parties and there was enmity in between the parties. Defence could not produce any evidence regarding alleged reason for any false implication of accused persons, also therefore, the finding of Trial Court that "since as many as five persons had been named as the murders, it could be possible that some innocent persons were also been included with a view to take revenge." is without any footing and is based upon surmises and conjecture.

101. It has been argued by learned counsel for accused/respondents that accused Dhara Singh was carrying Kharpali in his hand, solely caused incised wound to Satyapal, which caused excess bleeding and consequently has died and other accused persons had carried only *Lathi* and *Danda* in their hands, which have not caused any fatal injury to victim, hence they are not liable to be charged under Section 302 IPC.

102. According to FIR and prosecution evidence, five persons who had hide themselves in the sugar cane field came out before deceased Satya Pal, who

was returning to his residence. The evidence regarding the presence of weapon in the hands of assailants/accused persons is intact and without any discrepancies, they had formed the unlawful assembly with common target, they had beaten Satya Pal badly and caused him 10 injuries in different parts of his body, in furtherance of their common object. The cumulative effect of their attack establishes their intention to cause such injuries, which are sufficient in ordinary course of nature to cause death as a result of excessive bleeding. It is sufficient to prove the common object of accused persons. The number of injuries on the body of Satya Pal proves that he was assaulted by more than one person. The nature and dimensions of injuries indicates their knowledge and intention to inflict such injuries. Therefore, charge of Section 302 read with Section 149 I.P.C. is proved against accused-respondents.

103. The accused persons were carrying Lathi, Danda and Kharpali in their hands, which can undoubtedly be used as deadly weapon, they formed unlawful assembly and in prosecution of common object of such assembly, they committed the offence by violence, therefore, the charges of Section 147 I.P.C. is also proved.

104. In the case of ***Shivappa & Others Vs. State of Karnataka, 2008 CRI. L.J. 2992***, the Hon'ble Apex Court has held that the motive having been proved and the number of injuries being 20, in our opinion, leads to only one conclusion that all the accused persons formed a common object in committing the crime.

105. In the case of ***Hardev Singh Vs. Harbhej Singh & Others 1996 (4) Crimes 216***, the Apex Court has held in para 27, which reads as under:-

"27. Coming to the acquittal of accused Nos. 2 and 6 by the trial court against which the State of Punjab had filed an appeal to the High Court and the same was dismissed-in our opinion the learned Sessions Judge had completely misunderstood the scope of Section 149 IPC. The only reason given by the learned trial Judge was that there was no material on the record to prove that they caused any serious injuries to the two victims. It was further observed that no specific role was attributed to these two accused. In our opinion this finding is against and contrary to the evidence on record in as much as both these accused were the members of the unlawful assembly and did have the common object as it was implicit in their action i.e. they were armed with deadly weapons; came along with other accused and participated in the murderous assault on both the victims. The trial court and the High Court had erred in law in not holding both these accused guilty with the aid of Section 149 IPC for the substantive offences punishable under Section 302 IPC. The order of acquittal passed by the trial court and on appeal affirmed by the High Court thus cannot be sustained for the reasons recorded hereinabove."

106. So far as injuries of informant Mahak Singh is concerned, the injuries as shown in injury report and the statement of witnesses indicate that accused persons were not intending to cause death to informant as they were having motive to attack Satya Pal only in revenge of occurrence, which had taken place 7-8 months back between Dhara Singh and Satya Pal, as it has been proved by the evidence of PW-3. The injuries on the body of witness PW-1 was of simple in nature. The circumstances indicate that he has been assaulted when he stood between the accused persons and Satya Pal. Witness

PW-1 has stated in FIR that he was given Lathi blow by accused-respondents Sahab Singh. Witness PW-4 has also corroborated the above fact that accused Sahab Singh had given the Lathi blow to informant Mahak Singh, therefore, charges of Section 323 I.P.C. is also proved against accused respondent Sahab Singh.

107. All the accused-respondents were named in the FIR, who were carrying weapons in their hand. The medical evidence connect the injuries with weapons alleged. The occurrence is of day-light, which has been witnessed by eye witnesses including injured witness. The accused persons had constituted the unlawful assembly and attacked on Satya Pal with their common intention as well as knowledge about severity of injuries. The evidence of prosecution witness, so far as the role of accused persons is concerned, have no contradiction or discrepancy. No evidence is on record, which may bifurcate the role of any of the accused persons. The trial Court has not rightly appreciated the evidence on record and reached to a wrong conclusion holding the accused-respondents to be not guilty for committing the murder of deceased Satya Pal. The impugned judgment and order being against the settled law is unreasonable, based upon surmises and conjunctures, unreasonable and it is found that the relevant and convincing materials have been unjustifiably eliminated. The conclusion/findings recorded by learned trial Court in the impugned judgment and order are perverse and the same are not sustainable in the eye of law.

108. In the light of above discussions and taking into consideration the entire facts and circumstances of the case and reappreciating the evidence available on record in accordance with settled law, we are of the considered view that the prosecution has succeeded to prove the guilt of accused persons beyond any shadow of doubt and to the satisfaction of the judicial conscience of the Court. So, the impugned judgment and order of acquittal dated 22.06.1985 passed by the trial Court, which has been sought to be assailed, call for and deserves interference. The Government Appeal is liable to be allowed and the impugned judgment and order is liable to be set-aside.

109. Accordingly, Government Appeal is **allowed** and the impugned judgment and order of acquittal dated 22.06.1985 is set aside.

110. Since the occurrence does not come under the purview of rarest of rare cases, therefore, all the surviving accused persons, namely, Sahab Singh, Charan Singh, Dharamvir and Shri Pal are hereby convicted for the offence under Sections 147 IPC and sentenced for two years imprisonment, for the offence under Section 302/149 IPC, they are sentenced for life imprisonment with fine of Rs. 25,000/- each, in default of payment of fine, they will undergo six months additional simple imprisonment. Accused-respondent Sahab Singh will also served the sentence for one year imprisonment for the offence under Section 323 I.P.C. All the sentences shall run concurrently. Earlier period of their detention in jail shall be counted in period of imprisonment imposed by this judgment and order.

111. In case the accused persons deposit the fine, half of fine amount shall be paid to the legal heirs and representatives of deceased Satya Pal forthwith.

112. All the surviving accused-respondents, namely, Sahab Singh, Charan Singh, Dharamvir and Shri Pal, shall put their appearance immediately before Chief Judicial Magistrate concerned. If the accused persons appear before the Chief Judicial Magistrate, they shall be sent to jail to serve out the sentence, However, if they fail to surrender, as directed above, the Chief Judicial Magistrate concerned is directed to take coercive action against them in this regard.

113. Let a copy of this judgment alongwith lower court record be sent forthwith to the Trial Court as well as Chief Judicial Magistrate, concerned for necessary compliance and further action. A compliance report be sent to this Court.

(2022)07ILR A1067
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.07.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Public Interest Litigation No. 350 of 2022

Sudhir Singh & Ors. ...Petitioners
Versus
Union of Bharat & Ors. ...Respondents

Counsel for the Petitioners:
Asok Pande, Ankit Mishra, Parmanand Sharma

Counsel for the Respondents:
A.S.G.I., C.S.C.

A. Constitution of India, 1950 - Article 226 - confers powers on this Court to issue writs to any person or authority throughout the territories in relation to which it exercises jurisdiction, and it can issue writs in relation to the territories within which the cause of action for exercising such power arises. If the cause of action arises wholly within Oudh areas then the Lucknow Bench will have jurisdiction. Similarly, if the cause of action arises wholly outside the specified areas in Oudh then Allahabad will have jurisdiction. If the cause of action in part arises in the specified Oudh areas and part of the cause of action arises outside the specified areas, it will be open to the litigant to frame the case appropriately to attract the jurisdiction either at Lucknow or at Allahabad.

B. P.I.L.- The Writ Petition has not been filed on the ground of violation of any Fundamental right or any statutory right of the public at large, which may warrant the issuance of a Writ Petition. Existence of a legally enforceable right and denial or violation thereof is a pre-requisite for invoking the Writ jurisdiction of this Court under Article 226 of the Constitution of India. 'Public Interest Litigation' must mention the legally enforceable right of the public at large which has been infringed or denied**.**

C. It is not proper on the part of the petitioners to invoke the jurisdiction of the High Court by filing a Public Interest Litigation seeking a relief regarding the subject matter, which is already the subject matter of the pending suits as also of the aforesaid Special Leave Petition.

Writ Petition dismissed. (E-12)

List of Cases relied upon:-

1. Ardhendu Kumar Das Vs St. of Odisha & ors., 2022 SCC OnLine SC 718

2. Committee of Management Anjuman Intezamia Masjid Varanasi Vs Rakhi Singh, 2022 SCC OnLine SC 694

3. Nasiruddin vs St. Transport Appellate Tribunal, 1975 (2) SCC 671

4. U.P. Rashtriya Chini Mill Adhikari Parishad, Lucknow Vs St. of U.P. & ors., 1995 (4) SCC 738

(Delivered by Hon'ble Subhash Vidyarthi J.)

1. Heard Sri Asok Pande, the learned counsel for the petitioners, Sri Vinod Kumar Shahi, the learned Additional

Advocate General of U.P. and Sri Abhinav Narayan Trivedi, the learned Chief Standing Counsel for the respondent nos. 2 and 3, Sri Surya Mani Singh Royekwar, the learned Counsel for the Union of India and Archaeological Survey of India, respondent nos. 1 and 4, who has filed his memo of appearance.

2. The instant petition, which has been styled as a Public Interest Litigation, has been filed by 7 persons praying that a direction be issued "to appoint a Committee / Commission headed by a Judge of the High Court or Supreme Court (sitting or retired) to study the nature of structure found in the Gyan Vapi Campus to ascertain as to whether it is Shivlinga, as being claimed by the Hindus or it is a fountain as being claimed by few of the Muslims and to direct the concerned respondents to act accordingly to such report means if it is a Shivlinga then permit the devotees to pray it as per rituals and if it is found fountain then make it functional".

3. At the outset, Sri Abhinav Narayan Trivedi, the learned Chief Standing Counsel has raised the following preliminary objections against maintainability of the Writ Petition:-

(i). Several Suits are pending in the Civil Court at Varanasi regarding the structures existing in Gyanvapi Parisar, Varanasi and, therefore, this Writ Petition concerning the same subject matter should not be entertained by this Court.

(ii). As per the orders of the Hon'ble Supreme Court passed in Special Leave Petition (Civil) No. 9388 of 2022, the suits filed at Varanasi concerning the controversy relating to Gyan Vapi Compound which were pending in the court of Civil Judge (Senior Division) Varanasi, have been transferred to the Court of District Judge, Varanasi. The aforesaid Special Leave Petition is still pending before the Hon'ble Supreme Court and it is fixed for 21.07.2022 and, therefore, it would not be proper for this Court to entertain a petition while the dispute is pending in the form of various civil suits before the District Judge, Varanasi and it is also engaging the attention of the Hon'ble Supreme Court in the aforesaid pending Special Leave Petition.

(iii). The subject matter of the writ petition is Gyan Vapi Campus situated at Varanasi and it falls within the territorial jurisdiction of this High Court sitting at Allahabad. Therefore, this Court sitting at Lucknow has no territorial jurisdiction to entertain this petition and the petition is liable to be dismissed for want of territorial jurisdiction.

(iv). The learned State Counsel has vehemently opposed the petition and has submitted that the writ petition does not disclose the credentials of the petitioners and the only thing pleaded in this regard is that the petitioners are the followers of Sanatan Dharma. The petition which has allegedly been filed in Public Interest, is not maintainable, unless the petitioners disclose their credentials so as to establish that they have actually approached this Court in public interest only. Placing reliance on a decision of the Hon'ble Supreme Court in the case of **Ardhendu Kumar Das Versus State of Odisha and others**, 2022 SCC OnLine SC 718, the learned State Counsel has submitted that the writ petition filed purportedly in public interest is actually designed to obtain publicity only and, therefore, it is liable to be dismissed at the threshold.

4. When the Court called upon the learned counsel for the petitioners to give a

reply to the preliminary objections raised by the learned State Counsel, he categorically stated that he is not bound to reply to each and every submission made by the learned State Counsel. However, when this Court put a question to the learned counsel for the petitioners as to how a Writ Petition can be entertained by this Court in respect of the subject matter which is already the subject matter of suits filed before the Civil Court at Varanasi, the learned Counsel for the petitioners stated that the relief claimed in the instant Public Interest Litigation has not been claimed in any of the suits and, therefore, pendency of the suit would not be a bar against filing of the Public Interest Litigation.

5. When called upon to address the Court on the point of maintainability of the Writ Petition before this Court sitting at Lucknow when the subject matter of the petition is situated at Varanasi, the learned Counsel for the petitioners submitted that Article 226 of the Constitution of India empowers every High Court to issue writs to any person or authority without any territorial fetters and in the past he had filed a Writ Petition in this Court regarding Ram Setu situated in the State of Tamil Nadu and that Writ Petition had been entertained without any objection regarding territorial jurisdiction. He further submitted that Article 226 of the Constitution of India does not contain any provision for separate Benches of the High Court. The territorial jurisdiction of this High Court sitting at Allahabad and at Lucknow has not been divided by the Constitution or by any statute.

6. The learned Chief Standing Counsel has informed that at least 5 regular suits bearing Regular Suit Nos. 350 of 2021, 358 of 2021, 693 of 2021, 839 of 2021 and 840 of 2021 have been filed in the Court of Civil Judge (Senior Division) at Varanasi. In Regular Suit No. 350 of 2021, the following main reliefs have been claimed: -

"(A) Pass decree in the nature of declaration declaring that the Worshippers of Maa Goddess Shrigar Gauri,Gooddess Maa Ganga,Lord Hanuman, Lord Ganeshji, Nandiji along with Lord Adi Visheshwar are entitled to have Darshan, Pooja and Worship of deities within the area of Settlement Polt No. 9130(Nine thousand One Hundred Thirty), measuring about 1 (One) Bhiga, 9 (Nine) Biswas and 6 (six) Dhoors situated at Dashashwamedh in the heart of city of Varanasi, Ward and police Station Dashashwamedh;

(B) Pass a decree in the nature of declaration declaring that the entire Avimukteshwar area belongs to deity Asthan Lord Adi Visheshwar in the radius of 5(Five) Kos (Krosh) from the principal seat at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty), measuring about 1(One) Bhiga, 9(Nine) Biswas and 6 (Six) Doors situated at Dashashwamedh in the heart of city of Veranasi, Ward and police Station Dashhashwamedh;

(C) Pass a decree in the nature of perpetual injunction against defendants prohibiting them, and their workers, agents, officers, officials and every person acting under them from interfering with or raising any objection or obstruction in the construction of NewTemple building consisting of Maa Ganga, Goddess Maa Shringar Gauri along with Lord Ganesh, Nandi Ji and other subsidiary deities at Principle seat of Asthan Adi Visheshwar at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty), Measuring about 1 (One) Bhiga, 9 (Nine) Biswas and 6(Six) Doors situated at Dashashwamedh in the

heart of city of Varanasi, Ward and Police Station Dashashwamedh after demolishing and removing the existing buildings and structures etc, situated thereat, in so far as it may be necessary are expecdient to do so for the said purpose;

(D) Decree the suit of plaintiffs issuing Mandatory in junction directing defendant No.2 (Two) the Government of Uttar Pradesh and Defendant No.7(Seven) the Board of trustees of Kashi Vishwanath Temple, created under Shri Kashi Vishwanath Temple Act,1983 (Nineteen Eight Three) to restore pooja worship of Goddess Gauri Shringarji,Goddess Maa Ganga, Lord Hanuman,Lord Ganeshji, Nandiji along with Lord Adi Visheswar and make appropriate arrangement for Darshan and Pooja by worshippers and maintain law and order situation;"

7. In Regular Suit No. 358 of 2021, the reliefs claimed are as follows: -

"(A) Pass a decree in the nature of declaration declaring that the worshippers of Goddess Maa Ganga, Maa Godess Shrigar Gauri, Lord Hanuman, Lord Ganeshji, Nandiji alongwith Lord Adi Visheshwar are entitled to have Darshan, Pooja and Worship of deities within the area of Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty), measuring about 1 (One) Bhiga, 9 (Nine) Biswas and 6 (Six) Dhoors situated at Dashashwamedh in the heart of city of Varanasi, Ward and police Station Dashashwamedh;

(B) Pass a decree in the nature of declaration declaring the entire Avimukteshwar area belongs to deity Asthan Lord Adi Visheshwar in the radius of 5 (Five) Kos (Krosh) from the principal seat at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty), measuring about 1 (One) Bhiga, 9 (Nine) Biswas and 6 (Six) Doors situated at Dashashwamedh in the heart of city of Varanasi, Ward and police Station Dashashwamedh.

(C) Pass a decree in the nature of perpetual injunction against defendants prohibiting them, and their workers, agents, officers, officials and every person acting under them from interfering with, or raising any objection or obstruction in the construction of New Temple building consisting of Maa Ganga, Goddess Maa Shringar Gauri alongwith with Lord Ganesh, Nsndi Ji and other subsidiary deities at principal seat of Asthan Adi Visheshwar at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty), measuring about 1 (One) Bhiga, 9 (Nine) Biswas and 6 (Six) Dhoors situated at Dashashwamedh in the heart of city of Varanasi, Ward and Police Station Dashashwamedh After demolishing and removing the existing buildings and structures etc, situated thereat, in so far as it may be necessary are expedient to do so for the said purpose;

(D) Decree the suit of plaintiffs issuing Mandatory in junction directing defendant No. 2 (Two) the government of Uttar Pradesh abd Defendant No. 7 (Seven) the Board of trustees of Kashi Vishwanath Temple, created under Shri Kashi Vishwanath Temple Act, 1983 (Nineteen Eighty Three) to restore pooja Darshan and performance of rituals related to Lord Adi Visheshwar and also the ritual of jalabhishl with fresh Gangajal of the Jyotirlingam along with Goddess Gauri Shringarji, Lord Hanuman, Lord Ganeshji, Nandiji at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty), measuring about 1 (One) Bhiga, 9 (Nine) Biswas and 6 (Six) Dhoors situated at Dashashwamedh in the heart of city of Varanasi, Ward and police station Dashashwamedh and make appropriate arrangement for Darshan and

Pooja by worshippers and maintain law and order situation."

8. In Regular Suit No. 693 of 2021, the following reliefs have been claimed: -

"(A) Decree the suit for declaration declaring that Plaintiffs are entitled to have Darshan, Pooja and perform all the rituals of Maa Sringar Gauri, Lord Ganesh, Lord Hanuman and other visible and invisible deities within old temple complex situated at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) in the area of Ward and P.S. Dashashwamedh District Varanasi.

(B) Decree the suit for permanent injunction restraining the Defendants from imposing any restriction, creating any obstacle, hindrance or interference in performance of daily Darshan, Pooja, Arti, Bhog and observance of rituals by devotees of Goddess Ma Sringar Gauri at Asthan of Lord Adi Visheshwa along with Lord. Ganesh, Lord Ganesh, Lord Hanuman, Nandiji and other visible and invisible deities within old temple complex situated at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) in the area of Ward and P.S. Dashashwamedh District Varanasi.

(C) Decree the suit for permanent injunction restraining the Defendants from demolishing, damaging, destroying or causing any damage to the images of deities Goddess Maa Sringar Gauri at Asthan of Lord Adi Visheshwar alongwith Lord Ganesh, Lord Ganesh, Lord Hanuman, Nandiji and other visible and invisible deities within old temple complex situated at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) in the area of Ward and P.S. Dashashwamedh District Varanasi.

(D) Decree the suit for mandatory injunction dircting the Government of Uttar Pradesh and District Administration to make every security arrangement and facilitate daily Darshan, Pooja, Aarti, Bhog by devotees of Maa Sringar Gauri along with Lord Ganesh, Lord Hanuman, Nandiji and other images and deities within the precincts of temple complex known as 'Ancient temple' existing at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) in the area of Ward and P.S. Dashashwamedh District Varanasi."

9. In Regular Suit No. 839 of 2021, the following reliefs have been claimed: -

"Declare that the plaintiffs No. 1 (One)-Deity is the owner of settlement land No. 9130 (Nine Thousand One Hundred Thirty) situated at Ward and P.S. Dashashwamedh Dist. Varanasi as the property vested in the deity much before Sat Yuga Beyond the memory of human being and Defendant Nos. 01 (One) and 2 (Two), their workers, supporters, men, attorneys and every person acting under them have no right to enter upon or use the aforesaid land and property in any manner or to make any interference in the Pooaj and worship and daily rituals of the diety within the property in suit i.e. old Shri Aadi Visheshwar Temple Complex and decree of declaration be passed to that effect in favour of the Plaintiffs and against the defendants;

(B) Declare that registration No. 100 (One hundred) made by U.P. Sunni Central Waqf Board in regard to any portion of land No. 9130 (Nine Thousand One Hundred Thirty) situated at Ward and P.S. Dasaswamedh Dist. Varanasi is having no sanction of law, illegal, ultra vires, null and void and decree of declaration be passed to

that effect in favour of the Plaintiffs and against the Defendants;

(C) Issue mandatory injunction directing Defendants No. (One) and 2 (Two) to remove the super structure raised over Aadi Visheshwar Jyotirlinga situated at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) within Ward and P.S. Dashashwamedh District Varanasi within the time provided by the Hon'ble Court failing which same may be removed through the executing agency of the Hon'ble court and decree in the nature of mandatory injunction be passed to that effect in favour of the Plaintiffs and against the Defendants.

(D) Issue mandatory injunction directing the Board of Trustees, the Defendant No. 3 (Three) to re-construct Shri Aadi Visheshwar Temple at the place of "Jyotirlinga" existing within old temple complex at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) within Ward and P.S. Dashashwamedh District Varanasi after removal of the present structure thereat and to ake arrangement for Pooja, Bhog, performance of rituals of the deity and Worship to be performed by devotees and decree in the nature of mandatory injunction be passed to that effect in favour of the Plaintiffs and against the Defendants.

(E) Issue permanent injunction restraining the Defendants No. 1 (One) and 2 (Two), their workers, agents, officers, officials and every person acting under them from interfering with, or raising any objection or obstruction in the construction of new temple of Lord Aadi Visheshwar at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) within Ward and P.S. Dashashwamedh District Varanasi after demolishing and removing the existing building/structure situated thereat, in so far as it may be necessary or expedient to do so far the said purpose and decree in the nature of permanent injunction be passed to that effect in favour of the Plaintiffs and against the Defendants;"

10. In Regular Suit No. 840 of 2021, the relief claimed are as follows: -

"(A) Declare that Nandiji seated within Shri Kashi Vishwanath Temple Complex is entitled to have darshan of Lord Aadi Visheshwar Jyotirlinga situated at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) within Ward and P.S. Dashashwamedh District Varanasi and is entitled to worshipped by devotees of Lord Shiva and Plaintiffs Devotees have right to get blessing from Nandiji before and after Darshan and Pooja of Jyotirlinga following the ordain provided in scriptures of Sanatan Dharma and decree of declaration be passed to that effect in favour of the plaintiffs and against the Defendants;

(B) Issue mandatory injunction directing the Defendants No. 01 (One) and 2 (two) to remove the super structure raised over Aadi Visheshwar Jyotirlinga situated at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) within Ward and P.S. Dashashwamedh District Varanasi and therefore the Board of Trustees the Defendant No. 3 (Three) to make every arrangement for Darshan and Pooja thereat by the devotees and worshippers and to maintain Law and Order situation and decree to that effect in favour of the Plaintiffs and against the Defendants;

(C) Issue permanent injunction restraining the Defendant No. 1 (One) and 2 (Two), their workers, agents, officers, officials and every person acting under them from interfering with or raising any objection or obstruction in the construction

of new temple of Lord Aadi Viseshwar at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) within Ward and P.S. Dashashwamedh District Varanasi after demolishing and removing the existing building/structures situated thereat, in so far as it may be necessary or expedient to do so for the said purpose and decree in the nature of permanent injunction be passed to that effect in favour of the Plaintiffs and against the Defendants;

(D) Decree the suit for such others reliefs for which the Plaintiffs may be found entitled to or which may be deemed necessary to be passed for proper adjudication of the case and in the interest of justice."

11. In the case of **Committee of Management Anjuman Intezamia Masjid Varanasi v. Rakhi Singh,** Special Leave Petition (Civil) No. 9388 of 2022, the Hon'ble Supreme Court passed the following order on 17-05-2022, which is reported in 2022 SCC OnLine SC 694: -

"1. The orders of the Civil Judge, Senior Division, Varanasi dated 18 August 2021, 5 April 2022 and 8 April 2022 were questioned before the Single Judge of the High Court of Judicature at Allahabad in a petition under Article 227 of the Constitution1. The Single Judge by an order dated 21 April 2022 rejected the petition.

2. In pursuance of the order of the Trial Judge, the Commissioner commenced executing the work of the Commission on 14 and 15 May 2022.

3. During the course of the execution of the work of the Commission, an application was moved before the Trial Judge on 16 May 2022 by counsel for the plaintiffs stating as follows :

"Sir

Today on 16.05.2022, a Shivalinga is found in Masjid Complex at the place where Waju Khana is there..

This is a very important piece of evidence.

Kindly make the following directions -

1. Direct the C.R.P.F. Commandant to seal the Waju Khana with proper force.

2. Kindly direct the District Magistrate to restrict entire of Muslims for offering Namaz. Not more than 20 Muslims be allowed to offer Namaz.

3. Kindly stop the usage of Weju Khana with immediate effect."

4. On the above application, the following order has been passed ex-parte :

"Application 78Ga is allowed. The DM, Varanasi is directed that the place where Shivalinga has been found should be sealed with immediate effect and entry of any person should be prohibited in the sealed area. The DM, Varanasi, Police Commissioner, Police Commissionerate, Varanasi and the C.R.P.F. Commandant, Varanasi, are directed that the individual responsibility for the protection and preservation of the place which is being sealed shall be individually upon the aforesaid officers. With regards to the place being sealed the responsibility of supervision of what is being done by the administration shall be upon the Director General of Police, Police Headquarters, Uttar Pradesh, Lucknow and Principal Secretary, U.P. Government, Lucknow."

5. Issue notice returnable on 19 May 2022. Dasti permitted in addition.

6. Mr. Huzefa A Ahmadi, learned senior counsel appearing on behalf of the petitioner, submits that since the Trial Judge has allowed application No 78Ga, the order is susceptible of the interpretation that the entirety of the reliefs which were sought has been allowed. Learned senior counsel urged that the above order has

been passed ex-parte when the work of the Commission was in progress and that the petitioners question the order to carry out a survey on the ground of jurisdiction.

7. Mr. Tushar Mehta, learned Solicitor General, appears for the State of Uttar Pradesh.

8. In order to obviate any dispute on the meaning and content of the order of the Trial Judge, the operation and ambit of the order dated 16 May 2022 shall stand restricted to the extent that the District Magistrate, Varanasi shall ensure that the area where the Shivalinga is stated to have been found, as indicated in the order, shall be duly protected.

9. The above direction shall not in any manner restrain or impede the access of Muslims to the mosque or the use of the Mosque for the purpose of performing Namaz and religious observances."

12. On 20-05-2022, the Hon'ble Supreme Court has been pleased to pass the following order in the aforesaid case, which is reported in 2022 SCC OnLine SC 696: -

"1. Having regard to the complexity of the issues involved in the suit and their sensitivity, we are of the considered view that the suit pending before the Civil Judge, Senior Division, Varanasi (Civil Suit No 693 of 2021) should be tried before a senior and experienced judicial officer of the Uttar Pradesh Higher Judicial Service.

2. We accordingly order and direct that:

(i) Civil Suit No 693 of 2021 shall stand transferred from the file of the Civil Judge, Senior Division, Varanasi to the court of the District Judge, Varanasi for trial and all interlocutory and ancillary proceedings in the suit shall be addressed to and decided by the court of the District Judge;

(ii) The application filed by the petitioner under Order VII Rule 11 of the Code of Civil Procedure 1908 shall be decided on priority by the District Judge upon the transfer of the suit;

(iii) Since parties are appearing on notice, all orders in the suit shall be passed upon hearing the parties;

(iv) The interim order of this Court dated 17 May 2022 shall continue to remain in operation pending the disposal of the application under Order VII Rule 11 CPC and thereafter for a period of eight weeks so as to enable any party which is aggrieved by the order of the District Judge to pursue its rights and remedies in accordance with law;

(v) Unless adequate arrangements for ensuring the due observance of Waju have already been made by the District Magistrate, we direct the District Magistrate, in consultation with the parties, to ensure that appropriate arrangements are made for the religious observance; and

(vi) The order passed by the Civil Judge, Senior Division, Varanasi on 16 May 2022 shall stand subsumed by the terms of the order of this Court dated 17 May 2022, pending further orders.

3. These proceedings shall be listed on 21 July 2022."

13. By means of the instant petition, the petitioners have sought a direction to the respondents to appoint a Committee / Commission to study the nature of the structure found in the Gyanvapi Campus. The structures existing in Gyanvapi compound at Varanasi are already the subject matter of dispute in various civil suits mentioned above and in Civil Suit No. 693 of 2021 a declaration has been sought regarding the right to perform all the rituals

of "visible and invisible deities" within the temple complex situated at Settlement Plot No. 9130 in the area of Ward and Police Station Dashashwamedh, District Varanasi. In Suit No. 350 of 2022 a declaration has been sought to the effect that the worshippers of Maa Godess Shrigar Gauri, Goddess Maa Ganga, Lord Hanuman, Lord Ganeshji, Nandiji alongwith Lord Adi Visheshwar are entitled to have Darshan, Pooja and Worship of the deities within the area of Settlement Plot No. 9130, measuring about 1 Bigha, 9 Biswas and 6 Dhoors situated at Dashwaamedh in the heart of City of Varanasi, Ward and Police Station Dashashwamedh.

14. A commission for local inspection has already been issued and it has been carried out in Civil Suit No 693 of 2021 under orders passed by the Civil Judge (Senior Division), Varanasi and as per the plaintiffs, a Shivlinga has been found during local inspection of the site by the Commissioner appointed by the Court and this claim is being disputed by the other side and having regard to the complexity of the issues involved, the Hon'ble Supreme Court has directed that the aforesaid Civil Suit shall be transferred to the Court of the District Judge, Varanasi, for trial and all interlocutory and ancillary proceedings in the suit have also been directed to be decided by the District Judge, Varanasi. The Special Leave Petition is still pending before the Hon'ble Supreme Court.

15. Keeping into consideration the aforesaid facts, we are of the considered opinion that it is not proper on the part of the petitioners to invoke the jurisdiction of the High Court by filing a Public Interest Litigation seeking a relief regarding the subject matter, which is already the subject matter of the pending suits as also of the aforesaid Special Leave Petition. For the aforesaid reason, we are not decline to entertain the Writ Petition.

16. However, since the learned Chief Standing Counsel has raised a preliminary objection against maintainability of the Writ Petition on the ground of lack of territorial jurisdiction and the learned Counsel for the petitioner has advanced his submissions in reply to the aforesaid preliminary objection, we think it appropriate to deal with the same also. The relevant portion of the Article 226 of the Constitution of India provides as follows:-

"226. Power of High Courts to issue certain writs: -

(i) Notwithstanding anything in Article 32 every High Court shall have powers, ***throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories*** *directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose*

(ii) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction ***in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power,*** *notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories*

(iii)....."

(Emphasis Supplied)

17. A perusal of the Article 226 of the Constitution of India makes it manifest that

it confers power upon every High Court to issue directions, orders or writs throughout the territories in relation to which it exercises jurisdiction. Clause (2) of the Article 226 of the Constitution of India further provides that the power to issue directions, orders or writs may be exercised by any High Court exercising jurisdiction in relation to the territory within which the cause of action wholly or in part arises for exercise of such power, notwithstanding that the seat of the Government, authority or the residence of any person to whom direction, order or writ is to be issued, is not within those territories.

18. Article 226 of the Constitution of India confers powers on this Court to issue writs to any person or authority throughout the territories in relation to which it exercises jurisdiction, and it can issue writs in relation to the territories within which the cause of action for exercising such power arises. Therefore, the submission of the learned Counsel for the petitioners that Article 226 of the Constitution of India empowers every High Court to issue writs to any person or authority and Article 226 of the Constitution of India does not put any territorial fetters on the powers of the High Court, is without any substance and the same is rejected.

19. The submission of the learned Counsel for the petitioners that in the past he had filed a Writ Petition in this Court regarding Ram Setu situated in the State of Tamil Nadu and that Writ Petition had been entertained without any objection regarding territorial jurisdiction is too vague to warrant any consideration. He has not submitted copy of any judgment which can be treated as a binding precedent. He has not even cared to give any particulars of the judgment e.g. the number of the case or the date of its decision. In absence of a copy or the particulars of the judgment having been produced before this Court, we cannot ascertain as to whether the point of territorial jurisdiction was raised in that Writ Petition and if such a point was involved in the Writ Petition, what ratio had been laid down by this Court while deciding the issue. Therefore, we reject the aforesaid submission of the learned Counsel for the petitioner.

20. The Uttar Pradesh High Courts Amalgamation Order, 1948 was published on 19.07.1948 and it was through this Order that the High Court in Allahabad and Chief Court in Oudh situated at Lucknow were amalgamated so as to constitute a new High Court by the name of "High Court of Judicature at Allahabad'. Clause-14 of the Amalgamation Order provides as follows:-

"14. The new High Court, and the Judges and Division Courts thereof, shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces, appointed :

Provided that unless Governor of the United Provinces with the concurrence of the Chief Justice, otherwise directs such Judges of the new High Court, not less than two in number, as the Chief Justice, may, from time to time, nominate, shall sit at Lucknow in order to exercise in respect of cases arising in such areas in Oudh, as the Chief Justice may direct, the jurisdiction and power for the time being vested in the new High Court :

Provided further that the Chief Justice may in his discretion order that any case or class of cases arising in the said areas shall be heard at Allahabad."

21. Historically, 12 districts, namely Lucknow, Hardoi, Kheri, Rai Bareli, Sitapur, Unnao, Faizabad, Ambedkar

Nagar, Baharaich, Shravasti, Barabanki, Gonda, Balrampur, Pratapgarh, Sultanpur, were known as "Oudh Region" and these areas were within the jurisdiction of the Court of Judicial Commissioner, Oudh, Lucknow. After passing of the Amalgamation Order, as per the provision contained in the First Proviso appended to Clause 14 of the Amalgamation Order, this Court sitting at Lucknow continued to exercise jurisdiction in respect of the cases arising in areas falling in Oudh region.

22. The submission of the learned counsel for the petitioners is that the Amalgamation Order dated 19.07.1948 lost its efficacy after the Constitution of India came into force on 26.01.1950. His submission is that Article 226 of the Constitution of India contains no provision limiting the territorial jurisdiction of this Court at Lucknow to the areas which were historically known as the "Oudh Region' and this Court's jurisdiction is not limited to the areas of Oudh and the writ petition filed for the reliefs concerning the subject matter situate at Varanasi can be filed and entertained at Lucknow.

23. In the celebrated judgment in the case of **Nasiruddin vs State Transport Appellate Tribunal**, 1975 (2) SCC 671, which was a case decided long after coming into force of the Constitution of India, the Hon'ble Supreme Court held that:-

*"**38.** To sum up. Our conclusions are as follows. First, there is no permanent seat of the High Court at Allahabad. The seats at Allahabad and at Lucknow may be changed in accordance with the provisions of the Order. Second, the Chief Justice of the High Court has no power to increase or decrease the areas in Oudh from time to time. The areas in Oudh have been determined once by the Chief Justice and, therefore, there is no scope for changing the areas. Third, the Chief Justice has power under the second proviso to para 14 of the Order to direct in his discretion that any case or class of cases arising in Oudh areas shall be heard at Allahabad. Any case or class of cases are those which are instituted at Lucknow. The interpretation given by the High Court that the word "heard" confers powers on the Chief Justice to order that any case or class of cases arising in Oudh areas shall be instituted or filed at Allahabad, instead of Lucknow is wrong. The word "heard" means that cases which have already been instituted or filed at Lucknow may in the discretion of the Chief Justice under the second proviso to para 14 of the Order be directed to be heard at Allahabad. Fourth, the expression "cause of action" with regard to a civil matters means that it should be left to the litigant to institute cases at Lucknow Bench or at Allahabad Bench according to the cause of action arising wholly or in part within either of the areas. I**f the cause of action arises wholly within Oudh areas then the Lucknow Bench will have jurisdiction. Similarly, if the cause of action arises wholly outside the specified areas in Oudh then Allahabad will have jurisdiction. If the cause of action in part arises in the specified Oudh areas and part of the cause of action arises outside the specified areas, it will be open to the litigant to frame the case appropriately to attract the jurisdiction either at Lucknow or at Allahabad.** Fifth, a criminal case arises when the offence has been committed or otherwise as provided in the Criminal Procedure Code. That will attract the jurisdiction of the Court at Allahabad or Lucknow. In some cases depending on the*

facts and the provision regarding jurisdiction, it may arise in either place.

39. Applications under Article 226 will similarly lie either at Lucknow or at Allahabad as the applicant will allege that the whole of cause of action or part of the cause of action arose at Lucknow within the specified areas of Oudh or part of the cause of action arose at a place outside the specified Oudh areas."

(Emphasis Supplied)

24. As per the law laid down by the Hon'ble Supreme Court in **Nasiruddin (supra)** an application under Article 226 of the Constitution of India will lie at Lucknow if the petitioners allege that whole of the cause of action or a part thereof arose within the areas of Oudh.

25. The judgment of **Nasiruddin (supra)** was followed and reaffirmed by the Hon'ble Supreme Court in the case of **U.P. Rashtriya Chini Mill Adhikari Parishad, Lucknow Vs. State of U.P. and others**, 1995 (4) SCC 738, wherein the Hon'ble Supreme Court has held that, "*to decide the question of territorial jurisdiction it is necessary to find out the place where the "cause of action" arose. We, with respect, reiterate that the law laid down by a Four-Judge Bench of this Court in Nasiruddin's case holds good even today despite the incorporation of an explanation to Section 141 to the Code of Civil Procedure".*

26. The law laid down by the Hon'ble Supreme Court in **Nasiruddin (supra)** and reaffirmed in **U.P. Rashtriya Chini Mill Adhikari Parishad, Lucknow (supra)** is binding on this Court and we find no force in the submission of the learned counsel for the petitioners that there is no law limiting the jurisdiction of this Court sitting at Lucknow to the cases in which the cause of action arose within the territorial limits of Oudh region.

27. We, therefore, hold that this Court sitting at Lucknow has no territorial jurisdiction to entertain this writ petition filed at Lucknow regarding the subject matter situate at Varanasi.

28. Now we proceed to deal with the last point raised by the learned State Counsel. The writ petition does not disclose the credentials of the petitioners and the only thing pleaded in this regard is that the petitioners are the followers of Sanatan Dharma. The sole ground taken in this petition reads as under:-

"A. Because it is necessary to ascertain the nature of the impugned structure found in the Gyan Vapi premises by a committee of the experts appointed by Govt. as well as the ASI so that in case it is Shivlinga as being claimed by the Hindus, the Bhog, Aarti, Prasad & Darshan of Lord Shiva may start without any further delay."

29. The Writ Petition has not been filed on the ground of violation of any Fundamental right or any statutory right of the public at large, which may warrant the issuance of a Writ Petition. Existence of a legally enforceable right and denial or violation thereof is a pre-requisite for invoking the Writ jurisdiction of this Court under Article 226 of the Constitution of India.

30. **Ardhendu Kumar Das Versus State of Odisha and others**, 2022 SCC OnLine SC 718 was a case arising out of a public interest litigation filed in the Orissa High Court challenging the alleged unsanctioned and unauthorized construction activities undertaken within

the prohibited area of the Shree Jagannath Temple Complex in contravention of the provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958. The order passed by the High Court in the aforesaid Public Interest Litigation Petition was challenged by a person who was not the petitioner before the High Court, by filing a SLP before the Hon'ble Supreme Court. He had based his claim of locus on the basis of being "ardent devotee of Lord Jagannath'. While dismissing the Special Leave Petition, the Hon'ble Supreme Court made the following observations:-

"58. We, therefore, find no merit in the contentions raised on behalf of the appellants. We are of the considered view that the public interest litigation filed before the High Court rather than being in public interest, is detrimental to the public interest at large.

59. In the recent past, it is noticed that there is mushroom growth of public interest litigations. However, in many of such petitions, there is no public interest involved at all. The petitions are either publicity interest litigations or personal interest litigation. We highly deprecate practice of filing such frivolous petitions. They are nothing but abuse of process of law. They encroach upon a valuable judicial time which could be otherwise utilized for considering genuine issues. It is high time that such so called public interest litigations are nipped in the bud so that the developmental activities in the larger public interest are not stalled."

31. The aforesaid observations of the Hon'ble Supreme Court squarely apply to the present petition, which has although been styled as a "Public Interest Litigation', but which does not contain any mention of any legally enforceable right of the public at large having been infringed or denied and it appears that the petition has been filed merely in order to gain some publicity. The filing of a Public Interest Litigation for the oblique motive of gaining publicity, as held by the Hon'ble Supreme Court, needs to be nipped in the bud by dismissing the same at the admission stage itself.

32. In view the aforesaid discussion, the Writ Petition is **dismissed**. However, there will be no order as to costs.

In this writ petition, the learned counsel for the petitioners has orally applied for issuance of a certificate for filing an appeal before the Hon'ble Supreme Court under Article 134-A (b) read with Article 133 (1) (a) & (b) of the Constitution of India.

The subject matter of the writ petition is already the subject matter of various suits filed before the Civil Court at Varanasi and the Hon'ble Supreme Court has passed an order in Special Leave Petition (Civil) No.9388 of 2022 transferring all the suits to the court of the District Judge, Varanasi and the aforesaid S.L.P. is still pending. We have decided the writ petition after taking into consideration and relying upon the law laid down by the Hon'ble Supreme Court on the points involved in the writ petition. Therefore, in our considered opinion, the matter does not involve any such question as may warrant issuance of a certificate for filing an appeal before the Hon'ble Supreme Court.

Accordingly, we are not inclined to grant the certificate as prayed for under Article 134-A (b) read with Article 133 (1) (a) & (b) of the Constitution of India, hence, we reject the said prayer.

(2022)07ILR A1080
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.07.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Public Interest Litigation No. 7472 of 2021

Sharad Kumar Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Krishna Kumar Singh, Anshu Singh, Prabhakar Vardhan Chaudhary

Counsel for the Respondents:
C.S.C., Mohammad Aslam Khan, Ratnesh Chandra

A. If a writ petition filed by a person raises question of public importance involving exercise of power by men in authority, then it is the duty of the Court to enquire into the matter. The legal fraud played by the public authority for benefit of the private persons at the expense of public at large cannot be condoned even if a person files a writ petition for vindication of his private interest

B. Civil Law - U.P.Z.A. & L.R. Act, 1950- Sections 132 & 117 (6) - The St. or its instrumentalities cannot give largesse to any person according to the sweet will and whims of the authorities of the St.. Every action/decision of the St. and its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy. the land recorded as 'Jangal Dhak' is a forest land and is a public utility land and same cannot be transferred by way of lease, sale etc and no bhumidhari rights shall accrue in respect of the said land. These lands are saved under Section 132 of the U.P.Z.A. & L.R. Act, 1950.

C. Civil Law - Revenue Code, 2006 - Section 101 r/w Rule 101 & 102 - The land which was a public utility land, was resumed and allotted in favour of a private person, Late R.S Agrawal, Ex-IAS officer by the then District Magistrate in purported exercise of the power under Section 117(6) of the U.P.Z.A. & L.R. Act, 1950 for charitable purpose and now it is being used for commercial purposes, therefore, such a land cannot be exchanged in any manner. Even otherwise, under Section 101 of the U.P. Revenue Code, 2006 the land in which bhumidhari rights cannot get accrued, cannot be exchanged. Since the very order of resuming the land for a private Trust, was against the law and, therefore, it was void ab initio and no valid right, title or interest got accrued in favour of the private Trust and no exchange, therefore, is permitted.

Writ Petition allowed. (E-12)

List of Cases relied upon:-

1. Akhil Bhartiya Upbhokta Congress Vs St. of M.P. & ors., (2011) 5 SCC 29

2. Gyanendra Singh Vs Additional Commissioner, Agra Division, Agra, 2003 (95) RD 286

3. Gyanendra Singh Vs Additional Commissioner, Agra Division, Agra, 2003 (95) RD 286

4. Rajendra Tyagi Vs St. of U.P. through Principal Secretary, Nagar Vikas, Babu Bhawan, Lucknow & ors., 2016 (131) RD 243

5. Jagpal Singh & ors. Vs St. of Pun. & ors., (2011) 11 SCC 396

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

Writ Petition

1. The present writ petition under Article 226 of the Constitution of India has been filed against the alleged illegal, arbitrary and mala fide resumption of the Gram Sabha land comprising in Gata Nos.467, 468, 509, 554 (new nos.842, 1034, 1039, 1040 and 1175), measuring 3

acres situated in Village Nanakganj Grant, Pargana Gopmau, Tehsil Sadar, District Hardoi for a private trust created by one Radhey Shyam Agarwal, a retired IAS officer, father of Sanjeev Agarwal, opposite party no.5, by the then District Magistrate, Hardoi vide order dated 30.1.1987. It has been prayed in the writ petition to issue a Writ of Mandamus to opposite parties-authorities to hold an independent inquiry into the matter and a direction has been sought for removal of unauthorized/illegal constructions of Maruti Car showroom of Concept Cars Limited over the said land.

Facts of the Case:

2. A private Trust namely, Gyan Yog Charitable Trust was created by late Radhey Shyam Agarwal on 10.9.1986. This Trust was said to have been created for charitable purposes. Main objects of the Trust were to provide help to poor people in education, medical relief and free accommodation and assistance to the travellers, providing food to the deserving people, advancement of Indian culture and literature, rural developmental etc. The Trust was settled with Rs.5,000/- which was the corpus of fixed property of the Trust. Radhey Shyam Agarwal became the first Managing Trustee and the Chairman of the Board of Trustees.

3. The revenue record before the consolidation operation was undertaken in the village, would suggest that in khatauni of 1333 Fasli (Year 1926) the lands of khata no.178 comprising of old plot nos.508, 509, 567, 544/1 (new plot nos.1034, 1035, 1039, 1040, 1175) were rerecorded as "Jangal Dhak' in clause (5)(iii)(b)(2) of the Land Record Manual. Thus, the lands were public utility lands vested in Gaon Sabha. In 1356 Fasli (Year 1949) also the lands in the aforesaid gata numbers were recorded as "Jangal Dhak'. The then District Magistrate, Hardoi resumed the said land for late Radhey Shyam Agarwal, a retired IAS officer purportedly in exercise of powers conferred under sub-section (6) of Section 117 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as U.P.ZA & LR Act) vide order dated 30.1.1987. It was said that the said order dated 30.1.1987 was passed in partial embellishment of the Government Order dated 16.6.1981. The total land resumed in the aforesaid gata numbers was 4-16-8 (three acres) for the Trust. The said transaction was reflected in Khata No.363 of Khatauni of 1395 Fasli. It was said that Radhey Shyam Agarwal deposited premium amount of Rs.24,000/-. After the land was transferred in the name of Radhey Shyam Agarwal, the said land was given on lease by him for annual rent of Rs.250/- in favour of Indresh Charan Das for 99 years. A school building was constructed for imparting education upto Class-VIII. It was also said that a small charitable hospital was also constructed and there was a Homeopathy Dispensary, 10 bedded Allopathy hospital which came up on the said land.

4. After death of Radhey Shyam Agarwal, vide order dated 23.10.1999, Tehsildar, Sadar, Hardoi in Case No.207 under Section 34 of the Uttar Pradesh Land Revenue Act, 1901 directed substitution of name of his eldest son, Rajeev Agarwal. In the khatauni of 1412-1417 Fasli Year, name of Rajeev Agarwal S/o Radhey Shyam Agarwal, President of the Gyan Yog Charitable Trust got recorded against the said land.

5. It is also relevant to note here that as per official version there is no record available regarding mutation of the name of Sanjeev Agarwal, opposite party no.5, S/o

Radhey Shyam Agarwal. Despite no order on record in respect of mutation of name of Sanjeev Agarwal in place of Rajeev Agarwal, Sanjeev Agarwal, opposite party no.5 sold the land of Khata No.657 in Gata Nos.842M/0.0370 hectares and 1175/0.1260 hectares, total 0.1530 hectares vide sale deed dated 19.6.2010 to his two worthy sons Yash Vardhan Agarwal and Surya Vardhan Agarwal for a meagre amount of Rs.15,00,000/-. Thereafter, again vide sale deed dated 1.7.2010, a portion of the aforesaid land (area 1057.72 Sq.M) was sold to his son, Yash Vardhan Agarwal and his close and promising relative, Pradeep Kumar Agarwal for a meagre amount of Rs.12,00,000/-. Names of sons of Sanjeev Agarwal i.e. Yash Vardhan Agarwal and Surya Vardhan Agarwal and his close relative, Pradeep Kumar Agarwal got mutated vide order dated 2.1.2013 passed by the Tehsildar (Judicial), Sadar, Hardoi. After the aforesaid sale deeds were executed, the hospital building was demolished and a showroom for Maruti Cars got constructed by Concept Cars Limited, in which the Sanjeev Agarwal, opposite party no.5, and his two sons and his close relative, Mr. Pradeep Agrawal are Directors.

6. It is also relevant to mention here that Surya Vardhan Agarwal S/o Sanjeev Agarwal is the Treasurer of trust and Yash Vardhan Agarwal is also the Trustee of the Trust. It is said that a resolution for sale of the land in favour of the two sons and a close relative of the President of the Trust was passed in the meeting of the Board of Trustees held on 20.9.2009. The excuse was that the trust was running into losses as financial aid from the Central and the State Governments got dried up and the audit balance sheet of 2009-2010 would show that there was a liability of Rs.23,02,750.85/- of sundry creditors and the trust was having no other source to pay the debt apart from liquidating the landed assets of the trust. Thus, in the meeting of the Board of Trustees dated 20.9.2009 held under the Chairmanship of Mr. K.B. Shukla, the Managing Trustee was authorized to dispose of the portion of the land, where the hospital etc. was being run by the trust. Later, the land sold, was leased to M/s Concept Cars Limited, in which Sanjeev Agarwal, Managing Trustee, his two sons and his close relative, Pradeep Kumar Agarwal are the Directors. The Concept Cars Limited had constructed a full fledged showroom over the said property and running commercial venture for profit.

7. Initially, on 18.3.2021 when this petition came up for hearing, opposite party no.5 was on caveat and represented by Sri Mohd. Arif Khan, learned Senior Advocate assisted by Sri Mohd. Aslam Khan. This Court noted very peculiar facts of the case. The land of Gaon Sabha, public utility land, which was resumed in favour of the trust, was transferred by the President of the trust in favour of his own sons and a close relative. Sons of the President of the trust are Treasurer and the trustees of the trust. Therefore, this Court formulated two questions, namely; (i) Whether the land could have been resumed and vested in a trust by the then District Magistrate in exercise of powers under sub-section (6) of Section 117 of the U.P.Z.A. & L.R. Act; and; (ii) Assuming that it could have been vested considering the public purpose sought to be achieved, whether it could have been sold off by the Trust or any of its member in favour of the Treasurer of the Trust for private purposes, if so, under what law? The Court passed the following order on 18.3.2021:-

"This is a P.I.L. filed by the petitioner seeking a Writ of Mandamus commanding the opposite party no. 3 to conduct an inquiry in the matter in pursuance of letter dated 28.07.2020 issued by opposite party no. 2 i.e. the Commissioner, Lucknow Division, Lucknow, whereby he has directed to conduct inquiry as per law.

Shri M.A. Khan, learned Senior Counsel assisted by Shri M.A. Khan, Advocate appearing for opposite party no. 5 having filed a caveat submits that the petition has been filed with oblique motive and is a personal interest litigation. Petitioner is an erst while employee of Concept Car Ltd. of which the opposite party no. 5 is the Managing Director and after his ouster from service, he has filed this petition with oblique motive and malafide intentions. Shri Khan proposes to file an affidavit in this regard.

Keeping the question of bona fide of the petitioner open for being considered, meaning thereby, if it is found that the petitioner is pursuing a personal agenda and the action is not actuated by bona fide, this Court would not encourage such a litigant, however, at this stage the Court cannot ignore certain facts and documents which are on record according to which the land in question was in the control and management of the Gaon Sabha concerned when it was resumed by the State Government in exercise of powers under Section 117 (6) of the U.P. Z.A. & L.R. Act, 1950 vide notification dated 30.01.1987 and the same was vested in a trust namely Gyan Yog Dharmarth, through its Chairman Shri R.S. Gangwar, retired I.A.S. It is said that the said trust took a decision to run a hospital and school on the said land which was earlier in the custody of the Gaon Sabha. Subsequently, it is said that the subsequent Chairman of the trust namely opposite party no. 5 herein sold of the said land to the Treasurer of the Trust namely Mr. Yash Vardhan Aggarwal who in turn has opened a Maruti showroom on the said land. Now, if these facts are correct then this Court would consider the registration of Suo Motu P.I.L., as, ultimately, the land belongs to the State and is held by it as a Trust for the people. The question would be firstly whether it could have been resumed and vested in a trust but assuming that it could have been vested considering the public purpose sought to be achieved, whether it could have been sold of by the Trust or any of its member in favour of the Treasurer of the Trust for private purposes, if so, under what law? The question then would be of larger public interest as such land is held by the State as a trustee of the people.

As Shri M.A. Khan, learned Senior Counsel appearing for opposite party no. 5 prays for time for filing counter affidavit.

10 days time as prayed is granted to him for filing counter affidavit.

The opposite party no. 1 shall file his own affidavit in the matter after getting the facts verified in the light of the law on this subject.

It is open for opposite parties no. 2, 3 and 4 also to file their counter affidavit but separately.

List/Put up this case on 05.04.2021 as fresh.

All pleas are open for consideration.

Shri Yogesh Kumar Awasthi, learned Standing Counsel shall communicate this order to the Additional Chief Secretary/Principle Secretary, Revenue, as also, to the Chief Secretary, U.P.

It is made clear that the petitioner is cautioned not to use this order for any ulterior purpose either in the media or social media as all pleas are still open for consideration and if he does so, it will have serious consequences."

8. Learned Standing Counsel representing the State was directed to communicate the aforesaid order to the Additional Chief Secretary/Principal Secretary, Revenue, as also, to the Chief Secretary of the Uttar Pradesh.

9. After the said order was passed by this Court, a letter dated 25.3.2021 was issued by the Additional Chief Secretary/Principal Secretary, Revenue to the District Magistrate, Hardoi with direction to send some senior officers along with record to brief her regarding the issue in question. On 26.3.2021, Sub-Divisional Magistrate and the Naib Tehsildar came along with record in respect of the land in question to brief the Principal Secretary, Revenue, Government of Uttar Pradesh. The Additional Chief Secretary/Principal Secretary, Revenue, prima facie, found irregularity in the whole process and, therefore, vide order dated 26.3.2021 directed the District Magistrate, Hardoi to inquire into the matter in detail and take further action against the officials/employees concerned and to intimate the same to the State Government.

10. In compliance of the directions issued by the Additional Chief Secretary/Principal Secretary, Revenue vide order dated 26.3.2021, the District Magistrate, Hardoi constituted a three members committee comprising of Sub-Divisional Magistrate, Sadar, Hardoi, Settlement Officer, Consolidation and the City Magistrate, Hardoi to inquire into the matter vide order dated 30.3.2021. The three members committee submitted its detailed report dated 1.6.2021 to the District Magistrate, Hardoi. The inquiry report has been placed on record with the affidavit of the Additional Chief Secretary/Principal Secretary, Revenue. The committee in its detailed report, said that the land in question was recorded in revenue record of 1333 Fasli (Year 1926) as "Jangal Dhak' of Class-5(iii)(b)(2) land. In 1356 Fasli (Year 1949) also the said land was recorded as "Jangal Dhak'. The said land is vested in the Gram Sabha as per Para A-124 of the U.P. Land Records Manual, and it is a public utility land.

11. The three members committee also said that the resumption order dated 30.1.1987 passed by the then District Magistrate was against the law. It was further said that transfer of the land by Mr. Sanjeev Agarwal, Managing Trustee of the Trust in favour of his two sons and a close relative for setting up commercial venture, was bad in law. The committee also noted the forging of the documents by the revenue authorities and misplacing the original file of the resumption and allotment of land by the then District Magistrate vide order dated 30.1.1987. The committee recommended for taking action and lodging of FIR against the erring officials.

12. The District Magistrate, Hardoi after considering the said report of the three members committee, vide a detailed order dated 4.6.2021 cancelled the resumption and allotment order dated 30.1.1987 passed by then District Magistrate, Harodi holding same to be void ab initio and directed the said land to be recorded as Gram Sabha land. FIR No.0305 of 2021 under Section 409 IPC has been registered for going missing of the original file of the resumption and allotment order dated 30.1.1987 from the office of the District Magistrate.

13. The District Magistrate also noted in his order that after death of Radhey

Shyam Agarwal, retired IAS officer, vide order dated 23.10.1999 passed under Section 34 of the U.P. Land Revenue Act, 1901, name of Rajeev Agarwal S/o Radhey Shyam Agarwal was substituted in place of Radhey Shyam Agarwal in the revenue records. However, there was no order of substitution of name of Sanjeev Agarwal in place of Sri Rajeev Agrawal. It has been further said that the transfer of land to private persons, is against the provisions of the Sections 51, 52 and 53 of the Indian Trust Act, 1882 and in violation of Section 117(6) of the U.P.Z.A. & L.R. Act. Thus, it has been said that the order dated 30.1.1987 was void ab initio and, therefore, the same is liable to be cancelled. Tehsildar, Sadar has been directed to take action under Section 67 of the U.P. Revenue Code, 2006 for eviction of the persons illegally occupying the land in question.

14. Sanjeev Agarwal, opposite party no.5 filed Writ Petition bearing No.12066 (MB) of 2021 before this Court on 14.6.2021 challenging the order dated 4.6.2021 passed by the District Magistrate, Hardoi. However, the said writ petition was dismissed as withdrawn with liberty to file a fresh petition on 16.6.2021. On 15.6.2021, opposite party no.5 filed a revision bearing No.1146 of 2021 before the Board of Revenue, Prayagraj impugning the order dated 4.6.2021 passed by the District Magistrate, Hardoi. Thereafter, second Writ petition bearing no.12641 (MS) of 2021 was filed before this Court impugning the order dated 4.6.2021 passed by the District Magistrate, Hardoi. This Court vide order dated 23.6.2021 directed the said writ petition to be listed along with the present writ petition. The said writ petition was, however, withdrawn by opposite party no.5 on 20.7.2021.

15. During the pendency of this writ petition, another revision bearing No.1351 of 2021 came to be filed by Ram Chandra Razwar, the Manager of the Concept Carts Limited under Section 210 of the U.P. Revenue Code, 2006 impugning the order dated 4.6.2021 passed by the District Magistrate, Hardoi. Interestingly, while the writ petition was pending on the subject matter and the High Court was in seisen of the subject matter, the Board of Revenue proceeded to decide the said revision and passed the order dated 2.8.2021. Two very interesting aspects of the order dated 2.8.2021 are to be taken note of. The Board of Revenue in paragraph eight of the said order held that the preliminary objection raised by the counsel for the complainant and the Standing Counsel for the revenue regarding maintainability of the revision on behalf of the Concept Cars Limited or its Manager had force. It was said that the Manager of the Concept Cars Limited and the Concept Cars Limited itself had no right file and maintain the revision challenging the validity of the order dated 4.6.2021 passed by the District Magistrate, Hardoi and, therefore, the Board of Revenue accepted the preliminary objection raised regarding the maintainability of the revision. It was observed that if the revisionist was so advised, he could become the party in the revision filed on behalf of the Trust impugning the order dated 4.6.2021, but the revision on behalf of the Manager of the Concept Cars Limited/Concept Cars Limited would not be maintainable. Despite the said finding on the preliminary objection, the Board of Revenue held that the prayer of the revisionist i.e. Manager of the Concept Cars Limited regarding exchange of the land in question with some other land being offered on behalf of the revisionist/Concept Cars Limited in

exercise of powers under Section 161 of the U.P.Z.A. & L.R. Act and under Section 101 of the U.P. Revenue Code, 2006 would be required to be considered.

16. This Court is of the considered view that the Board of Revenue has incorrectly held that the land in Gata No.1175 was not recorded as "public utility land' though the same was recorded as "Jangal Dhak' and was a public utility land as per the provisions of Para A-124 of the U.P. Land Records Manual. The Board of Revenue held that since the said land was not a public utility land, therefore, the said land could be exchanged with some other land of equal value and there would not be any legal hurdle in doing so. The Board of Revenue thus, directed the Sub-Divisional Magistrate, Sadar, Hardoi to make inspection of the lands, which are being offered by the revisionist/Concept Cars Limited in exchange of the land in Gata No.1175, and take possession of the land offered by the revisionist in exchange of the land in Gata No.1175 of the area, which would be 10% more than the area of Gata No.1175. It has been further held that the said order of exchange would be subject to the final outcome of Revision No.1146 of 2021 filed by the Trust. It has been ordered that that the revisionist would file an affidavit before the Sub-Divisional Magistrate and will undertake that in case the order dated 4.6.2021 is affirmed, the revisionist should not claim any right in respect of the land being offered in exchange of the land in Gata No.1175, and in future if it was found that the land offered in exchange of land in Gata No.1175 had any defect of ownership, then the revisionist would be liable to compensate for the loss, if any. It has been ordered that the revisionist would file the undertaking along with application within a period of two weeks before the Sub-Divisional Magistrate and the Sub-Divisional Magistrate has been directed to make inspection of the land in Gata Nos.1143, 1167 Cha and 846, which are being offered in exchange and then out of the three gatas, the most valuable land should be accepted in exchange. After taking possession of the said land, the possession should be handed over to the Gram Sabha. It has been further directed that all this should be completed within a period of six weeks. It has been ordered that for a period of two months or from the date of taking possession of the land offered in exchange of Gata No.1175, status-quo in respect of the possession of Gata No.1175 shall be maintained.

17. Thus, on one hand the Board of Revenue held that the revision on behalf of the Manager of Concept Cars Limited or by the Concept Cars Limited itself was not maintainable, and on the other hand, it allowed the prayer of the revisionist/Manager of the Concept Cars Limited for exchange of the land. This Court finds the approach of the Board of Revenue wholly illegal, unjustified and against the judicial propriety inasmuch as when the High Court was in seisen of the matter, the Board of Revenue had no business to proceed with the matter. Further, after holding that the revision was not maintainable, the Board of Revenue had allowed the prayer of the revisionist/Manager of the Concept Cars Limited in a most illegal and uncalled for manner. The Board of Revenue has overreached its jurisdiction and this Court deprecates the way the order has been passed to favour a private party in a non-maintainable proceeding. This Court holds that the order passed by the Board of Revenue dated 2.8.2021 is wholly illegal,

non est and without jurisdiction. The authorities are directed not to take any action in pursuance of the order dated 2.8.2021 passed by the Board of Revenue.

18. After Revision No.1146 of 2021 was filed by the Trust against the order darted 4.6.2021, the Trust filed a recall application before the District Magistrate, Hardoi praying to recall the order dated 4.6.2021. However, the District Magistrate vide order dated 31.1.2022 rejected the said application for recall on the ground that against the order dated 4.6.2021, a revision had already been filed by the Trust being Revision No.1146 of 2021 before the Board of Revenue and, therefore, the recall application was not maintainable. Against the said order dated 31.1.2022, the Trust has filed another Revision bearing No.511 of 2022 before the Board of Revenue and the Board of Revenue vide interim order dated 9.3.2022, admitted the said revision and strangely enough stayed the orders dated 4.6.2021 and 31.1.2022 passed by the District Magistrate, Hardoi. The Board of Revenue appears to be extra generous and benevolent towards the revisionist. The approach of the Board of Revenue is anything but judicial.

19. Before the order dated 9.3.2022 came to be passed by the Board of Revenue, the Tehsildar, Sadar, Hardoi proceeded under Section 67 of the U.P. Revenue Code, 2006 and ordered for eviction of Devendra Das S/o Mahant Indresh Charan Das, Principal, Sri Gururamrai Public School, Lucknow Road, Hardoi and imposed the compensation of Rs.5,65,76,000/- along with cost of Rs.11,300/- vide order dated 27.1.2022 passed in Case No.6112 of 2021. Another order of the same day i.e. 27.1.2022 was passed in Case No.6113 of 2021 for eviction of Sri Siya Ram S/o Chote Lal, who had constructed shops on Gata No.749/M land in Gata No.1175/0.126 hectares along with compensation of Rs.22,20,000/- and cost of Rs.11,000/-. Third order dated 27.1.2022 was passed in Case No.6114 of 2021 Gram Sabha Vs. Sanjeev Agarwal under Section 67 of the U.P. Revenue Code, 2006 for eviction of opposite party no.5, Sanjeev Agarwal from 8248 Sq.M land along with compensation of Rs.35,04,60,000/- along with cost of Rs.12,800/-.

20. It appears that appeal(s) was/were filed against the order(s) dated 27.1.2022 passed by the Tehsildar, Sadar, Hardoi before the District Magistrate, Hardoi. However, Transfer Application No.47 of 2022, under Section 212 of the U.P. Revenue Code, 2006 was filed before the Board of Revenue on behalf of opposite party no.5 and the Board of Revenue vide order dated 22.3.2022, transferred the appeal(s) to the Court of District Magistrate, Sitapur from the court of District Magistrate, Hardoi.

Questions: -

21. The following questions are involved in the present writ petition:-

(i). Whether the present petition raises the question of public importance involving misuse of authority and powers vested in the then District Magistrate and, therefore, the Court would be justified in looking into the mater even if it is assumed that the petitioner has some personal grudge against the Concept Cars Limited and its Directors etc.?

(ii). Whether the order dated 30.1.1987 passed by the then District Magistrate, Hardoi resuming the Gram Sabha land recorded as "Jangal Dhak', a public utility land for a private trust created

by late Radhey Shyam Agarwal, a retired IAS officer was void ab initio ?

(iii). Whether the order dated 4.6.2021 passed by the District Magistrate, Hardoi holding the order dated 30.1.1987 to be void ab initio and cancelling the said order and restoring the land back to the Gram Sabha, is just and proper order ?

(iv). Whether the land recorded as "Jangal Dhak' in revenue record under Para A-124 of the U.P. Land Records Manual, which is a public utility land, can be offered in exchange with some other land ?

22. Since the issues involved in this writ petition are complex issues of revenue laws, this Court requested Sri P.V. Chaudhary, learned Counsel of this Court to assist the Court as Amicus in disposal of the writ petition. Sri P.V. Chaudhary willingly agreed to assist the Court and the Court records its appreciation for his valuable assistance and labour put by him in short notice, in rendering his valuable assistance for deciding the issues involved in this petition.

Submissions:-

23. Sri P.V. Chadhary, learned Amicus has submitted that the land in question was recorded as "Jangal Dhak' in Class 5(iii)(b)(2) in revenue records from 1333 Fasli (Year 1926) and 1352 Fasli (Year 1949). Para A-124 of the U.P. Land Records Manual provides class of tenures and the categories of land within each village in the khatauni. Class 5(iii)(b)(2) of Para A-124 is in respect of the forest and other trees shrubs, bushes etc. Two kinds of forests are mentioned i.e. (1) forest under the management of Forest Department (including erstwhile private forests made over to Forest Departments); and (2) forest vested in the Gram Sabha. Class 5(b)(2) will consist of Babool, Dhak, Sirhoar, Bankraunda etc. These lands are recorded as "Jangal Dhak' and, therefore, the same are public utility lands. He has further submitted that under Section 132 of the U.P.Z.A. & L.R. Act, the public utility lands are saved and no bhumidhari rights shall accrue in respect of the public utility land in favour of anyone. He has also submitted that the order dated 30.1.1987 passed by the then District Magistrate, Hardoi purportedly in exercise of power under Section 117(6) of the U.P.Z.A. & L.R. Act, whereby he resumed the said land for Gyan Yog Charitable Trust through its chairman, Radhey Shyam Agarwal, a retired IAS officer, was wholly illegal inasmuch as no bhimidhari right could have been created in favour of anyone in respect of the said land being public utility land. He has further submitted that the order was void ab initio and was result of arbitrary and mala fide exercise of the powers by the then District Magistrate, Hardoi to benefit his fellow brother of IAS community.

24. Sri P.V. Chadhary, learned Amicus has further submitted that the object of the Trust was to run the trust for public purpose, and it is said that for the said object and purposes, it constructed a charitable hospital and school etc. Instead of carrying out its objects of public purpose, the Board of Trustees of the Trust in its meeting dated 9.10.2009 resolved that the land along with building should be sold and Sri Sanjeev Agarwal, the Managing Trustee was authorized for the said purpose. In furtherance of the resolution of the Board of Trustees of the Trust, Sri Sanjeev Agarwal, Managing Trustee, executed two sale deeds on 19.6.2010 and on 1.7.2010 in favour of his own sons, Yash Vardhan Agarwal and Surya Vardhan Agarwal and his close relative, Pradeep

Kumar Agarwal, who are the Treasurer and Trustees of the Trust for meagre amounts of Rs.15,00,000/- and Rs.12,00,000/- respectively. Thereafter, this land was given on lease to their own company i.e. Concept Cars Limited, in which Sanjeev Agarwal, his two sons and Pradeep Kumar Agarwal are the Directors. After demolishing the hospital building, they have constructed commercial complex and a Maruti Car showroom is being run from the commercial complex to earn profit.

25. Sri P.V. Chadhary, learned Amicus has also submitted that the public utility land belonging to the Government/Gram Sabha was initially obtained in the name of charitable trust and subsequently the same was sold by the President of the Trust to his own sons and a close relative. It is nothing but a sham transaction and fraud played by the trustees to make commercial use of the public land held in Trust. It is nothing but a breach of trust, cheating and legal fraud committed by the Trustees in connivance with the authorities concerned. The authorities/State Government is the Trustee of the land in question and instead of protecting the public utility land, they had resumed it in favour of the private persons in a mala fide, arbitrary and unjust manner. He has, therefore, submitted that the question involved is of huge public importance and, therefore, even if it is assumed that the petitioner has some personal grudge against opposite party no.5 or the Concept Cars Limited, this Public Interest Litigation would be maintainable, and the Court is required to examine the issue of public importance involved in the petition.

26. Sri P.V. Chadhary, learned Amicus has further submitted that this Court vide order dated 18.3.2021 has itself recorded the important issues involved in the writ petition and held that if it is found that the petitioner was espousing his personal vendetta/grudge against opposite party no.5, but if the facts mentioned in the writ petition were correct, the Court would itself examine the issues involved and register the present writ petition as Public Interest Litigation suo motu.

27. Sri P.V. Chadhary, learned Amicus has taken this Court to the detailed report submitted by the three members committee, which was constituted by the District Magistrate, Hardoi vide order dated 30.3.2021 and has submitted that the District Magistrate, Hardoi has rightly held that the order of resumption of land in favour of the Trust, was wholly illegal and without jurisdiction and void ab initio. He has further submitted that since the order of resumption dated 30.1.1987 in favour of Gyan Yog Charitable Trust through its Chairman was *void ab initio*, there is no question of exchanging the land with some other land.

28. Sri P.V. Chadhary, learned Amicus has further submitted that the land was public utility land and the same was illegally obtained by Sri Radhey Shyam Agarwal, father of opposite party no.5, by using his influence and reach being an ex-IAS officer. Though the land was obtained for charitable purpose, but the same is being used for commercial purpose and the same cannot be exchanged in any manner. Illegal encroachment of the Gram Sabha land cannot be regularized inasmuch as the same would amount to perpetuating the illegalities. Even if the opposite parties are carrying out the commercial activities for several years, the same would not vest them with any legal right to continue their illegal possession and the villagers cannot

be allowed to suffer merely because the opposite party no 5 and others have continued to occupy the land for several years. The unauthorized occupants are liable to be evicted. He has, therefore, submitted that this Court should order for eviction of the opposite parties forthwith from the land in question, which is a public utility land which was wrongfully resumed by the then District Magistrate in favour of the Trust inasmuch as the opposite parties have no right to continue possession of the land in question.

29. Sri K.K. Singh, learned counsel for the petitioner has supported the submissions made by Sri P.V. Chaudhary, learned Amicus and has prayed that writ petition be allowed, and the opposite parties be evicted forthwith from the land in question.

30. Sri Shailendra Kumar Singh, learned Chief Standing Counsel assisted by Sri Yogesh Kumar Awasthi, learned Standing Counsel has submitted that admittedly the trust namely, Gyan Yog Charitable Trust, is a private trust. The powers under Section 117(6) of the U.P.Z.A. & L.R. Act can be exercised by the State Government for resuming the land vested in the Gram Sabha or any other local authority. However, the public utility land covered under Section 132 of the U.P.Z.A. & L.R. Act cannot be allotted in favour of any person. It has been further submitted that the said land was recorded as "Jangal Dhak' in revenue record and was a public utility land, therefore, resuming the said land for a private Trust, was in violation of Section 132 of the U.P.Z.A. & L.R. Act and, therefore, it was void *ab initio*.

31. On facts, the order passed by the District Magistrate, Hardoi has been supported. It has been submitted that the order dated 30.1.1987 was void ab initio in terms of law. It has also been submitted that the Trustees have played fraud and breached the trust inasmuch as they have usurped the public land held by the government under trust for their commercial venture. The land, which was allotted ostensibly for charitable purposes, is being used for commercial establishment and the transfer of the land by the Managing Trustee in favour of his sons, who are the Treasurer and the Trustees of the Trust and a close relative, is a legal fraud and thus, transfer would not vest them with any right over the land, which is a public utility land illegally allotted to the Trust for charitable purposes. It has also been submitted that the Tehsildar has already passed orders for eviction and compensation and the action accordingly would be taken against the illegal occupants and the encroachers of the Gram Sabha land.

32. Sri Mohd. Arif Khan, learned Senior Advocate assisted by Sri Mohd. Aslam Khan and Sri Ratnesh Chandra has submitted that though the land was recorded as land in Class-5(iii)(b)(2) in the revenue record but the same was not a public utility land. He has further submitted that the land of Class-5(iii)(b)(2) would refer to the nature of land to be a cultivated land, which remained uncultivated since long time, due to which stray trees etc, came up over it naturally. He has also submitted that merely use of the term "Jangal Dhak' in revenue record, would not render the nature of the land as public utility land and merely by use of nomenclature "Jangal Dhak', the land would not ipso facto become a land of public utility. He has further submitted that public utility lands are those lands, which

are mentioned in Class-6 and only those lands are saved under Section 132 of the U.P.Z.A. & L.R. Act or the lands, which are reserved under the consolidation operation. The land, which has been earmarked as a public utility land, basically refers to a land which has been kept reserved for being utilized as a common land by residents of a Gaon Sabha to whom it has been entrusted under Section 117(6) of the U.P.Z.A. & L.R. Act. However, Gram Sabha will not have any absolute right over the said land and the State will continue to be ultimate owner of the property.

33. Sri Mohd. Arif Khan, learned Senior Advocate has further submitted that Section 117(6) of the U.P.Z.A. & L.R. Act deals with the power of the State Government to resume any land entrusted to Gram Sabha, and take over control of any piece of land. The reservation over such land resumed by the State Government will not continue. There is no fetter upon the power of the State Government to resume any public utility land inasmuch as on resumption, the land would not be treated to be a land in control any more by the provisions of the U.P.Z.A. &L.R. Act. He has therefore, submitted that resumption by the then District Magistrate of the land in question in favour of the Trust, cannot be said to be illegal or against any provision of Section 117(6) of the U.P.Z.A. & L.R. Act. He has further submitted that if it is held that the State Government/Collector has power to resume the land, including the land recorded as "Jangal Dhak', then the State Government/ Collector would be empowered to assign the land to a private person and the Government Department etc. after receiving the cost of the land under the provisions of U.P. Land Records Manual inasmuch Paragraph No.361 of the U.P. Land Records Manual empowers the Government to dispose of the land in its possession by sale, by grant, by gift etc. He has, therefore, submitted that in the present case, the Collector has firstly taken the land under control of the State Government and, thereafter, has settled it in favour of Gyan Yog Charitable Trust after receiving the cost of the land, and there was no illegality committed in resumption or allotment of the land in favour of the Trust.

34. Sri Mohd. Arif Khan, learned Senior Advocate has further submitted that the Trust in question, is a private charitable Trust and therefore, any act done by the Trust with the property so purchased by it, can be challenged either by trustees or by the beneficiary thereof. The petitioner is neither the Trustee nor a beneficiary of the Trust, therefore, he is not entitled to challenge the sale of the land of the Trust in favour of two sons and a close relative of the Managing Trustee of the Trust. He has also submitted that this writ petition under the garb of "Public Interest Litigation' would not be maintainable inasmuch as the Trust being a charitable Trust, an aggrieved person is required to approach the regular Civil Court by way of filing proceedings under Section 92 of Code of Civil Procedure. He has submitted that the purchasers of the land had already moved an application before the appropriate authority to give in exchange an equally valuable bigger piece of land in lieu of the land sold by the trust, and this Court may pass an order directing the State Government to consider the exchange as per law prevailing on the subject. He has further submitted that the exchange of the land is permitted under Section 101 of the U.P. Revenue Code, 2006 read with Rules 101 and 102 of the U.P. Revenue Rules, 2016 and the statute itself permits the exchange of land of any kind or nature.

Therefore, the authorities may be directed to consider the application of the purchasers for exchange of the land.

Relevant Provisions:-

35. Para A-124 of the U.P. Land Records Manual provides the classes of the tenure or categories of land, which reads as under:-

*"**A-124. Arrangement of holdings:-** The arrangement of land within each village in the khatauni shall be as follows:-*

Part I=

(1)

(1-A)

(1-B)

(2)

(3)

(4)

(5) Culturable Land-

(I)

(ii)

(iii) Culturable Waste-

(a) Forests of timber trees-

(1) under the management of Forests Department (including erstwhile private forests made over to Forests Department)

(2) vested in the Gram Sabha.

(b) Forests of other trees, shrubs, bushes etc.

(1) (1) under the management of Forests Department (including erstwhile private forests made over to Forests Department)

(2) vested in the Gram Sabha."

36. Section 117 of the U.P.Z.A. & L.R. Act, 1950 is in respect of the vesting of certain lands etc. in Gram Sabhas and other local authorities. Section 117(6) of the U.P.Z.A. & L.R. Act, 1950 reads as under:-

*"**117. Vesting of certain lands, etc. in Gaon Sabhas and other Local Authorities.***

(1) ...

(2) ...

(6) The State Government may at any time, [by general or special order to be published in the manner prescribed], amend or cancel any [declaration, notification or order] made in respect of any of the things aforesaid, whether generally or in the case of any Gaon Sabha or other local authority and resume such thing and whenever the State Government so resumes any such things, the Gaon Sabha or other local authority, as the case may be, shall be entitled to receive and be paid compensation on account only of the development, if any, effected by it in or over that things :

Provided that the State Government may after such resumption make a fresh declaration under sub-section (1) or sub-section (2) vesting the thing resumed in the same or any other local authority (including a Gaon Sabha), and the provisions of sub-sections (3), (4) and (5), as the case may be, shall mutatis mutandis, apply to such declaration."

37. Section 132 of U.P.Z.A. & L.R. Act, 1950 provides the category of lands in which bhumidhari rights shall not accrue. Relevant provisions of Section 132 of the U.P.Z.A. & L.R. Act, 1950 read as under:-

*"**132. Land in which [bhumidhari] rights shall not accrue.-** Notwithstanding anything contained in Section 131, but without prejudice to the provisions of Section 19, [bhumidhari] rights shall not accrue in-*

(a) pasture lands or lands covered by water and used for the purpose of growing singhara or other produce or land in the

bed of a river and used for casual or occasional cultivation;

.....

(c) lands declared by the Slate Government by notification in the Official Gazette, to be intended or set apart for taungya plantation or grove lands of a [Gaon Sabha] or a Local Authority or land acquired or held for a public purpose and in particular and without prejudice to the generality of this clause-

.....

(vi) lands set apart for public purposes under the U.P. Consolidation of Holdings Act, 1953 (U.P. Act V of 1954).]"

38. Section 101 of the U.P. Revenue Code, 2006 permits the exchange of land by a Bhumidhar with prior permission in writing of the Sub-Divisional Officer. However, it further provides that the Sub-Divisional Officer shall refuse permission for exchange inter alia in respect of the land in which bhumidhari rights do not accrue. Section 101 of the U.P. Revenue Code, 2006 reads as under:-

*"**101 Exchange.**- (1) Notwithstanding anything in section 77 of this Code, any bhumidhar may with prior permission in writing of the Sub-Divisional Officer exchange his land with the land- (a) held by another bhumidhar; or (b) entrusted or deemed to be entrusted to any Gram Panchayat or a local authority under section 59. (2) The Sub-Divisional Officer shall refuse permission under sub-section (1) in the following cases, namely- (a) if the exchange is not necessary for the consolidation of holdings or securing convenience in cultivation; or (b) if the difference between the valuation, determined in the manner prescribed, of the lands given and received in exchange exceeds ten per 52 cent of the lower valuation; or (c) if the difference between the areas of the land given and received in exchange exceeds twenty-five per cent of the lesser area; or (d) in the case of land referred to in clause (b) of sub-section (1), if it is reserved for planned use, or is land in which bhumidhari rights do not accrue; or (e) if the land is not located in same or adjacent village of the same tahsil: Provided that the State Government may permit the exchange with land mentioned in clause (d) aforesaid, on the conditions and in the manner, prescribed. (3) Nothing in this section shall be deemed to empower any person to exchange his undivided interest in any holding, except where such exchange is in between two or more co-sharers. (4) Nothing in the Registration Act, 1908 (Act No.16 of 1908), shall apply to an exchange in accordance with this section."*

Analysis:

39. It is a trite law that if a writ petition filed by a person raises question of public importance involving exercise of power by men in authority, then it is the duty of the Court to enquire into the matter. The legal fraud played by the public authority for benefit of the private persons at the expense of public at large cannot be condoned. In the present case, even if it is believed that the petitioner has some personal grudge or score to settle with opposite party no.5 and his sons, the cause espoused by him in this writ petition is of greater public importance and, therefore, this Court in its order dated 18.3.2021 observed that looking at the facts of the case, this Court may treat this writ petition as Public Interest Litigation suo motu.

40. Supreme Court in the case of ***Akhil Bhartiya Upbhokta Congress Vs.***

State of Madhya Pradesh and others, (2011) 5 SCC 29 in paragraph 80 held as under:-

"80. The challenge to the locus standi of the appellant merits rejection because it has not been disputed that the appellant is a public spirited organization and has challenged other similar allotment made in favour of Punjabi Samaj, Bhopal, That apart, as held in Shivajirao Nilangekar Patil v. Mahesh Madhav Gosavi (1987) 1 SCC 227 even if a person files a writ petition for vindication of his private interest but raises question of public importance involving exercise of power by men in authority then it is the duty of the Court to enquire into the matter."

41. The State or its instrumentalities cannot give largesse to any person according to the sweet will and whims of the authorities of the State. Every action/decision of the State and its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy. Paragraph 65 of the said judgment reads as Under:-

"65. What needs to be emphasized is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefitted by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."

42. This Court in ***Gyanendra Singh Vs. Additional Commissioner, Agra Division, Agra***, 2003 (95) RD 286 has held that the land recorded as "Jangal Dhak' is a forest land and is a public utility land and same cannot be transferred by way of lease, sale etc and no bhumidhari rights shall accrue in respect of the said land. These lands are saved under Section 132 of the U.P.Z.A. & L.R. Act, 1950. This Court considering the provisions of Section 132 of the U.P.Z.A. & L.R. Act, 1950 held that lands recorded as "Jangal Dhak' are covered by the lands enumerated under Section 132 U.P.Z.A. & L.R. Act, 1950 and the same cannot be transferred in favour of anyone.

43. This Court defined in the said judgment that "Jangal Dhak' means "Dhaka Forest'. Dhaka is a kind of small tree having large leaves. It has been held that the entry of the land as "Jangal Dhak' would mean that it is a forest land and forest is beneficial for human life and environment. Therefore, the land in the category of "Jangal Dhak' is a public utility land, in respect of which no bhumidhari right can accrue. Paragraphs 7 and 8 of the said judgement read as under:-

"7.The sub-clause (3) of Section 132 includes land held for a public purpose on

which bhumidhari rights shall not accrue. The aforesaid three plots being recorded as "Dhaka Jangal" were covered by land as enumerated in Section 132 and lease of bhumidhari rights with non-transferable right cannot be granted on the said plots. No error has been committed by the courts below in cancelling the lease granted in favour of the petitioners. The submission of petitioners is that other persons have also been granted lease of "Dhaka Jangal", hence petitioners have been discriminated in so far as the lease of other persons have not been cancelled and the petitioners have only been singled out for cancellation. The counsel for the petitioners has raised the submission based on discrimination. As noted above, lease of "Dhaka Jangal" is not permissible in accordance with Section 132 of U.P. Zamindari Abolition and Land Reforms Act and the fact that leases were granted to certain other persons cannot validate the lease of the petitioners which was in violation of Section 132 of U.P. Zamindari Abolition and Land Reforms Act. The plea of discrimination is not available in a case where the benefit which was taken by other persons cannot be said to be in accordance with law. Apex Court in Chandigarh Administration v. Jagjit Singh, (1995) 1 SCC 745, held that mere fact that the respondent has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination in case the order in favour of other persons is found to be contrary to law or not warranted in the facts of this case. Following was laid down in paragraph 8:

"8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be correct, if it can be done according to law indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent authority to repeat the illegality; the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law....."

44. Thus, I do not find any substance in the submission of Sri Mohd. Arif Khan, learned Senior Advocate that the land in question, which was recorded as "Jangal Dhak' is not a public utility land and, therefore, there was no bar under Section 132 of the U.P.Z.A. & L.R. Act, 1950.

45. This Court has taken judicial notice of the fact regarding loot of the public property and observed that during consolidation proceedings, consolidation authorities/officers liberally donate the Gram Sabha properties to influential and resourceful persons by passing illegal and arbitrary orders.

46. In the case of ***Dina Nath Vs. State of U.P. and others***, 2009 (108) RD 321, this Court directed the Collectors of all the districts in the State to reopen such cases where names of private persons are entered in revenue records based on old pattas or adverse possession over Gram Sabha land and correct the illegality by taking suo motu action. Paragraphs 11 and 12 of the said judgement, which are relevant, are extracted herein below:-

"11. The experience of the Court is that during consolidation proceedings, Consolidation Authorities/ Officers liberally donate the Gaon Sabha properties to influential/resourceful persons by passing such orders as has been passed in the instant case.

12. Accordingly, all the Collectors of all the Districts in the State are directed to reopen such cases where names of private persons are entered in revenue records on the basis of old pattas or adverse possession over Gaon Sabha land and correct the illegality by taking suo motu action. However, no orders shall be set aside without issuing notice and hearing affected persons. If notice through registered post is not served then it may be served through publication in the newspaper also. If it is found that some Consolidation Officer or S.O.C. or D.D.C. has done similar thing, then the action must be proposed to be taken against him also."

47. Supreme Court in the case of ***Dina Nath Vs. State of Uttar Pradesh and others***, (2010) 15 SCC 218, not only upheld the said direction issued by this Court in its order dated 8.9.2009 passed in the case of Dina Nath (supra), but dismissed the Special Leave Petition with exemplary cost of Rs.50,000/-. It has been further held that in a matter such as this, the Court cannot be a silent spectator and is bound to perform its constitutional duty for ensuring that the public property is not frittered by unscrupulous elements in the power corridors and acts of grabbing public land are properly enquired into and appropriate remedial action be taken. Paragraphs 5, 6 and 7 of the aforesaid judgement are extracted herein below:-

"5.We have heard Shri S.R. Singh, learned Senior Advocate appearing for the petitioner and perused the record. In our view, the learned Single Judge did not commit any error by refusing to entertain the writ petition. In a matter like the present one, the Court cannot be a silent spectator and is bound to perform its constitutional duty for ensuring that the public property is not frittered by unscrupulous elements in the power corridors and acts of grabbing public land are properly enquired into and appropriate remedial action taken.

6. Since the petitioner has not disputed that the allotment was made in the name of his mother Smt Kalawati Devi by Gaon Sabha headed by his grandfather, we do not

find any justification whatsoever to entertain his challenge to the order of the learned Single Judge.

7. Accordingly, the special leave petition is dismissed with costs of Rs 50,000 which the petitioner shall deposit with the State Legal Services Authority within a period of one month from today."

48. A Division Bench of this Court again in the case of ***Rajendra Tyagi Vs. State of U.P. through Principal Secretary, Nagar Vikas, Babu Bhawan, Lucknow and others***, 2016 (131) RD 243 took judicial notice of the loot of the Gram Sabha land with active assistance and connivance of the revenue officers on a large scale and suggested the steps to be taken by the Government to prevent the loot and take corrective measures. The Division Bench interpreted the provisions of sub-section(6) of Section 117 of the U.P.Z.A. & L.R. Act, 1950 and held in paragraph 8 as under:-

"8. The effect of section 117(1) of the Act is that after the estate has vested in the State Government under section 4, the State Government is empowered to direct that the land, among other things, which had vested in the State, shall vest in the Gram Sabha or any other local authority established in respect to the village in question. Under sub-section (6), however, the State Government is empowered to amend or cancel any declaration or notification made by it and to order resumption. When the State Government issues an order of resumption, the Gram Sabha or local authority, as the case may be, is entitled to receive compensation on account only of the development, if any, effected by it in or over the land or thing. Under the proviso to sub-section (6), the State Government, upon resumption, is empowered to make a fresh declaration vesting the land resumed in the same or any other local authority including the Gram Sabha. The provisions of sub-sections (1) and (6) make it abundantly clear that the vesting of land in the Gram Sabha or the local authority does not confer an absolute title which at all material times continues to vest in the State Government. Indeed that is the basis on which the State under sub-section (6) of section 117 is empowered to cancel or amend a notification of vesting which has been issued under sub-section (1). Upon the issuance of such a notification, the Gram Sabha or local authority in which the land has originally vested, is entitled to receive compensation in respect of the development carried out by it thereon.

The true nature of the vesting in the State Government under sub-section (1) of section 4 as contrasted with the vesting under sub-sections (1) and (6) of section 117 in the Gram Sabha or local authority has been adjudicated upon in the judgment of the Supreme Court in Maharaj Singh (supra). The Supreme Court observed as follows:

"In the instant case the Act contemplates taking over of all zamindari rights as part of land reforms. However, instead of centralizing management of all estates at State level, to stimulate local self-Government, the Act gives an enabling power-not obligatory duty to make over these estates. to Gaon Sabhas which, so long as they are in their hands, will look after them through management committees which will be under the statutory control of Government under section 126. Apart from management, no power is expressly vested in the Sabhas to dispose of the estates absolutely..."

The principle is stated thus:

"...the vesting in the State was absolute but the vesting in the Sabha was

*limited to possession and management subject to divestiture by Government. Is such a construction of "vesting' in two different senses in the same section, sound? Yes. It is, because "vesting' is a word of slippery import and has many meanings. The context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. That is why even definition clauses allow themselves to be modified by contextual compulsions. So the sense of the situation suggests that in section 117(1) of the Act "vested in the State' carries a plenary connotation, while "shall vest in the Gaon Sabha' imports a qualified disp*osition confined to the right to full possession and enjoyment so long as it lasts..."

49. This Court vide its judgment and order dated 17.7.2012 passed in ***Writ-A No.33751 of 2012*** in view of the fraud being played in respect of the allotment of the public utility land in favour of private persons by the authorities in power in respect of the Ghaziabad, Gautam Budh Nagar and Panchsheel Nagar (Hapur) where the land has become extremely valuable suggested as under:-

*"**Suggestion:-***

As the land of Ghaziabad, Gautam Budh Nagar, Panchsheel Nagar (Hapur) has become extremely valuable and as for industrial and residential purposes land in those districts is urgently required and as the courts are constantly restricting the scope of acquisition of the properties belonging to private persons/bhoomidhars hence the best solution is that the State shall resume the entire gaon sabha land in these districts under Section 117(6) of U.P.Z.A.L.R. Act. This will serve two purpose one the land illegally occupied by private person through active support by officers will be taken back. Chances of further manipulation and usurpation will not be there, secondly lot of land will be available without having recourse to land Acquisition Act for Industrial Development including construction of residential colonies."

50. The land which was a public utility land, was resumed and allotted in favour of a private person, Late R.S Agrawal, Ex-IAS officer by the then District Magistrate in purported exercise of the power under Section 117(6) of the U.P.Z.A. & L.R. Act, 1950 for charitable purpose and now it is being used for commercial purposes, therefore, such a land cannot be exchanged in any manner. Even otherwise, under Section 101 of the U.P. Revenue Code, 2006 the land in which bhumidhari rights cannot get accrued, cannot be exchanged.

51. Therefore, I am not convinced with the submission of Sri Mohd Arif Khan, learned Senior Advocate that once the land was resumed by the District Magistrate, it came out of the purview of the provisions of the U.P.Z.A.&L.R. Act, 1950 and cannot be governed under the said Act.

52. The question is whether in the said land the bhumidhari rights could have been created by transferring the said land in favour of a private person headed by a retired IAS officer.

53. As discussed above, the land recorded as a "Jangal Dhak', is a public utility land and on such land bhumidhari rights could not have been created in favour of private person/ Trust headed by a such a person. Since the very order of resuming the land for a private Trust, was against the

law and, therefore, it was *void ab initio* and no valid right, title or interest got accrued in favour of the private Trust and no exchange, therefore, is permitted. It is nothing but a *mala fide*, arbitrary and colourable exercise of the power by the then District Magistrate on a fraud played by the Trustees by usurping the public utility land ostensibly given for the charitable purposes, but they sold it amongst themselves for commercial purpose and constructed a commercial building, in which commercial establishment is being run for profit. This is nothing but an illegal encroachment of the Gram Sabha land by respondent No.5 and his family members. Such illegality cannot be permitted to continue in perpetuity. For commercial interest of opposite party no.5 and his sons, the villagers cannot be allowed to suffer.

54. Supreme Court in the case of ***Jagpal Singh and others Vs. State of Punjab and others***, (2011) 11 SCC 396, noticed that since Independence, in large parts of the country this common village land has been grabbed by unscrupulous persons using muscle power, money power or political clout, and in many States now there is not an inch of such land left for the common use of the people of the village, though it may exist on paper. It has been further held that long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections cannot be treated as a justification for condoning this illegal act or for regularizing the illegal possession. Regularization should only be permitted in exceptional cases, where lease has been granted under some Government Notification to landless labourers or members of Scheduled Castes/Scheduled Tribes or where there is already a school, dispensary or other public utility on the land. Paragraph 22 of the aforesaid judgement reads as under :-

"22.Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/unauthorised occupants of the Gram Sabha/Gram Panchayat/ poramboke/shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show-cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularising the illegal possession. Regularisation should only be permitted in exceptional cases e.g. where lease has been granted under some government notification to landless labourers or members of the Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land."

55. In the aforesaid judgment, the Supreme Court took note of the judgement in the case of ***M.I. Builders (P) Ltd. Vs Radhey Shyam Sahu***, 1999 (6) SCC 464, in which the Supreme Court ordered for restoration of a park after demolition of a shopping complex constructed at the cost of over Rs.100 Crores.

56. In the case of ***Friends Colony Development Committee Vs. State of***

Orissa, 2004 (8) SCC 733, the Supreme Court held that even where the law permits compounding of unsanctioned constructions, such compounding should only be by way of an exception.

57. This Court wonders that if Late R.S. Agrawal was not an IAS officer, could the then District Magistrate have resumed the land for him. Judicial notice has been taken of the phenomenon of grabbing scarce natural resources by powerful persons in active connivance with the state machinery. A few in the administrative establishment who have commitment to the rule of law take initiative to correct the wrong done favouring powerful persons. Such officers who could muster courage of conviction face unsurmountable pressure from all quarters, which is evident in the present case. This Court believes that but for the cognizance taken by this Court of the fraud played by the Trustees in connivance with the State machinery, it would have been extremely difficult for the District Magistrate to pass the order dated 4.6.2021. This Court appreciates the courage of conviction shown by the District Magistrate and his team.

58. The natural resources are limited and scarce and meant to be preserved and protected. The State holds natural resources such as land, forests, minerals etc on behalf the citizens of this country in trust. The state authorities can not allow natural resources going in the hands of unscrupulous persons who have money and muscle power or have influence in the State machinery. If one undertakes a case study regarding the wealth in the hands of people who have enjoyed power or in power, startling facts would come out that how people with absolutely no means or with limited means once occupied power became rich/super rich and without any known source of income from calling or profession live Maharaja lifestyle in palace like houses. Once these people reach to power, they create enormous wealth for themselves not by legal and justified means but by corruption and taking control of scarce and valuable natural resources by their influence over the administration. This Court can not shut its eyes to this alarming phenomenon. New kind of Maharajas and princes have prop up after independence who could or have reached to power even for short period. The people are not pursuing merit as they find that merit is not recognised in this country. They believe that to earn wealth and power, one should enter politics. Politics is no longer a public service but a means to achieve power and wealth. This phenomenon must be reversed if democracy has to survive in this country and society is to be governed by rule of law. Unscrupulousness must be eschewed. Merit is to be recognised and respected .

Conclusion:

59. In view of the aforesaid discussion, answers to the questions formulated above are as under:-

(i). The writ petition could not have been thrown out on the ground of alleged grudge of the petitioner against opposite party no.5 or his sons and Concept Cars Limited etc. inasmuch the writ petition involves question of huge public importance regarding allotment of public utility land in favour of the private persons in an arbitrary and illegal manner against the express provision of the law and,

therefore, this Court has decided to examine the question of public importance involved in the present writ petition without going into the question of alleged personal grudge of the petitioner.

(ii). Order dated 30.1.1987 passed by then District Magistrate, Hardoi for resumption of the land in favour of the private Trust was against the provisions of Section 132 of the U.P.Z.A. & L.R. Act, 1950 as the then District Magistrate was not empowered to resume the land for a private person/ Trust in exercise of powers purported to be vested in him under Section 117(6) U.P.Z.A. & L.R. Act, 1950 read with notification dated 16.6.1981. The order passed by the then District Magistrate was void ab initio inasmuch as it created the right in respect of the public utility land, which was recorded as "Jangal Dhak' in revenue record of the relevant khatauni Fasli Years.

(iii). The District Magistrate, Hardoi after considering the three members committee report, has rightly held that the order dated 30.1.1987 was void ab initio and the committee has noted the fraud played by the Trustees in its detailed report. Therefore, the order passed by the District Magistrate for cancelling the entries in favour of opposite party no.5 etc., is in accordance with law and the District Magistrate deserves full credit for his decision, which has been taken in accordance with law.

(vi). As discussed above, in respect of the public utility land, no bhumidhari right can be accrued. The land recorded as "Jangal Dhak', is a public utility land and under Section 132 of the U.P.Z.A. & L.R. Act, 1950, no bhumidhari right could not have been created in respect of the land in question. Section 101 of the U.P. Revenue Code, 2006 empowers the Sub-Divisional Officer for exchange of land, but this power does not extend to the land of the Gram Sabha, which is a public utility land and in which no bhumidhari right can be accrued. Therefore, no exchange is possible in respect of the land in question.

60. In view of the aforesaid discussion, writ petition is ***allowed*** with the following directions: -

1. Opposite party no.5 and other illegal occupants of the land in question are to be evicted forthwith inasmuch as the orders of eviction have already been passed in compliance of the order passed by the District Magistrate on 4.6.2021.

2. Necessary action must get completed within 15 days regarding eviction. With respect to compensation, the appeal(s) shall be heard and decided by the competent authority against the orders passed by the Tehsildar, Sadar, Hardoi expeditiously preferably within a period of one month from the date of the order.

61. Let a copy of this judgment be communicated forthwith to the Chief Secretary, Additional Chief Secretary/Principal Secretary, Revenue and the District Magistrates, Hardoi and Sitapur for necessary compliance.

(2022)07ILR A1101
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.07.2022

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE JASPREET SINGH, J.

Public Interest Litigation No. 16150 of 2020

Suo-Moto Inre Right to Decent & Dignified Last Rites/Cremation
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Abhinav Bhattacharya, Ajit Singh, Anjani Kumar Mishra, Ashish Kumar Agarwal, Atul Kumar Singh, Digvijay Singh Yadav, Jaideep Narain Mathur(Ac, Nadeem Murtaza, Onkar Singh, Pradeep Kumar Singh, Seema Kushwaha, Sharad Bhatnagar

Counsel for the Respondents:
C.S.C., A.S.G., Anurag Kumar Singh, Ashok Shukla, Dr. Ravi Kumar Mishra, Manjusha, Pranjal Krishna, Satyaveer Singh

A. Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 15A (6) - Special Court or the Exclusive Special Court trying a case under this Act is required to provide to victim, his dependent, informant or witnesses, complete protection to secure the ends of justice; the travelling and maintenance expenses during investigation, inquiry and trial; the social-economic rehabilitation during investigation, inquiry and trial; and relocation, but, we cannot be unmindful of the fact that considering the importance of the issues, cognizance of which has been taken by this Court and suo moto proceedings have been registered, we have already granted protection to the victim's family instead of making them run from pillar to post.

B. Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 2(ec). - the word 'legal guardian' used in Section 2(ec) would cover guardians declared as such by any Act and also guardians appointed by Courts in the case of minors or lunatics. The term 'legal heirs' would obviously get its meaning from the law governing the right/inheritance to succeed the estate of the victim. However, the term 'relatives' used therein though it has not been defined, it has been used to give a wide meaning to the word 'victim' so as to advance and achieve the Object of the Act, which is to provide relief and rehabilitation to the victims which includes the family members of the deceased victim. Ordinarily it includes father, mother, husband or wife, son, daughter, brother, sister, nephew or niece, grandson or granddaughter of an individual.

C. Rule 12 & Section 15A - Rule 12 of the Rules, 1995 has to be read conjointly with Section 15-A of the Act 1989. Sub-rule (1) of Rule 12 of the Rules 1995. Sub-rule (4) of Rule 12 is relevant. It enjoins upon the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate to make necessary administrative and other arrangements and provide relief in cash or in kind or both within seven days to the victims of atrocity, their family members and dependents according to the scale as provided in Annexure-I read with Annexure-II of the Schedule annexed to these rules and such immediate relief shall also include food, water, clothing, shelter, medical aid, transport facilities and other essential items. Thus, this Rule is in furtherance of the object of the Act to provide relief and rehabilitation to the victim of an atrocity under the Act, 1989. 47.

D. Item 46 of the Schedule Annexure I to the Rules- the word 'may' used in Column 3 corresponding to the item 46 is indicative of the fact that the benefits mentioned therein would be available only where the provision applies and also where there is a need for the same. As far as Item 46 is concerned the object is to provide measures of socioeconomic rehabilitation to a victim of an atrocity under the Act 1989 in cases where they are in need of such rehabilitation. In Clause (i) of Column 3 of Item 46 there are three parts which have to be read, understood and applied disjunctively. the first part applies to the widow or other dependents who are entitled to basic pension etc. mentioned therein whose need is self-evident, the second part applies to one member of the family of the deceased who is to be given employment where it is required to be given and not where there are family members already in employment capable of taking care of the family unless there are exceptional reasons in the sense that the employment is not adequate or sufficient to sustain the family members, who may be large in numbers etc. The third part speaks of provision of agricultural land and house, if necessary by outright purchase. This third part does not mention as to whom it is to be provided, however, in view of our discussion hereinabove we are of the opinion that this would be provided where there is a need for providing such agricultural land and house,

meaning thereby, such cases in which the victim or the family members of the victim are very poor, landless, shelterless or land held by them is inadequate for their sustenance and the house or shelter which they own or are in possession of is inadequate in any manner.

E. In the event of ambiguity an interpretation which advances the object of the Act and provision should be preferred and not one which defeats the object of the provisions.

F. if ultimately the incident of atrocity is found to be false in the sense that the incident itself did not occur or the informant or victim's family belonging to SC/ST are themselves held to be the perpetrators of atrocity, then, all reliefs given under the Act 1989 are liable to be recovered with such other action as may be permissible in law. This is necessary to discourage frivolous cases/claims under the Act 1989.

G. Sub-Rule (1) Clause Page No. 74 (d) of Rule 15 - which speaks of scheme for employment in Government or Government Undertaking to the dependent or one member of the family. If the intent of the legislature or the Rule making authority was that a private job be provided, it would have been mentioned therein, therefore, this offer of a private job is something which is not expected from the State Government and absolutely uncalled for.

H. Section 15-A (6)(d) and Rule 15 (aa),(b) and (c) - The provision for relocation of the family members exists in Section 15-A (6)(d) and Rule 15 (aa),(b) and (c). The reason we are directing the State to consider this relocation instead of directing the family members to approach the Special Court under Section 15-A(6)(d) is that first and foremost it is the State and its authorities who have to consider such claim/request of the victims and only thereafter, if the victims are aggrieved they would approach the Special Court.

I. Section 21(2)(ii) read with Rule 11 of the Rules 1995 - enjoins upon the State and its Authorities specifically the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate to make necessary arrangements for providing transport facilities or reimbursement of full payment thereof to the victims of atrocity etc., therefore, first and foremost the State and its authorities have to comply their statutory obligations in this regard and thereafter, if the family members are still aggrieved, they can approach the Court concerned under Section 15-A(6)(b) of the Act, 1989.

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard.

2. These proceedings were ordered to be registered suo moto under Article 226 of the Constitution of India taking cognizance of certain incidents which took place on 14.09.2020 in District Hathras involving the alleged rape and murder of a girl belonging to a Scheduled Caste of 19 years followed by her cremation in wee hours of the night intervening 29/30.09.2020 which appeared to be against the wishes of her family members thereby raising important questions pertaining to fundamental right to a decent burial and role of State authorities in this regard.

3. As regards criminal case pertaining to the alleged rape and murder, monitoring of investigation/trial is also being undertaken by this Court under Article 226 of the Constitution of India. In this regard, certain orders have been passed by Hon'ble the Supreme Court on 27.10.2020 in Writ Petition (Criminal) No. 296 of 2020; Satyama Dubey and others vs. Union of India and others and other connected petitions. The trial is still pending.

4. In these very proceedings the victim's family has claimed employment for one of its members i.e. the elder brother in view of Item 46 of Schedule Annexure-I which is referable to Rule 12(4) of the

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (hereinafter referred to as 'Rules 1995') and Section 15A of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred as 'Act 1989'), and the assurance given to it on 30.09.2020 by the Head of the State which has been recorded in a document of the same date. The family has also claimed relocation as per the provisions of the Act 1989 considering the inimical condition in its village.

5. The victim's family which belongs to a Scheduled Caste filed an affidavit dated 23.10.2020 inter alia seeking relocation/rehabilitation outside the State of Uttar Pradesh as also Government employment to one member of the family. Subsequently, additional affidavit dated 06.01.2021 was filed on behalf of the victim's family seeking inter alia employment to one of the brothers of the victim on a Group 'C' post in the Government and also seeking the benefits prescribed at Item 46 of the Schedule Annexure-I to the Rules, 1995.

6. Response to these affidavits have been filed by the State which are on record.

Submissions on Behalf of the Victim's Family:

7. In nutshell, the contention of Ms. Seema Kushwaha, learned counsel for the victim's family was that on 30.09.2020 the Head of the State had given certain assurances with regard to employment, etc. to the victim's family. The monetary benefit as promised has been extended but the employment part has not been complied. The assurances were reduced in writing and were singed by the District Magistrate and various other Public Authorities, therefore, the State is under an obligation to provide the benefits assured therein which are referable to statutory provisions.

8. The submission of learned counsel for the victim's family was that after the unfortunate incident which took place on 14.09.2020 followed by the illegal cremation in the night of 29/30.09.2020, an atmosphere of fear and insecurity has gripped the family members who are nine in number including three girls aged 7, 3 and 1 year old respectively. The demography of Village Boolgadhi is such that there were only four Scheduled Castes families in the village, rest being upper castes and after the above incident, two of the four families have migrated elsewhere leaving only two families of which one is the victim's family. The atmosphere is very hostile. The victim's family has been subjected to economic and social boycott. Round the clock security by the CRPF personnel has also thrown the family's life haywire as movement has become restricted. The father is no longer employed after the incident. Likewise, the elder brother who was employed in Ghaziabad is also unemployed. The younger brother is also unemployed. The family has agricultural holding of only four bighas of land and a house in the village comprising two rooms, verandah, etc. Considering the atmosphere prevailing in the village, in spite of the CRPF personnel being posted therein, it is not possible for the family to lead a normal life as such they need to be relocated/rehabilitated elsewhere so that they may feel socially, and economically secure.

9. Her contention was that the family has relatives in Noida and Delhi, therefore, if they are relocated/rehabilitated in Noida

it would give them a proper atmosphere for living a normal life far away from the place of incident. The entire family wants to live together and they would be secure in such an environment at Noida having the support of their peer group and relatives. The accused belong to the upper caste which is the dominant caste in Village Boolgadhi, therefore, normal life for the victim's family which belongs to the Schedules Caste is not possible.

The offer of Sri Raju, learned Senior Counsel appearing for the State of U.P., albeit after some persuasion by the Court, for providing a house constructed by the District Urban Development Agency within the municipal limits of Hathras was turned down by the victim's family on the ground that living at Hathras is not an option considering the aforesaid scenario. The contention was that the State could not prevent the crime being committed and on account of the negligence of the said authorities, life and liberty of the victim's family has been compromised. The family feels highly insecure, socially, economically, mentally and psychologically. Children are unable to go to school as the mother is afraid to send them for studies in the vicinity of the village or even nearby.

10. Learned counsel also referred to a Mahapanchayat having been called by Karni Sena an organization of upper caste people in favour of the accused which has further aggravated the situation and has added to the fear of the victim's family which belongs to the downtrodden class.

11. Learned counsel also referred to another incident involving death of Vinay Tiwari and Manish Gupta and that their spouses were given employment in a Public Undertaking, that too Class II job, apart from Rs. 40.00 lakhs given to them, in comparison to which, the victim's family had only been provided Rs. 25.00 lakhs, moreover, no employment has been provided in spite of an assurance having been given. She contended that the said families were well-off economically and socially yet they were given said benefits whereas a downtrodden family in spite of there being statutory backing under the Act 1989 and the Rules 1995 made thereunder, has not been extended the benefits prescribed in law and as were assured by the Government itself on 30.09.2020. She alleges discrimination and arbitrariness in this regard which according to her was painful for the family and displayed an unnecessary adversarial attitude on the part of the State against the poorest of the poor.

Submissions on Behalf of the State:

12. Sri S.V. Raju, learned Senior Counsel assisted by Mr. Pranjal Krishna, learned counsel appearing for the State of U.P. submitted that the benefits prescribed under Item 46 of the Schedule Annexure-I to the Rules 1995 are not mandatory as is evident from the use of word 'may' in Column 3 of Item 46. It is a relief additional to the other reliefs mentioned at Items No. 1 to 45. He raised important issues pertaining to the scope of Item 46 of the said Schedule Annexure-I to the Rules 1995 and the meaning and purport of the term 'family', 'atrocity' and use of the word 'may' therein in the light of the Act 1989 and Rules 1995 in support of his argument. According to him employment referred in Item 46 of Schedule Annexure-I to the Rules 1995 was only with respect to 'dependents' of the victim or widow which the family members were not. The word 'and' used in Clause (i) of Column 3 of Item

46 is conjunctive, not disjunctive. He submitted that only needy persons could be given the additional relief envisaged in Item 46 and it cannot be claimed as a matter of right. It is not supposed to be a bounty. He also raised an issue as to whether the brothers and sisters of the victim would fall within the meaning of legal heir under the provisions of the Hindu Succession Act, 1956 and whether such a wide definition of 'family' should be given so as to include them also in the said definition for the purpose of Item 46. What if the married brother does not look after the family after being provided employment. The Act 1989 and the Rules 1995 framed thereunder do not speak of a Government job. He also submitted that negative parity/equality cannot be claimed by the victim's family with Vinay Tiwari and Manish Gupta' family.

13. The assurances recorded in the minutes dated 30.09.2020 are contrary to the provisions of Rules 1995 and are not enforceable in a Court of law. He submitted that provision of such employment to the victim's family would not only violate the statutory provisions but would also be completely violative of public policy and hit by Article 14 and 16 of the Constitution of India. He also submitted that an amount of Rs. 25.00 lakhs given to the victim's family was much more than what was envisaged in Schedule Annexure-I to the Rules 1995 at Items No. 1 to 45, therefore, the State Government had been more than fair to the victim's family.

14. The victim's family did not have any indefeasible and enforceable right with regard to employment. However, in the same vein, he suggested that the State Government could arrange private employment to one of the members of the family, however, on surprise being expressed by the Court as to how the State will arrange private employment, the learned counsel at the fag end of the hearing on this issue submitted that after conclusion of trial the State is agreeable to consider the grant of employment to one member of the family. This, of course, he submitted was without prejudice to the legal issues which he had raised as regards the provision of the Act 1989 and the Rules 1995 and Schedule Annexure-I thereto.

15. He also submitted that it is not as if the father and brother who were in employment prior to the incident had been removed from employment but a case where they had voluntarily stopped going for the job. The children could be provided best education in a nearby school. As regards the house, as already recorded, he submitted that a house built by DUDA within the municipal limits of District Hathras can also be provided. However, he was against the provision of a house, etc. to the victim's family at Noida or outside Hathras. He also submitted that the house of the victim's family was a large one having three rooms, verandah, etc. and the same was not being shared by the uncle as alleged by the counsel for the victim's family.

16. He also submitted that the said reliefs could only be given after atrocities mentioned therein had been proved in trial meaning thereby such benefits could only be given after conclusion of trial and not before.

17. Furthermore, he submitted that these proceedings, being in public interest, cannot be used by the victim's family for redressal of their individual grievance. Complicated factual issues are involved

which cannot be seen under Article 226 of the Constitution of India, especially as it would entail an inquiry regarding the quantum of relief, if any, to be given.

18. In addition to it, he submitted that the jurisdiction, if at all in this regard, is with the Special Court under Section 15A (6) of the Act 1989, therefore, this Court should not consider this issue.

19. In support of his contention, Sri Raju, learned Senior Counsel relied upon the following decisions:

"1. Ram Pravesh Singh vs. State of Bihar; (2006) 8 SCC 381

2. State of Bihar vs. Sachindra Narayan; (2019) 3 SCC 803

3. State of Haryana vs. Mahabir Vegetable Oils (P) Ltd.; (2011) SCC OnLine SC 374

4. Excise Commr. vs. Issac Peter; (1994) 4 SCC 104

5. Bannari Amman Sugars Ltd. vs. CTO; (2005) 1 SCC 625

6. South-Eastern Coalfields Ltd. vs. Prem Kumar Sharma; (2007) 14 SCC 508

7. V Sivamurthy vs. State of A.P.; (2008) 13 SCC 730

8. SBI vs. Jaspal Kaur; (2007) 9 SCC 571

9. State of Jharkhand vs. Shiv Karampal Sahu; (2009) 11 SCC 453

10. Auditor General of India vs. G. Ananta Rajeswara Rao; (1994) 1 SCC 192"

Submissions on behalf of the Amicus Curiae:

20. Learned Amicus, Sri J.N. Mathur, learned Senior Counsel assisted by Mr. Abhinav Bhattacharya invited the attention of the Court to the wordings and language used in various provisions of the Act 1989 and the Rules 1995. He submitted that the term 'victim' includes the dependent and non-dependent. The submission was that the victim's family is covered by the provision contained in Item 46 of the Schedule Annexure-I to the Rules 1995 and the grant of employment, etc. is not restricted only to the dependents. There is no reason to give a restrictive meaning to the term family used therein. He submitted that the assurance given on 30.09.2020 was within the purview of the Act 1989 and the Rules made thereunder. The assurance/letter of the District Magistrate, etc. is enforceable in law. It is hardest of the cases, therefore, whatever benefit/relief can be given, should be given by the Court. Alternative remedy is not an absolute bar in this regard.

He further submitted that these proceedings are suo moto proceedings under Article 226 of the Constitution of India in public interest considering the fact that the victim and her family belong to downtrodden Schedule Castes and are the poorest of the poor. It is not a case where the proceedings are transcribed and prescribed on written pleadings and reliefs filed by the petitioner. It is also not the case that the relief being sought by the victim's family is alien to the subject matter in issue. In fact, it is an offshoot of an incident which led to cognizance being taken by this Court suo moto and, as there is statutory backing to the said reliefs, therefore, it can very well be considered in these very proceedings and there is no reason as to why the victim's family which already does not have sufficient means to sustain itself should be made to initiate separate proceedings in a Court of law, especially considering their social, educational and

economic status. This issue should not be treated as an adversarial issue by the State.

21. According to him, the additional reliefs envisaged at Item 46 of the Schedule are for victims of atrocities as mentioned in column. The family members are victims within the meaning of Section 2(ec) of the Act 1989, therefore, they are entitled to employment and also for relocation. The word 'and' used in Clause (i) of Column 3 of Item 46 if read as conjunctive it will defeat the intent of the provision. As regards Schedule Annexure-I, he submitted that it refers to the minimum amount payable under various heads from Items No. 1 to 45, therefore, Rs. 25.00 lakhs given by the State Government is not more than what is envisaged in the said provision and it was permissible for the State Government to give the said amount and even more and the submission of Sri Raju to the contrary is incorrect.

22. In support of his contention Sri Mathur relies upon the following decisions:

"1. Indore Development Authority (LAPSE-5J.) vs. Manoharlal; (2020) 8 SCC 129

2. Ishwar Singh vs. State of U.P.; AIR 1968 SC 1450

3. Samee Khan vs. Bindu Khan; (1998) 7 SCC 59

4. Mobilox Innovations (P) Ltd vs. Kirusa Software (P) Ltd.; (2018) 1 SCC 353

5. Gujrat Urja Vikash Nigam Ltd. vs. Essar Power Ltd.; (2008) 4 SCC 755

6. Joint Director of Mines Safety vs. Tandur and Nayandgi Stone quarries (P) Ltd.; (1997) 3 SCC 208

7. Maharshi Mahesh Yogi Vedic Vishwavidyalaya vs. State of M.P. and Ors.; (2013) 15 SCC 677

8. Sanjay Dutt vs. State; (1994) 5 SCC 410

9. Jindal Stainless Ltd. & Ors. vs. State of Haryana and Ors; (2017) 12 SCC 1

10. Sukhnandan vs. Suraj Bali and Ors.; AIR 1541 All 119

11. The Food Inspector, Trichur Municipality, Trichur vs. O.D. Paul and Ors; AIR 1965 Ker 96

12. Reg. vs. Oakes; (1959) 2 Q.B. 350"

Discussions and Analysis:

23. Before delving into the merits of the issues involved we deem it proper to decide the preliminary objections raised on behalf of the State.

24. As regards the objection of Sri Raju that these proceedings being in public interest, therefore, the victim's family cannot raise individual grievances herein for seeking employment, etc. under the Act 1989 and that they should raise these grievances separately, the same is not acceptable for the reason the victim's family belongs to downtrodden class of society. They belong to the Scheduled Caste. The very reason this Court took cognizance of the matter involving alleged rape, murder and thereafter cremation of the victim in the mid of the night in the circumstances already dealt with in the earlier orders of this Court was on account of the fact that the victim and her family belong to downtrodden class of the society i.e. they were from the socially and economically weaker section of the society, poorest of the poor, who have been given certain protections by the Constitution and also statutorily by the Act 1989 and such persons are often not in a position to raise their grievance or assert their rights for

various reasons including their unawareness and their social, educational and economic status.

In this case Ms. Seema Kushwaha has come forward to represent them pro bono as was specifically stated by her on a query being put by the Court. We have also appointed an Amicus for our assistance and also to protect the interest of the victim's family as per law.

Moreover, it is not as if the relief being claimed herein during pendency of these proceedings and the trial pertaining to the alleged criminal offence before the Court below is alien to the subject matter in issue involved herein. It is an offshoot of the crime committed. In fact, the Act 1989 has been promulgated by the Parliament of India to prevent the commission of offence of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special Courts and exclusive Special Courts for the trial of such offences **and for the relief and rehabilitation of the victim of such persons and for matters connected therewith and incidental thereto**. The relief of employment and rehabilitation, etc. being claimed by the victim's family are in terms of the the Act 1989 and the Rules 1995. These reliefs are consequential to the incident which took place involving the alleged rape and murder of the victim followed by her cremation in the mid of the night, therefore, it is not a matter unconnected with the proceedings which are pending before us. We are also monitoring the trial being conducted in this regard by the Court below.

Considering the subject matter it cannot be said that this is purely an individual grievance as the relief sought is one which is claimed by the victim's family as being permissible and which the State is obliged to provide to them under the Act 1989 and the Rules made thereunder. They are seeking constitutional and statutory protections and reliefs as perceived by them, therefore, we do not see any reason as to why a downtrodden family which does not have any member in employment, as of now, a fact which is not in dispute, and which has lost a member and is in distress, should be made to run from pillar to post or for that matter should be compelled to initiate separate legal proceedings involving unnecessary expenses and the mental stress which goes with such litigation. We do not see as to why in these very proceedings we should not consider such relief as claimed, whether they are permissible under the Constitution and the Act 1989 and the Rules made thereunder, etc. Rights of the downtrodden class especially Scheduled Castes who are victims under the Act 1989, can and should be enforced and protected in these proceedings.

25. It is also necessary to point out that these proceedings have not been drawn on a petition filed with specific pleadings, grounds and reliefs; rather suo moto cognizance has been taken by this Court as already referred in our earlier orders in public interest, considering the social, educational and economic status of the victim and her family and the incident, therefore, this is not a matter which is circumscribed by pleadings and reliefs claimed in a written and drafted petition, which is not to say that we can consider any or every issue unrelated to the incident. In fact, as already stated hereinabove, this is an issue which is an offshoot of the issues already involved in the proceedings. We accordingly reject the contention of Sri Raju to the contrary.

26. As regards other objection of Sri Raju that this issue should be raised by the

victim's family before the Special Court which is trying the criminal offence relating to the victim, we are of the opinion that no doubt as per Section 15A (6) of the Act 1989, Special Court or the Exclusive Special Court trying a case under this Act is required to provide to victim, his dependent, informant or witnesses, complete protection to secure the ends of justice; the travelling and maintenance expenses during investigation, inquiry and trial; the social-economic rehabilitation during investigation, inquiry and trial; and relocation, but, we cannot be unmindful of the fact that considering the importance of the issues, cognizance of which has been taken by this Court and suo moto proceedings have been registered, we have already granted protection to the victim's family instead of making them run from pillar to post and even Hon'ble the Supreme Court has vide its order dated 27.10.2020 observed/directed that we may monitor the criminal trial also.

Moreover, considering the objections which have been raised by Sri Raju some of which are of a legal nature touching upon the object and scope of the Act 1989, especially the scope of various provisions contained therein such as Section 15A and Item 46 of the Schedule Annexure-I to the Rules 1995 their purport and meaning, we are of the opinion that these legal issues involve interpretation of statutory provisions, therefore, this Court under Article 226 of the Constitution of India is best suited to consider these aspects of the matter, and which the Special Court may not be suited for.

Sri Raju has touched upon various aspects such as the meaning to be given to the term 'family' used in Item 46 of Schedule Annexure-I to the Rules 1995, the meaning of the term 'may' 'atrocities' used therein, the meaning of the term 'dependent' contained in Section 2 (bb), meaning of the word 'victim' in Section 2(ec), scope of Item 46 Schedule Annexure-I to the Rules 1995, etc. to contend that, in fact, the brothers and sisters would not fall within the definition of victim nor within the meaning of the term family and they are not entitled to the benefits envisaged in Item 46 of the Schedule Annexure-I referred hereinabove.

Furthermore, he has contended that the said provision is not enforceable in law in the sense that it is not mandatory, therefore, the meaning, purport and scope of all these provisions have to be considered by this Court, and the Special Court, in our opinion, would not be in a position to do so, therefore, it is our constitutional obligation to consider and, if necessary, interpret the provisions referred hereinabove.

Moreover, the relief claimed herein by the victim's family is based on an assurance dated 30.09.2020 which has been reduced in writing and signed by various authorities including Public Authorities and in this context also Sri Raju contends that the said assurance has no force in law and, in fact, it is contrary to the Act 1989 and the Rules 1995 and is not enforceable, therefore, this is an aspect which has to be considered by the High Court and the Special Court would not be suited to do so considering the magnitude and importance of the issue involved. How far we can interfere in the matter is a separate issue which we will consider hereinafter. Subject to this, we reject this contention of Sri Raju.

27. The next objection raised by Sri Raju was that the plea raised herein involves complicated and disputed questions of fact which may involve a roving inquiry, especially as to the extent of

relief to be given to the victim's family, therefore, the High Court under Article 226 of the Constitution of India is not suited for such an exercise and should desist from considering these pleas.

From the records, there are certain undisputed facts which are as under:

(i) The CBI has filed a charge-sheet against the accused under Sections 302, 376, 376A, 376D IPC and under Section 3(2)(v) of the Act 1989 before the Trial Court relating to the incident of rape, etc. of the victim.

(ii) As on date none of the family members are employed. In fact, they have not been in employment for quite sometime after the incident.

(iii) They have only about four bighas of land and a house in their village which according to them is jointly owned by victim's family and the uncles, though as per the State the uncles are not residing therein.

(iv) There are nine members in the victim's family three of whom are girl children aged about 7, 3 and 1 year and the child who is seven years old is unable to go to school.

(v) There is an assurance on record dated 30.09.2020 under which certain benefits and facilities were to be provided to the victim's family consequent to a meeting held between them and the de facto Head of the State. The minutes of the meeting and the assurances have been recorded in a document on record and signed by various authorities including the District Magistrate, etc. Whether this is enforceable or not is another matter which shall be considered hereinafter, but the fact that there is a document which had been prepared, is not in dispute.

(vi) It is also a fact that under the provisions of the Act 1989 and the Rules 1995 certain reliefs and rehabilitation including employment measures have been envisaged for being provided to the victim, his or her dependent, informant, witnesses and family members.

28. In view of the aforesaid, as of now, we do not see any such intricate and complex factual issues involved in considering the plea of the victim's family for employment, etc., however, if at any stage, we do find that complicated factual questions are involved, then we can certainly consider this aspect of the matter as to how far we are required to exercise our jurisdiction under Article 226 of the Constitution of India, but we do not find any reason to throw out the plea at the threshold without any consideration of the issues involved, especially in view of the legal issues involved herein as already mentioned above.

Analysis of Relevant Provisions of Act 1989

29. Before we proceed any further to consider the legal issues raised by Sri Raju, learned Senior counsel for the State, it will be apposite to take a glance at the scheme and relevant provisions of the Act 1989 and the Rules 1995.

30. As per the statement of Objects and Reasons of the Act 1989 noticing an increase in the disturbing trend of commission of certain atrocities including rape etc. of a woman belonging to the Scheduled Castes and Scheduled Tribes, as, the existing laws like the Protection of Civil Rights Act, 1955 and the normal provisions of the Indian Penal Code were found to be inadequate to check these crimes a special legislation to check and deter crimes/atrocities against them committed by non-Scheduled Castes and non-Scheduled Tribes was found to be

necessary. It is also mentioned that despite various measures to improve social-economic conditions of the Scheduled Caste and Scheduled Tribes, they remain vulnerable. They were denied number of civil rights and were subjected to various offences, indignities, humiliations and harassment and increase in the disturbance. It was also proposed to enjoin upon the States and Union Territories to take specific preventive and punitive measures to protect the Scheduled Castes and Schedule Tribes from being victimized and where atrocities were committed, to provide adequate relief and assistance to rehabilitate them. The Act 1989 seeks to achieve the above Objects.

31. According to long title of the Act 1989 it is an Act to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special Courts and Exclusive Special Courts for the trial of such offences and **for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.**

32. The term '**atrocity**' which had not been defined earlier, has been defined in the Act 1989 in **Section 2(a)** to mean an offence punishable under Section 3. **Section 3** mentions punishment for offences of atrocities. The offences involved in this case are covered within the meaning of the term 'atrocity' as defined in the Act 1989. Trial in respect thereof is in progress before the Special Court at Hathras.

33. **Section 8** refers to certain presumptions as to offences, as mentioned therein.

34. **Chapter IV-A of the Act 1989** deals with the Rights of Victims and Witnesses which reads as under:-

"Chapter IV- A
RIGHTS OF VICTIMS AND WITNESSES

15-A. Rights of victims and witnesses.--(1) It shall be the duty and responsibility of the State to make arrangements for the protection of victims, their dependents, and witnesses against any kind of intimidation or coercion or inducement or violence or threats of violence.

(2) A victim shall be treated with fairness, respect and dignity and with due regard to any special need that arises because of the victim's age or gender or educational disadvantage or poverty.

(3) A victim or his dependent shall have the right to reasonable, accurate, and timely notice of any court proceeding including any bail proceeding and the Special Public Prosecutor or the State Government shall inform the victim about any proceedings under this Act.

(4) A victim or his dependent shall have the right to apply to the Special Court or the Exclusive Special Court, as the case may be, to summon parties for production of any documents or material, witnesses or examine the persons present.

(5) A victim or his dependent shall be entitled to be heard at any proceeding under this Act in respect of bail, discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Special Court or the Exclusive Special Court trying a case under this Act shall provide to a victim, his dependent, informant or witnesses--

(a) the complete protection to secure the ends of justice;

(b) the travelling and maintenance expenses during investigation, inquiry and trial; and

(c) the social-economic rehabilitation during investigation, inquiry and trial;

(d) relocation.

(7) The State shall inform the concerned Special Court or the Exclusive Special Court about the protection provided to any victim or his dependent, informant or witnesses and such Court shall periodically review the protection being offered and pass appropriate orders.

(8) Without prejudice to the generality of the provisions of sub-section (6), the concerned Special Court or the Exclusive Special Court may, on an application made by a victim or his dependent, informant or witness in any proceedings before it or by the Special Public Prosecutor in relation to such victim, informant or witness or on its own motion, take such measures including--

(a) concealing the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to the public;

(b) issuing directions for non-disclosure of the identity and addresses of the witnesses;

(c) take immediate action in respect of any complaint relating to harassment of a victim, informant or witness and on the same day, if necessary, pass appropriate orders for protection:

Provided that inquiry or investigation into the complaint received under clause (c) shall be tried separately from the main case by such Court and concluded within a period of two months from the date of receipt of the complaint:

Provided further that where the complaint under clause (c) is against any public servant, the Court shall restrain such public servant from interfering with the victim, informant or witness, as the case may be, in any matter related or unrelated to the pending case, except with the permission of the Court.

(9) It shall be the duty of the Investigating Officer and the Station House Officer to record the complaint of victim, informant or witnesses against any kind of intimidation, coercion or inducement or violence or threats of violence, whether given orally or in writing, and a photocopy of the First Information Report shall be immediately given to them at free of cost.

(10) All proceedings relating to offences under this Act shall be video recorded.

(11) It shall be the duty of the concerned State to specify an appropriate scheme to ensure implementation of the following rights and entitlements of victims and witnesses in accessing justice so as--

(a) to provide a copy of the recorded First Information Report at free of cost;

(b) to provide immediate relief in cash or in kind to atrocity victims or their dependents;

(c) to provide necessary protection to the atrocity victims or their dependents, and witnesses;

(d) to provide relief in respect of death or injury or damage to property;

(e) to arrange food or water or clothing or shelter or medical aid or transport facilities or daily allowances to victims;

(f) to provide the maintenance expenses to the atrocity victims and their dependents;

(g) to provide the information about the rights of atrocity victims at the time of making complaints and "registering the First Information Report;

(h) to provide the protection to atrocity victims or their dependents and witnesses from intimidation and harassment;

(i) to provide the information to atrocity victims or their dependents or associated organisations or individuals, on the status of investigation and charge sheet

and to provide copy of the charge sheet at free of cost;

(j) to take necessary precautions at the time of medical examination;

(k) to provide information to atrocity victims or their dependents or associated organisations or individuals, regarding the relief amount;

(l) to provide information to atrocity victims or their dependents or associated organisations or individuals, in advance about the dates and place of investigation and trial;

(m) to give adequate briefing on the case and preparation for trial to atrocity victims or their dependents or associated organisations or individuals and to provide the legal aid for the said purpose;

(n) to execute the rights of atrocity victims or their dependents or associated organisations or individuals at every stage of the proceedings under this Act and to provide the necessary assistance for the execution of the rights.

(12) It shall be the right of the atrocity victims or their dependents, to take assistance from the Non-Government Organisations, social workers or advocates."

35. Thus, apart from the constitutional obligation in this regard, statutory duties have also been imposed upon the State and its authorities to protect the rights of the members of Scheduled Castes/Scheduled Tribes.

36. The Act 1989 not only encompasses the trial of non-SC/ST accused for atrocities against SC/ST but also takes care of relief and rehabilitation of the victims.

37. **Sub-section 6 of Section 15-A** provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Special Court or the Exclusive Special Court trying a case under this Act shall provide to a victim, his dependent, informant or witnesses - **(a)** the complete protection to secure the ends of justice; **(b)** the travelling and maintenance expenses during investigation, inquiry and trial; **(c)** the social-economic rehabilitation during investigation, inquiry and trial; and (d) relocation.

Thus, four categories of persons are eligible/entitled to the aforesaid benefits which can be provided by the Special Court or the Exclusive Special Court which is trying a case under the said Act. These four categories are victim, dependent, informant and witnesses.

38. The term '**victim**' has been defined in **Section 2(ec)** to mean any individual who falls within the definition of the Scheduled Castes and Scheduled Tribes under clause (c) of sub-section (1) of Section 2, and who has suffered or experienced physical, mental, psychological, emotional or monetary harm or harm to his property as a result of the commission of any offence under this Act and includes his relatives, legal guardian and legal heirs. The term 'relatives' has not been defined in the Act 1989.

39. Sri Raju, learned Senior Counsel appearing for the State contended that the family members of the victim i.e. the brothers and sisters do not fall within the meaning of the term 'legal guardian and legal heirs'. He further submitted that the word 'relatives' herein would also not include these relations. In this regard he submitted that what if the married brother does not take care of the family.

We are of the opinion that the word 'legal guardian' used in Section 2(ec) would cover guardians declared as such by any Act and also guardians appointed by Courts in the case of minors or lunatics. The term 'legal heirs' would obviously get its meaning from the law governing the right/inheritance to succeed the estate of the victim. However, the term 'relatives' used therein though it has not been defined, it has been used to give a wide meaning to the word 'victim' so as to advance and achieve the Object of the Act, which is to provide relief and rehabilitation to the victims which includes the family members of the deceased victim.

A narrow view as to the meaning of the term 'relatives' would defeat the purpose of the Act. The term 'relative' has not been defined in the act 1989, therefore, it has to be understood as is commonly understood. Ordinarily it includes father, mother, husband or wife, son, daughter, brother, sister, nephew or niece, grandson or granddaughter of an individual. The word 'relative' has been defined in P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition Reprint 2007, at Page 4036 as under:

"Relative. "Relative" includes any person related by blood, marriage or adoption. (Lunacy Act (4 of 1912), S. 3(11)]

The expression "RELATIVE" means a husband, wife, ancestor, lineal descendant, brother or sister. [Estate Duty Act (34 of 1953), S. 17(4)(iii), Expln. (a)]

"Relative" means in relation to the deceased,

(a) the wife or husband of the deceased,

(b) the father, mother, children, uncles and aunts of the deceased, and

(c) any issue of any person falling within either of the preceding sub-clauses and the other party to a marriage with any such person or issue. [Estate Duty Act (34 of 1953), S. 27(7)(i)]

A person shall be deemed to be a RELATIVE of another if, and only if,--

(a) they are members of a Hindu undivided family; or

(b) they are husband and wife; or

(c) the one is related to the other in the manner indicated in Schedule I-A. [Companies Act (1 of 1956), S. 6]

"RELATIVE" in relation to an individual, means the husband, wife, brother or sister or any lineal ascendant or descendant of that individual. [Income tax Act (43 of 1961), S. 2(41) and FEM (Acquisition & Transfer of Immovable Property Outside India) Regulations, 2000, R. 5, Expln.]

"RELATIVE" in relation to an individual means--

(a) the mother, father, husband or wife of the individual, or

(b) a son, daughter, brother, sister, nephew or niece of the individual, or

(c) a grandson or grand-daughter of the individual, or

(d) the spouse of any person referred to in sub clause (b). [Income-tax Act (43 of 1961), S. 80 B(8), omitted by Act 4 of 1988 w.e.f. 1.4.1989]

"RELATIVE" means-- .

(1) spouse of the person;

(2) brother or sister of the person;

(3) brother or sister of the spouse of the person;

(4) any lineal ascendant or descendant of the person;

(5) any lineal ascendant or descendant of the spouse of the person;

(6) spouse of a person referred to in sub-clause (2), sub-clause (3), sub-clause (4) or sub-clause (5)

(7) any lineal descendant of a person referred to in sub-clause (2) or sub-clause

(3). [Narcotic Drugs and Psychotropic Substances Act (61 of 1985) S. 68B(i)]"

In **Black's Law Dictionary**, Eighth Edition at Page 1315, the word relative is defined as under:

*"**Relative,** n. A person connected with another by blood or affinity; a person who is kin with another. Also termed relation; kinsman. Cf. NEXT OF KIN (1).*

***blood relative.** One who shares an ancestor with another.*

collateral relative. A relative who is not in the direct line of descent, such as a cousin. [Cases: Descent and Distribution 32-41. C.J.S. Descent band Distribution. §§ 29, 38-49.]

***relative by affinity.** A person who is related not by marriage or by blood or by adoption, but solely as the result of a marriage. A person is a relative by affinity (1) to any blood or adopted relative of his Actor her spouse, and (2) to any spouse of his or her Is blood and adopted relatives. Based on the theory that marriage makes two people one, the relatives of each spouse become the other spouse's relatives by affinity. See AFFINITY.*

***relative of the half blood**. A collateral relative who shares one common ancestor. A half brother, for example, is a relative of the half blood. See half blood under BLOOD."*

40. Considering the meaning as noticed above of the term relatives and applying it to the scheme of the Act at hand, it would include the brothers and sisters apart from the father and mother and we see no reason why we should hold that the relatives would not includes these relations as there is nothing in the Act 1989 to exclude them from the said term. May be that in the facts of a given case where the brothers and sisters had severed their relationship with the victim and other family members and were living separately without any subsisting emotional or family relationship with them, in the facts of such a case, the Court may decline relief to them, but, this can not be the basis for holding as a matter of general proposition of law that brothers and sisters per se, even if they are married, would not fall within the meaning of the term 'relatives'. Applying such an understanding and meaning universally and interpreting the provisions of Section 2(ec) of the Act 1989 accordingly, would be against the spirit of the Act and would defeat its objective.

The legislature has consciously used the words 'relatives', 'legal guardians' and 'legal heirs' so as to provide maximum assistance and relief to the victims who suffer atrocities which includes family members. There is no reason why we should give a restrictive meaning to the term 'relatives' so as to oust brothers and sisters from its purview and that of Section 2(ec). The father, brothers, sisters in this case are covered within the meaning of victim defined in Section 2(ec) as the deceased victim was unmarried, especially as they are living together with ties intact. The family members of the victim have been paid Rs. 25 lacs as monetary relief immediately after the incident which took place on 23.09.2020, therefore, obviously even as per the State Authorities, the family members in this case qualify as victims but now a different stand is being taken before us.

41. The word '**witnesses**' will have the meaning as per Section **2(ed) of the Act 1989** wherein the word 'witness' has been defined to mean any person who is acquainted with the facts and circumstances, or is in possession of any information or has knowledge necessary for

the purpose of investigation, inquiry or trial of any crime involving an offence under this Act, and who is or may be required to give information or make a statement or produce any document during investigation, inquiry or trial of such case and includes a victim of such offence. The family members herein the father, mother, brothers and sisters are witnesses in terms of the aforesaid provision in the criminal trial which is pending before the Special Court, therefore, they fall within the meaning of the said term in Section 2(ed).

42. The term '**dependent**' is defined in **Section 2(bb**) to mean the spouse, children, parents, brother and sister of the victim, who are dependent wholly or mainly on such victim for his support and maintenance. Thus, if a person even though he or she may be the spouse, children, parents, brother or sister of the victim, if they were not dependent wholly or mainly on such victim for their support and maintenance, then, they would not be covered in the aforesaid definition of dependent.

43. The term 'i**nformant**' had not been defined in the Act 1989, therefore, it will have to be understood as per meaning assigned to it under the Code of Criminal Procedure in view of Section 2 (f) of the Act 1989. In the Code of Criminal Procedure, the word 'informant' would mean the person who gives an information relating to the commission of cognizable offence as is mentioned in Section 154 Cr.P.C.

44. I n exercise of power under **Section 23(1)** of the Act 1989 the Centre has formulated the Rules known as the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995. The word 'dependent' as defined in Rule 2(b) of the said Rules 1995 has the same meaning as per the definition contained in the Act 1989. The family members of the victim, who was a girl child, were obviously not dependents wholly or mainly on her, therefore, they do not qualify within the meaning of the said term, but, they certainly qualify as 'victims' within the meaning of Section 2(ec) as already discussed and also as 'witnesses' under Section 2(ed).

Analysis of the Rules 1995:

45. In the Rules 1995, Rule 12 is relevant which reads as under:-

"12. Measures to be taken by the District Administration.-- (1) The District Magistrate and the Superintendent of Police shall visit the place or area where the atrocity has been committed to assess the loss of life and damage to the property and draw a list of victims, their family members and dependents entitled for relief.

(2) Superintendent of Police shall ensure that the First Information Report is registered in the book of the concerned police station and effective measure for apprehending the accused are taken.

(3) The Superintendent of Police, after spot inspection, shall immediately appoint an investigation officer and deploy such police force in the area and take such other preventive measures as he may deem proper and necessary.

(4) The District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate shall make necessary administrative and other arrangements and provide relief in cash or in kind or both within seven days to the victims of atrocity, their family members and dependents according to the scale as provided in

Annexure -I read with Annexure -II of the Schedule annexed to these rules and such immediate relief shall also include food, water, clothing, shelter, medical aid, transport facilities and other essential items.

(4-A) For immediate withdrawal of money from the treasury so as to timely provide the relief amount as specified in sub-rule (4), the concerned State Government or Union Territory Administration may provide necessary authorisation and powers to the District Magistrate.

(4-B) The Special Court or the Exclusive Special Court may also order socioeconomic rehabilitation during investigation, inquiry and trial, as provided in clause (c) of sub-section (6) of Section 15-A of the Act.

(5) The relief provided to the victim of the atrocity or his/her dependent under sub-rule (4) in respect of death, or injury or rape, or gang rape, or unnatural offences, or voluntarily causing grievous hurt by use of acid, or voluntarily throwing or attempting to throw acid etc. or damage to property shall be in addition to any other right to claim compensation in respect thereof under any other law for the time being in force.

(6) The relief and rehabilitation facilities mentioned in sub-rule (4) above shall be provided by the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate in accordance with the scales provided in the Schedule annexed to these rules.

(7) A report of the relief and rehabilitation facilities provided to the victims shall also be forwarded to the Special Court or Exclusive Special Court by the District Magistrate or the Sub-Divisional Magistrate or the Executive Magistrate or Superintendent of Police. In case the Special Court or Exclusive Special Court is satisfied that the payment of relief was not made to the victim or his/her dependent in time or the amount of relief or compensation was not sufficient or only a part of payment of relief or compensation was made, it may order for making in full or part the payment of relief or any other kind of assistance."

46. Rule 12 of the Rules, 1995 has to be read conjointly with Section 15-A of the Act 1989. Sub-rule (1) of Rule 12 of the Rules 1995. Sub-rule (4) of Rule 12 is relevant. It enjoins upon the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate to make necessary administrative and other arrangements and provide relief in cash or in kind or both within seven days to the victims of atrocity, their family members and dependents according to the scale as provided in Annexure-I read with Annexure-II of the Schedule annexed to these rules and such immediate relief shall also include food, water, clothing, shelter, medical aid, transport facilities and other essential items. Thus, this Rule is in furtherance of the object of the Act to provide relief and rehabilitation to the victim of an atrocity under the Act, 1989.

47. In this Rule word 'victim of atrocity', 'family members' and 'dependents' have been used for the purpose of provision of relief as per Annexure-I read with Annexure-II. The family members of the victim in this case are also 'victims of atrocity' as already discussed. They are, however, not dependents of the victim.

48. Sub-rule (4-B) of Rule 12 provides that the Special Court or the Exclusive Special Court may also order

socio-economic rehabilitation during investigation, inquiry and trial, as has been provided in clause (c) of sub-section (6) of Section 15-A of the Act. The words 'socio-economic rehabilitation' have not been defined in the Act 1989 or the Rules 1995. Social rehabilitation would, thus, mean social integration of the victims in society, social security and restoration of dignified status in society. Economic rehabilitation would imply provision for economic security, availability of adequate means to sustenance for a dignified life.

49. Sub-rule (6) of Rule 12 provides that the relief and rehabilitation facilities mentioned in sub-rule (4) above shall be provided by the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate in accordance with the scales provided in the Schedule annexed to these Rules. Sub-rule (7) of Rule 12 enjoins upon the District Magistrate or the Sub-Divisional Magistrate or the Executive Magistrate or Superintendent of Police to forward a report of the relief and rehabilitation facilities provided to the victims to the Special Court or Exclusive Special Court.

50. The State has not brought on record any such report which may have been forwarded to the Special Court in this case, therefore, the inference is that no such report has been forwarded.

51. Furthermore, **Rule 15 of the Rules 1995** reads as under:-

*"**15. Contingency Plan by the State Government.**-(1) The State Government shall frame an implement a plan to effectively implement the provisions of the Act and notify the same in the Official Gazette of the State Government. It should specify the role and responsibility of various departments and their officers at different levels, the role and responsibility of Rural/ Urban Local Bodies and Non-Government Organizations. Inter alia this plan shall contain a package of relief measures including the following:*

(a) scheme to provide immediate relief in cash or in kind or both;

(aa) an appropriate scheme for the rights and entitlements of victims and witnesses in accessing justice, as specified in sub-section (11) of Section 15-A of Chapter IV- A of the Act;

(b) allotment of agricultural land and house-sites;

(c) the rehabilitation packages;

(d) scheme for employment in Government or Government undertaking to the dependent or one of the family members of the victim;

(e) pension scheme for widows, dependent children of the deceased, handicapped or old age victims of atrocity;

(f) mandatory compensation for the victims;

(g) scheme for strengthening the socioeconomic condition of the victim;

(h) provisions for providing brick/stone masonry house to the victims;

(i) such other elements as health care, supply of essential commodities, electrification, adequate drinking water facility, rural cremation ground and link roads to the Scheduled Castes and the Scheduled Tribes habitats.

(2) The State Government shall forward a copy of the contingency plan or a summary thereof and a copy of the scheme, as soon as may be, to the Central Government in the Department of Social Justice and Empowerment, Ministry of Social Justice and Empowerment and to all

the District Magistrates, Sub-Divisional Magistrates, Inspectors-General of Police and Superintendents of Police."

52. We may, at this stage, take note of the affidavit dated 28.03.2022 wherein, in response to our orders, it has been stated in para 4 that the Under Secretary of the Department of Social Welfare, Government of U.P. has apprised the Home Department, Government of U.P. that the proceedings for finalizing the contingency plan envisaged in Rule 15 of the Rules 1995 are under process. What this means is that in spite of the fact that almost 28 years having lapsed since formulation of the Rules 1995, till date the State Government has not prepared the contingency plan as is envisaged in Rule 15 thereof. Successive Governments have been sleeping over such an important matter which touches upon the rights of the Scheduled Castes/Scheduled Tribes. There has to be some soul searching on the part of all those who were involved in Governance ever since 1995 as to what they had been doing for all these years. One only needs to look at Rule 15 of the Rules 1995 to understand the importance of the said provision and the contingency plan envisaged therein and the deprivation as a result of absence of such scheme.

53. Most important, the contingency plan envisaged in Rule 15 is required to contain a package of relief measures including inter alia an appropriate scheme for the rights and entitlements of victims and witnesses in accessing justice, as specified in sub-Section(11) of Section 15-A of Chapter IV-A of the Act; **allotment of agricultural land and house sites; the rehabilitation packages; scheme for employment in Government or Government undertaking to the dependent or one of the family members of the victim.** This clause in Rule 15 itself answers the submission of Sri Raju that there is no provision in the Act or the Rules made thereunder for providing Government employment or employment under a Government undertaking. The Act 1989 envisages provision of employment in Government or Government undertaking. Furthermore, the plan has to include measures relating to mandatory compensation for the victims, scheme for strengthening the socioeconomic condition of the victim etc. As mentioned in the affidavit of the State dated 28.03.2022 no such plan is in existence though it is in process of being framed.

54. We may now refer to **Schedule Annexure-I** which is referable to Rule 12(4) of the Rules 1995 which in turn is referable to the benefits mentioned in sub-Section (6) of Section 15-A and Section 21(2)(iii) of the Act 1989 which enjoys upon the State to undertake measures for provision of economic and social rehabilitation of the victims of atrocities. We are primarily concerned with the purport and scope of this Schedule.

55. The heading of said Schedule Annexure- I is - **Norms For Relief Amount.** Column 2 thereof mentions the name of the offence and Column 3 mentions - '**Minimum amount of relief**.' Thus, the amount mentioned therein against the corresponding offence is the '**minimum amount**' payable meaning thereby the State Government can pay more that the minimum amount. This is relevant, as, the contention of Sri Raju, learned Senior Counsel appearing for the State at one stage was that much more than what had been envisaged with respect to the offences alleged against the victim herein has been

paid monetarily to the victim's family. We have no hesitation in saying that what has been paid, could be paid under the relevant Items from 1 to 45 and, therefore, it is not as if that the State had paid more than what is envisaged in the Act and Rules. The contention is, therefore, misconceived.

Analysis of Item 46 of Schedule Annexure-I to the Rules 1995:

56. There is not much of a dispute with regard to the monetary relief provided to the victim under the relevant items mentioned at Serial No. 1 to 45, as may be applicable. The dispute is with regard to the meaning and purport of Item 46 of the said Schedule **Annexure-I Item 46** reads as under:

46.	**Additional relief to victims of murder, death, massacre, rape, gang rape, permanent incapacitation and dacoity.**	In addition to relief amounts paid under above items, relief may be arranged within three months of date of atrocity as follows:- (i) Basic Pension to the widow or other dependents of deceased persons belonging to a Scheduled Caste or a Scheduled Tribe amounting to five thousand rupees per month, as applicable to a Government servant of the concerned State Government or Union territory Administration, with admissible dearness allowance **and employment to one member of the family of the deceased**, and provision of agricultural land, an house, if necessary by outright purchase; (ii) Full cost of the education up to graduation level and maintenance of the children of the victims. Children may be admitted to Ashram schools or residential schools, fully funded by the Government; (iii) Provision of utensils, rice, wheat, dals, pulses, etc., for a period of three months.

57. In Column No. 2 corresponding to the said Item 46 the sub-heading is - **Additional relief to victims of murder, death, massacre, rape, gang rape, permanent incapacitation and dacoity**. Column 2, as is evident from nature of the provision and language contained therein, gives us an idea that the reliefs referred in Item 46 are additional to the reliefs referred in Items 1 to 45 and also that they are available to '**victims**'.

'Victims' have been defined in Section 2(ec). In the context of Item 46 victim can mean the actual victim in case of rape, gangrape, incapacitation and dacoity but in other cases such as of death, massacre it will mean relatives, legal guardians and

legal heirs as mentioned in Section 2(ec). The meaning of the word has already been discussed earlier. In this case, originally the FIR was lodged under Section 307 IPC read with Section 3(va) of the Act, 1989, however, subsequently the offences alleged to have been committed under Section 376-B and 302 IPC have been added, therefore, Item 46 is applicable to the case at hand. The additional relief envisaged therein is available to 'victim' as is mentioned in Column 2. In our discussion in the earlier part of our judgment, we have already said that remaining family members i.e. mother, father, brothers and sisters all fall within the definition of victim under Section 2(ec) of the Act 1989, therefore, the provision (Item 46) is applicable in this case.

58. The difficulty has arisen on account of entries contained in Column 3 of Item 46. The contention of Sri Raju, learned Senior Counsel in this regard was that the word 'may' used in Column 3 of Item 46 is proof of the fact that the provision is not mandatory. It is not enforceable in law and that it gives discretion to the State Government to provide such additional relief, only in cases where the said provision applies and where there is a need. He further says that the benefits mentioned therein can only be given to dependents and not to others. The victims herein not being dependents are not entitled to the benefits mentioned therein. Secondly, such benefits can only be given where there is a need for the same. It has to be need based. It can not be as a matter of indefeasible right nor a means of source of enrichment or a bounty.

59. On a perusal of the provisions contained in Column 3, we are of the opinion that the word 'may' used therein is indicative of the fact that the benefits mentioned therein would be available only where the provision applies and also where there is a need for the same. To this extent we agree with Sri Raju. To illustrate further, what if the victim though he/she belongs to the Scheduled Caste is well-off say in the case of a PCS or IAS Officer who already has other surviving family members in employment and/or owns a house sufficient to meet the needs of the remaining family members or for that matter a case where after the death of the victim, other family members are already educated and employed and in a position to take care of the family having a suitable home. Whether even in such a case employment is necessarily to be provided to one member of the family of the deceased? Our answer has to be in the negative.

We are conscious of the legal position that backwardness of Scheduled Castes and Scheduled Tribes is constitutionally recognized, which requires no further proof but as far as Item 46 is concerned the object is to provide measures of socio-economic rehabilitation to a victim as defined in Section 2(ec) of an atrocity under the Act 1989 in cases where they are in need of such rehabilitation. We have to keep the object behind the provision in mind so that it is not implemented to enrich those who are not in need of it. The provision can not be given meaning nor can it be implemented in a manner so as to violate the rights of others including those victims belonging to SC/ST who are more in need or whose need is greater, considering the fact that resources of State are limited. The provision is supposed to give additional relief in cases where on account of the atrocity the family has been put in dire straits with no or inadequate means of sustenance and/or where they are rendered

shelterless. Cases of relocation of course are different requiring consideration of factors relevant to the same.

60. In Clause (i) of Column 3 of Item 46 there are three parts. First part of Clause (i) which provides for basic pension to widow, other dependents of deceased persons belonging to a Scheduled Caste or a Scheduled Tribe is applicable only in the case of a widow or dependents and not to others. The need of a dependent or a widow is self evident. The word 'dependent' is defined in Section 2 (bb) of the Act 1989. As already stated, the family members in this case are not dependents of the 'victim' nor widow, as they were neither wholly nor mainly dependent on her for their support and maintenance. They are, therefore, not entitled to the said benefit.

61. The second part of Clause (i) of Column 3 Item 46 is regarding employment to '**one member of the family of the deceased**'. The contention of Sri Raju, learned Senior Counsel was that the use of the word 'and' to join the first part and the second part is indicative of the fact that employment is also to be given only to dependents. We are unable to accept this argument for the reason that if we hold it to be so on the ground that the word 'and' here is conjunctive and not disjunctive, then, it will lead to incongruous and absurd results as, the word '**employment'** is followed by the words '**to one member of the family of the deceased'**. If the intention of the rule making authority was to provide employment only to 'dependents', then, it could have very well stopped after using the word 'and employment to the dependent', instead, it has cautiously used the word 'employment to one member of the family of the deceased' and has deliberately not used the word 'dependents'. The object is to give a wider scope so as to ensure sustenance and economic rehabilitation of the family members, what if the dependents are not qualified or eligible for employment? One of the family members can be given employment to achieve the object.

The *sine qua non* is that whichever family member is provided employment has to sustain the family and if he does not do so then he can be deprived of such employment and some other family member can be provided the same. Such conditions are often provided statutorily in cases of compassionate appointment such as in the U.P. Recruitment of Government Servant (Dying-in-Harness) Rules, 1975. This takes care of the apprehension of Sri Raju as to what if the brother does not support the family. No doubt, if there are family member or family members of the victim already in employment that too gainful employment which is sufficient to sustain the family, then, employment can not be claimed as a matter of right, but, in a case where the family members are unemployed or on account of the atrocity they are unable to gain employment for various reasons, then, this provision will certainly apply.

In the case at hand the father was employed at Ayush Pharmacy, however, after the atrocity a sense of fear having gripped the family, the family does not feel secure and he is no longer in employment. Likewise, the brother, who was employed at Ghaziabad, is also unemployed. The other unmarried brother is also unemployed. We will consider more of it on facts of this case, later.

62. The term '**family**' has not been defined in the Act 1989 and the Rules 1995, therefore, we have to give it meaning as is

commonly understood but, of course, keeping the object of the provision in mind. The **Black's Law Dictionary,** Eighth Edition, page 637, the word 'family' is defined as under:

*"**family,** n. 1. A group of persons connected by blood, by affinity, or by law, esp. within two or three generations. 2. A group consisting of parents and their children. 3. A group of persons who live together and have a shared commitment to a domestic relationship. See RELATIVE.- familial, adj.*

***blended family.** The combined families of persons with children from earlier marriages or relation ships.*

***extended family.** 1. The immediate family together with the collateral relatives who make up a clan; GENS. 2. The immediate family together with collateral relatives and close family friends.*

***immediate family**. 1. A person's parents, spouse, children, and siblings. 2. A person's parents, spouse, children, and siblings, as well as those of the person's spouse. Stepchildren and adopted children are usu. immediate family members. For some purposes, such as taxes, a person's immediate family may also include the spouses of children Band siblings.*

***intact family.** A family in which both parents live together with their children."*

63. In this case employment is being claimed for one of the two brothers, therefore, we are for the moment not concerned with other relationships. Suffice it to say that both the brothers are members of the family of deceased-victim who is alleged to have been murdered. The fact that the elder brother is married makes no difference as he lives with the family. If any member of the family goes away for employment it does not mean he ceases to be member of the family unless it can be demonstrated that he had severed all relations with the family as mentioned earlier. In this case there is sufficient material on record to show that all family members including the brothers are living together. Family members are covered within the definition of victim in Section 2(ec) as they are relatives of the victim. Words have to be given meaning and applied so as to advance and achieve the object of the provisions of the Act and not to defeat it.

64. Clause (i) in Column 3 contains a third part, for providing agricultural land, a house, if necessary by outright purchase. This again has to be implemented on the basis of need and Sri Raju, learned Senior Counsel is right in saying that it can not be a source of enrichment. It can not be that if a person is already having agricultural land and a house sufficient for sustenance and suitable for living of the family members, even then, he can claim land or a house, as, any such understanding of the provision and its implementation would be hit by Article 14 of the Constitution of India, unless of course it is a case of relocation which is a different matter involving separate parameters and modalities depending upon the fact of a case.

65. According to the us, the three parts of Clause (i) of Column 3 have to be read, understood and applied disjunctively, meaning thereby, the first part applies to the widow or other dependents who are entitled to basic pension etc. mentioned therein whose need is self evident, the second part applies to one member of the family of the deceased who is to be given employment where it is required to be given and not where there are family members already in employment capable of taking care of the

family unless there are exceptional reasons in the sense that the employment is not adequate or sufficient to sustain the family members, who may be large in numbers etc. The third part speaks of provision of agricultural land and house, if necessary by outright purchase. This third part does not mention as to whom it is to be provided, however, in view of our discussion hereinabove we are of the opinion that this would be provided where there is a need for providing such agricultural land and house, meaning thereby, such cases in which the victim or the family members of the victim are very poor, landless, shelterless or land held by them is inadequate for their sustenance and the house or shelter which they own or are in possession of is inadequate in any manner. If we give a conjunctive meaning to the provision by providing that all the three benefits would be available only in cases of widow or dependents as suggested by Sri Raju, learned Senior Counsel, then, it would create a hardship in a case where the family members are not dependents, but, nevertheless they are 'victims' and in need of additional relief by virtue of being rendered unemployed or shelterless consequent to the atrocity.

We may in this context refer to ***Stroud's Judicial Dictionary, 3rd Edn***. it is stated at page 135 that "and" has generally a cumulative sense, requiring the fulfillment of all the conditions that it joins together, and herein it is the antithesis of or. Sometimes, however, even in such a connection, it is, by force of a contexts, read as "or". Similarly in ***Maxwell on Interpretation of Statutes, 11th Edn***. it has been accepted that "to carry out the intention of the legislature it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other" or else it will defeat the object. These authorities support and reinforce our opinion in the matter

66. Entries in Column No. 3 at Item 46 are to be governed by remarks in Column no. 2 which says that additional reliefs (as mentioned in Column 2) in cases mentioned therein are meant for '**victims'.** Column No. 3 can not be interpreted so as to contradict Column No. 2. Column No. 3 is applicable to 'victims' as defined in Section 2(ec). Amongst the victims, first part of Clause (i) in Column 3 applies to widows or dependents, second part of Clause (i) applies to a victim who is a family member, who need not necessarily be a dependent, the third part of Clause (i) applies to victims as defined in Section 2(ec) as a whole, who are in need of such benefits. We may also refer to Clause (ii) which speaks of 'children' of victims.

In the event of ambiguity an interpretation which advances the object of the Act and provision should be preferred and not one which defeats the object of the provisions.

67. As we have held that the additional reliefs mentioned in Item 46 have to be considered and given based on need and circumstances of the victims we are in agreement with Sri Raju, learned Senior Counsel to this extent that it does not create any indefeasible right in favour of such persons who may not be in need of the said benefits, however, in cases where the victims are in need of the said benefits, the State would be obliged to provide the same to them and the word 'may' used in Column 3 can not be read and understood to give a discretion to the State to deny the benefits come what may merely because it

does not want to extend the benefits to them.

68. The consideration has to be meaningful, keeping in mind the object of the Act, the provisions contained therein and the object of Item 46, with due and proper application of mind to the relevant aspects and it has to be implemented accordingly in the interest of the victims. The endeavour shall be to provide such benefit where it is due and not that because there is a discretion, therefore, we will not provide it. The use of the word 'may' in Column 3 corresponding to Item 46 does not give the State or its authorities any such unbridled and uncanalised power to reject a claim to additional reliefs whimsically or for extraneous reasons, unreasonably and arbitrarily.

69. There is no dispute with regard to the applicability of Clause (ii) and (iii) of Item 46 in the facts of the present case, therefore, we need not enter into that aspect. State shall fulfill the educational needs of children of victim accordingly. Provision of food items, etc. has been taken care of as informed by the State but if the family has any grievance in this regard it can be raised before the District Magistrate who shall do the needful.

70. It is necessary to consider another argument of Sri Raju, learned Senior Counsel that the aforesaid additional relief such as employment has to be provided after the trial is over and not prior to it. We are unable to accept the aforesaid contention for the simple reason that this would defeat the object sought to be achieved. The Object is to provide additional relief at the earliest that is why a period of three months from the date of atrocity has been mentioned. No doubt, as per proviso to Section 14(3) of the Act 1989 when the trial relates to an offence under this Act, the trial shall, as far as possible, be completed within a period of two months from the date of filing of the charge sheet, but, this requirement is qualified by the word 'as far as possible' which is an acknowledgment of the harsh and painful reality regarding delay in trials which could be for various reasons. Secondly, most of the trials especially contentious one such as the case at hand would take much more than two months. In this case the trial has remained pending for two years for various reasons such as the Covid-19 pandemic and the constraints accompanying it, the number of witnesses to be examined etc., therefore, if we hold that the benefit would be available only after the trial is over the same would amount to compromising the object sought to be achieved by the provision contained at Item 46 of Schedule Annexure-I referable to Rule 12(4) of the Rules 1995 and Section 15A, 21 of the Act 1989. Even in criminal matters appeals are considered to be a continuation of the trial, therefore, if Sri Raju's suggestion is accepted, then, it would mean that till the appeal is decided before the High Court and thereafter before the Supreme Court, which may take decades or at least few years, the benefits envisaged in the Act 1989 would not be available. Even if this aspect is ignored, the trial itself could take long. If this is accepted, the widow or other dependents covered by first part of Column 3 of Item 46 will not get the basic pension and dearness allowance till conclusion of trial. This is certainly not the objective of the provision.

71. Furthermore, the argument advanced by Sri Raju, learned Senior Counsel that the words 'within the three

months of atrocities' mentioned in Column 3 of Item 46 means 'atrocity which is proved'. We are unable to read the word 'proved' after the 'atrocity'. If the intention of the rule making authority was that the additional relief mentioned therein should be given after the atrocity has been proved, then, it would have been mentioned specifically and categorically. Atrocity has to be given the meaning as defined in Section 2(a) which means '**an offence punishable under Section 3**'. The words used are '**an offence punishable under Section 3**' and not 'an offence under Section 3 which has to be proved'. Therefore, this argument is also rejected.

72. Having said so we must hasten to add, if ultimately the incident of atrocity is found to be false in the sense that the incident itself did not occur or the informant or victim's family belonging to SC/ST are themselves held to be the perpetrators of atrocity, then, all reliefs given under the Act 1989 are liable to be recovered with such other action as may be permissible in law. This is necessary to discourage frivolous cases/claims under the Act 1989.

The decisions relied upon by Sri Raju have been read by us but they do not persuade us to take any other view in the matter.

Claim of Employment to One Member of the Family:

73. Now, we may consider the facts of the this case in the light of what has been discussed hereinabove.

74. First and foremost we need to reproduce the assurances given by the State on 30.09.2020 to the victim's family members, which has been signed by the District Magistrate and various district and public authorities. The said document reads as under:-

"ग्राम बूलगढ़ी थाना चन्दपा जनपद हाथरस से सम्बन्धित प्रकरण में पीडित बेटी परिवारजनों द्वारा जो मांगे रखी गई, उन पर मा0 मुख्यमंत्री जी द्वारा आज दिनांक 30.09.2020 को अपनी सहमति प्रदान करते हुए पूरा करने का आश्वासन दिया गया। परिवारजनों द्वारा रखी गई मांगो का विवरण निम्नवत है:–

1- परिवार को कुल 25 लाख रूपये की आर्थिक सहायता प्रदान की जाए, जिसमें से 10 लाख रूपए जिला प्रशासन द्वारा पीड़ित के पिता के खाता में हस्तांतरित किये जा चुके है। शेष धनराशि शीघ्र प्रदान कर दी जाएगी।

2- पीड़िता के एक भाई को ग्रुप–सी की सरकारी नौकरी।

3- प्रकरण से सम्बन्धित वाद की सुनवाई फास्ट ट्रैक में कराकर आरोपियों को कड़ी से कड़ी सजा दिलवाई जाए।

4- पीड़ित परिवार को शहर हाथरस स्थित डूडा विभाग द्वारा निर्मित 01 आवास का आंवटन।

5- एस.आई.टी. का गठन कर प्रकरण की निष्पक्ष जॉच कराई जाए।

उपरोक्त के क्रम में मा0 मुख्यमंत्री जी द्वारा पीड़िता के पिता से विडियो कॉल के माध्यम से वार्ता की गई एवं अवगत कराया गया कि प्रकरण की जांच निष्पक्ष रूप से कराए जाने हेतु एस0आई0टी0 का गठन कर दिया गया है। प्रकरण में जो भी दोषी होगा उसको सख्त से सख्त सजा दी जाएगी। मा. मुख्यमंत्री जी द्वारा पीड़ित बेटी के परिवार से अपनी संवेदनाऐं व्यक्त की गई एवं आश्वस्त किया गया कि पीड़ित परिवार को हर सम्भव मदद मुहैया कराई जाएगी।

तत्क्रम में पीड़ित बेटी के परिवार द्वारा मा. मुख्यमंत्री जी के आश्वासन से संतुष्ट होकर अपना आभार व्यक्त किया गया एवं प्रकरण में कथित समूहों एवं व्यक्तियों द्वारा किए जा रहे धरना प्रदर्शन आदि को समाप्त कर शांति की अपील की गई।

मा0 मुख्यमंत्री जी एवं पीड़ित परिवार के मध्य हुई वार्ता मा0 पंचायतीराज मंत्री श्री भूपेन्द्र सिंह चौधरी की उपस्थिति में हुई एवं वार्ता के समय निम्नांकित जनप्रतिनिधि एवं अधिकारीगण उपस्थित थे :–

1- श्री राजवीर सिंह दिलेर, मा0 सांसद हाथरस।

2- श्री हरीशंकर माहौर, मा0 विधायक हाथरस।

3- श्री वीरेन्द्र सिंह राणा, मा0 विधायक सिकन्द्राराऊ।

4- श्री गौरव आर्य, मा0 जिलाध्यक्ष भा0ज0पा0 हाथरस।

5- श्री आशीप शर्मा, अध्यक्ष नगर पालिका परिषद हाथरस।

6- श्री गगगगगग निवासी बूलगढ़ी, थाना चन्दपा।

7- श्री राजकुमार निवासी अलीगढ़।

xxxxxx - The name at serial no. 6 has not been mentioned in view of the law requiring non disclosure of the name of the victim and her family members.

75. The aforesaid assurance was given by the Head of the State and public authorities who have signed it as witness of the aforesaid fact. The document is not denied, rather admitted.

76. Sri Raju, learned Senior Counsel, however, contended that the aforesaid assurance is contrary to the law i.e. the law contained in Item 46 of Schedule Annexure-I read with Rule 12(4) of the Rules 1995. This argument obviously was based on his understanding of Clause 1 of Column 3 corresponding to Item 46 of Schedule Annexure-I, which according to him, was applicable only in the case of widow or dependents and the family members of the victim herein being neither the widow nor dependents of the victim, according to him, were not entitled for the same. We have already rejected this contention and have held that the family members are covered in the definition of victim under Section 2(ec), therefore, they are also covered by Item 46 referred above.

77. The only question to be considered is of their need in the context of employment referable to Clause (i) of Column 3 of Item 46.

78. In the affidavit dated 06.01.2021 the victim's family has *inter alia* prayed for employment, etc. in terms of Item 46 of Schedule Annexure-I to the Rules 1995 and the assurance given on 30.09.2020 by the Head of the State. In para 9 of the said affidavit, it has been averred that the elder brother of the deceased was working in Sector 64 Noida with MCM Mobile Company prior to the incident but at present he is residing in the house in Village Boolgadhi. Likewise, younger brother was employed at Dr. Lal Pathlab, Vasundhara, Plot No. 20, Sector IAC, Ghaziabad but he is also residing at his house at Village Boolgadhi. The reason for the same is mentioned as security of the family. It has been averred that considering the economic condition of the family and its need for sustenance the assurance given by the Chief Minister on 30.09.2020 regarding provision of employment to one member of the family should be honoured. In the affidavit date 23.10.2020 filed on behalf of the victim's family also there is a prayer for providing employment in terms of the assurance given by the Head of the State through Video Conferencing on 30.09.2020.

79. Furthermore, another affidavit dated 12.11.2021 has been filed on behalf of the victim's family. In the said affidavit, the family has mentioned its economic condition and also expenses it had to bear after the commencement of the trial. It has raised a grievance about non-payment of travelling allowance, etc. for going to the Court and coming back to their house. It has been mentioned that none of the male members are employed and, therefore, the family does not have any source of income. The money provided as compensation by the State Government is being utilized for sustenance and meeting the needs of the family. It has also been mentioned that as a consequence of the incident involving the criminal offence against the girl, on the one hand, none of the family members have

been able to get an employment and on the other hand the State Government is not fulfilling its promise for providing such employment.

downtrodden class i.e. Scheduled Caste, is being treated in such a manner, on the other hand, two of the family members of Vinay Tiwari and Manish Gupta had not only been provided Rs. 40.00 lakhs as compensation consequent to the incident involving the death of Vinay Tiwari and Manish Gupta but the have also been provided Class II jobs in Public Undertakings, therefore, discrimination and arbitrariness have been alleged in this regard.

81. In this affidavit it has been stated that the father of the deceased was earlier working as Sweeper in Ayush Pharmacy prior to the incident but is now unemployed and none of the Organizations nearby are willing to employ him. Likewise, the non-employment of two brothers has been mentioned. The promise by the Head of the State to provide Government service to one of the members of the family has not been honoured. It has also been averred that on account of security reasons the family is compelled to live within the four-walls of their house and also that it somehow survives without employment on account of which the economic condition of the family is bound to deteriorate in future. The morale of the family is also ebbing. In this situation, non-providing of employment as was promised adds to the misery of the victim's family which comprises of nine members of which three are girls aged about 7, 2 and half and 1 year. It has also been mentioned that the family has only 0.402 hectare agriculture land being part of Gata No. 146 in Village Boolgadhi, Tehsil and District Hathras, which comes to one and half bigha, therefore, it does not have adequate means of sustenance and is somehow surviving on the basis of compensation given by the State Government.

82. At this point, we may refer to certain documents filed by the State Government along with their affidavits. One of them is a report/letter of District Magistrate, Hathras dated 29.03.2022 along with the report of Sub Divisional Magistrate, Hathras and Tehsildar, Sadar, District Hathras dated 28.03.2022 in which as far as employment is concerned, it is clearly mentioned that neither the father nor the two brothers are employed and all of them are living at their house. It has been stated by the family members that on account of the incident leading to these proceedings the brothers had to come to their village and are staying at their house. It has already been noticed earlier that the family wants to live together and feels insecure on account of nature of the incident which is alleged to have taken place leading to the death of a family member and also the demography of the village, etc.

83. The affidavit of the State dated 29.03.2022 clearly mentions in para 4 that one of the brothers was earlier working in Ghaziabad in 2019, however, after the incident he has come back to his village and since then he is staying at his house and at present he is also unemployed. With regard to other brother also it has been mentioned that he was working as a Helper in a Mobile Company in Noida, however, in March, 2021, due to Covid-19, he came back to his village. After the incident, due to security reasons, CRPF has been deployed at their home and he is unable to go outside, thus he is staying at his house

and at present he is unemployed. This affidavit is by the Special Secretary, Home, Government of U.P., Lucknow. This affidavit corroborates the version of the victim's family about the male members being unemployed who are unable to go outside for security reasons etc.

84. Furthermore, there is another affidavit on behalf of the State Government along with which there is a letter dated 01.11.2020 written by the Commandant, 239 Battalion, CRPF, Hathras addressed to the District Magistrate, Hathras wherein details of the members of the victim's family have been given. As against the father, it is mentioned that he is involved in agriculture. We have already noticed that the family has only one and half bigha of land which apparently, for a family consisting of nine members with three children, is not adequate for sustenance. With regard to the two brothers, it is clearly mentioned in the said letter also that at present they are living in their house and are unemployed. The rest of the family members are house wives/females.

85. The State has filed another affidavit dated 23.09.2021 here-again the claim of the victim's family for employment and other benefits has been opposed and the issues raised therein have already been considered as far as the legal interpretation of the Act 1989 and the Rules 1995 involved is concerned, in the earlier part of the judgment.

86. On facts, it has not been denied in any of these affidavits that none of the male members are employed, as of now.

87. In the affidavit dated 07.12.2021, in response to the query of the Court as to the employment provided to the members of the family late Vinay Tiwari and late Manish Gupta, the State has annexed documents showing creation of two posts of Officer on Special Duty in Pay Matrix Level 10 Pay Scale 56100-177500/- by His Excellency the Governor of Uttar Pradesh and appointment letters of the wives of the deceased, appointing them on the said post and pay scale. This is relevant in the context of the assertion of the victim's family that though there is statutory backing for providing employment to a Scheduled Caste/Scheduled Tribe victim and its family members who are covered under the definition of 'victim', the said benefit has not been extended to the victim's family in spite of an assurance having been given by the Head of the State whereas, as contended by Ms. Kushwaha, in spite of the fact that there is no statutory backing for such appointment to other categories the same has been extended, that too, on a Class-II post and the amount of compensation paid is also much more than what has been paid to the victim's family. In this regard, the contention of Sri Raju and as also been stated on affidavit that the case of Vinay Tiwari and Manish Gupta involves police atrocity and the case of the victim's family, the same has to be considered in the light of the statutory provisions whereas there was no statutory provision for appointment of family members of Vinay Tiwari and Manish Gupta, therefore, the two cannot be compared and there is no discrimination, appears to have been made only to be rejected.

We fail to understand the rationale behind such a stand by the State. In the case of the victim's family, the contention of the victim's family is that the State which is responsible to protect the life, liberty and property of a citizen, especially

those belonging to the Scheduled Caste/Scheduled Tribe failed to fulfill this obligation and was negligent on account of which the incident occurred which led to the death of the victim and then to her illegal cremation in the dead of the night.

In these circumstances, the distinctions sought to be drawn on the ground that in other cases the police was involved in committing atrocities does not appear to be reasonable non-acceptable. These are only two facets of deprivation of life and liberty. In both the situations, the contention is that the police failed to perform its obligation. Moreover, in the other cases also, the trial is still pending, therefore, it is not as if that the guilt of the police has been proved. In this case also the CBI has filed a charge-sheet under Sections 302, 376, 376A, 376D IPC and under Section 3(2)(v) of the Act 1989, therefore, at least, the CBI is prima facie satisfied that an offence has been committed including the Offence under the Act 1989. Moreover, to say that the case at hand is governed by statute and its Rules whereas the provision of employment in the case of Vinay Tiwari and Manish Gupta was not in terms of any statute is hardly a ground for an intelligible differentia, in fact, the victim's family herein is better placed as they have statutory backing to their claim for employment. This is not to say that persons other than SC/ST cannot be provided such appointment, but only to say that the distinction sought to be made by the State is unacceptable. Even without the parity being claimed or discrimination being alleged by the victim's family viz-a-viz, the other two families referred hereinabove, the victim's family has a legal basis for its claim in view of the provisions of the Act 1989 and the Rules made thereunder which have already been discussed.

88. We have already held that the family members of the deceased are 'victims', therefore, one of the family members is entitled to employment and it is on account of this that the Head of the State assured employment to one of the family members on a Group "C' post as is recorded in the document dated 30.09.2020 which we have quoted hereinabove. This document is signed by the District Magistrate and various other public authorities. The father of the deceased has also signed it. We have already held that the said assurance and the document dated 30.09.2020 is not contrary to the provision of the Act 1989 and Rules 1995, especially Item 46 of Schedule Annexure-I to the Rules 1995, because such an act has statutory backing and there is a rationale behind it i.e to provide relief and rehabilitation to the family of the victim which belongs to SC/ST which is in furtherance of the object of the Act 1989, therefore, the contention of Sri Raju that the provision of employment in such a case would violate the Article 14 and 16 is without any constitutional and legal basis, it is accordingly rejected. Even without the assurance dated 30.09.2020 one of the family members is entitled to be considered for employment under Item 46.

89. Having held as above, on facts we have already seen that it is the undisputed factual position that none of the male members of the victim's family is employed as of now. This is as a consequence of the atrocity committed. The only other source of income available is one and half bigha land in their possession, therefore, clearly a family which comprises of nine members with three children who in the days to come will go to school, does not have adequate means of sustenance. Clearly the family is in need of employment and that is why the same was promised by the Head of the State. The promise is not based on any

whims or fancy, but it is referable to statutory provisions and the Rules made thereunder as already discussed, therefore, it is enforceable in these proceedings. This is especially as the Act 1989 is itself a legislative measure to protect the rights and the interest of the poorest of poor, the downtrodden, who belong to Scheduled Caste/Scheduled Tribe.

90. As regards the contention of Sri Raju that the State can arrange for a private job and that the Act 1989 nowhere mentions about a Government job, we have, in this regard, already referred to Rule 15 of the Rules 1995 which we have quoted above. We may refer specifically to sub-Rule (1) Clause (d) of Rule 15 which speaks of scheme for employment in Government or Government Undertaking to the dependent or one member of the family. If the intent of the legislature or the Rule making authority was that a private job be provided, it would have been mentioned therein, therefore, this offer of a private job is something which is not expected from the State Government and absolutely uncalled for. The assurance dated 30.09.2020 also mentions about appointment on a Class "C' post. We are not saying that the Government should necessarily provide a job in any service under the Government, but, this can be done in a Government Undertaking also. In the case of Vinay Tiwari and Manish Gupta no such offer of a private job was made, then, why such an offer in this case which is backed by statutory provisions. Ex-cadre posts have been created in the cases referred above. Without extending parity, the question which we put to ourselves is - why this cannot be done in this case, especially in view of the statutory backing to such an exercise. We have to say that there is no reason why it should not be done in this case, if required, otherwise, appointment can be offered against an existing vacancy. We also take note of the fact that both the brothers are Intermediate pass which is the minimum qualification for appointment on a Class - III (Group "c') post in the Government and probably in Government Undertakings also. A job suitable to their qualification can certainly be provided to one of them. The family wants a job for the elder brother.

91. We accordingly direct the State Government to consider employment of one of the family member in the light of the what has been discussed hereinabove under the Government or Government Undertaking commensurate with the qualification possessed by them keeping in mind the document dated 30.09.2020 and the assurance contained therein. This shall be done within three months from the date of receipt of this order.

Relocation of the Family:

92. So far as the claim for relocation of the family members is concerned, the provision for it exists in **Section 15-A (6)(d) and Rule 15 (aa),(b) and (c)**. The family members have prayed for relocation in their affidavit dated 06.01.2021. In Para 9 of the said affidavit, it has been stated that the behaviour of the nearby residents in the village concerned is not humane rather it is objectionable to the family members. It Para 11 it has been stated that after filing of the charge sheet against the accused a special group i.e. "Karni Sena', which is an organization belonging to a particular caste, called for a Mahapanchayat against the victim's family members whereupon the Police even apprehended some of the trouble makers, a fact which has not been denied by the State. Furthermore, in the

earlier affidavit dated 23.10.2020 also the family members of the victim have sought their relocation outside the State. Even orally this was prayed for but we did not accept the said prayer for relocation outside the State for reasons which are quite obvious, as, relocation by the State, if at all, can be made within the state itself. We may also refer to the affidavit dated 12.11.2021 in this regard wherein, in the context of demography of the village it has been stated that there were only four families belonging to the Scheduled Castes in the said village, out of which, two had migrated after the incident. Details in this regard have been given in Para 6 of the said affidavit meaning thereby only two families of Scheduled Castes are left in the village, one of which is the victim's family. Majority of the population in the village belongs to the upper castes and it is stated that the family is always targeted by other villagers. Even after being under the security of CRPF whenever the family members go out, they are subjected to abuse and objectionable comments in the village. It has been stated that the family has become socially isolated in the village after the incident. As already noticed earlier it has also been stated that the economic condition is also very poor. All this makes living of the family in village Boolgadhi cumbersome and impossible. Out of the three children, one of them, who is about 7 years of age, is unable to go to school on account of insecurity of the family, therefore, living in the said village any further is also not conducive to the educational need of the children. The family fears reprisal and repetition of the criminal acts against them. Apart from one and half bighas of agriculture land which the family owns as bhumidhars with transferable rights, the family has a house comprising of one kitchen, one "kachcha' room and another "pakka', one toilet and bathroom in a compound covering about 200 square yards.

According to the said affidavit, the said house was constructed at time of Kuwar Sen, an ancestor of the family, who had three sons, who are named therein and the father of the deceased is the son of one of such ancestors. It is said that all the descendants of the sons of Hazari Lal have a share in the said house. The State says that other alleged co-sharers are not occupying the house. As regards the allegation of encroachment on land forming part of Gata No. 94 and 95, it has been stated that the said Gata is used by the villagers and a small construction has been made by the deceased's father for keeping the cattle. The rights under the revenue laws have been asserted with regard to the SC and ST in this regard.

93. As regards the provision of a house in Hathras itself the family has declined the same on the fear of repetition of such acts and that living in the same district where the incident had occurred is not an option for the family. The State Government had offered a house to the victims within the municipal limits at Hathras, but the same has been declined. The family wants relocation outside Hathras preferably in Noida or near Delhi for the reason that it has relatives living in these areas and would be socially and economically more comfortable, as, on the one hand it will have support of peer groups and members of their social strata and relatives and on the other had they will also have an economic opportunity so that the father can also engage himself in employment, apart from the employment to be offered to one of the members by the State.

94. Considering the social and economic condition of the victim's family as also the mental state in which the family members claim to be, which is not improbable in view of the social strata to which they belong and the demography of the village, we are of the opinion that the State should consider their relocation to any other place within the State outside Hathras keeping in mind their social and economic rehabilitation and also the educational needs of the children. It is not too much for the family to ask for relocation outside Hathras in the circumstances in which they find themselves wherein their movements are highly restricted on account of their security by the CRPF and also on account of the alleged hostile behaviour/attitude of the other villagers who belong to the upper caste. After the incident considering the limelight it hogged in newspapers and social media etc., one can very well imagine that it would not be easy for the family to live in village Boolgadhi.

How and in what manner relocation is to take place is something which the State and its Authorities are required to consider. What will happen to the land and house at present owned by the family? whether they will have to surrender it to the Government so that Government may provide them suitable house and land elsewhere, if so, what would be the mode of doing it, are issues, which will have to be considered by the State Government with cooperation of the family members. This Court would not enter into the nitty gritties of this aspect, as, it may involve assessment of various factual issues. It would have been better and easier if there had been a contingency plan in place as is envisaged in Rule 15, but, as it is not so, therefore, the State should consider this aspect of the matter. Almost four months have passed since filing of the affidavit dated 28.03.2022, when it was said that preparation of such plan is in process, the state should prepare it, unless already prepared, within next three months.

95. The reason we are directing the State to consider this relocation instead of directing the family members to approach the Special Court under Section 15-A(6)(d) is that first and foremost it is the State and its authorities who have to consider such claim/request of the victims and only thereafter, if the victims are aggrieved they would approach the Special Court. There is no reason as to why we should make the family members, who belong to downtrodden class, run to the Court and engage themselves in proceedings before it when the State has not yet considered their request for relocation. As already stated the nitty gritties in this regard can be sorted out by the State in an objective, fair and reasonable manner keeping in mind the object of the Act 1989, the Rules made thereunder and the plight of the family members and a report in this regard can be submitted by the State and its Authorities through the District Magistrate, Hathras before the Special Court where the trial is pending. If the family members have any further grievance they can raise it before the said Court, but there is no reason as to why we should direct the family members to approach the Special Court without even the State Government having considered their request.

96. We are not tying the hands of the State Government with any conditions in this regard for reasons already stated hereinabove except that any such consideration for relocation has to be in furtherance of the object sought to be

achieved and also in keeping with the social, economic and educational rehabilitation of the members of the family. The area of relocation has to be socially conducive to the family members apart from being conducive to their economic and educational rehabilitation. This would take sometime, therefore, we direct the State Government to consider this aspect of the matter in the light of the observations made hereinabove and take a decision within six months. After taking such a decision a report shall be submitted to the Special Court where the trial is pending through the District Magistrate, Hathras and as already stated hereinabove the family members, if they are aggrieved thereafter, may raise a grievance before the said Court unless there are exceptional reasons for approaching the High Court.

97. From the scheme of the Act 1989 and Rules made thereunder, we also find that in Section 21(2)(ii) one of the measures which the State Government is required to take for the effective implementation of the Act is the provision for travelling and maintenance expenses to witnesses, including the victims of atrocities, during investigation and trial of offences under this Act. There are pleadings by the family members to the effect that these expenses are not being paid to them. We also find that Rule 11 of the Rules 1995 also deals with travelling allowance, daily allowance, maintenance expenses and transport facilities to the victim of atrocity, his or her dependents and witnesses.

We, therefore, direct the District Magistrate, Hathras to look into the request by the family members on a representation being submitted by them in this regard, if they raise any claim as regards to the expenses referred in the Act 1989 and the Rules 1995, he shall verify the same and the do the needful as per law, but, with expedition. Section 21(2)(ii) read with Rule 11 of the Rules 1995 enjoins upon the State and its Authorities specifically the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate to make necessary arrangements for providing transport facilities or reimbursement of full payment thereof to the victims of atrocity etc., therefore, first and foremost the State and its authorities have to comply their statutory obligations in this regard and thereafter, if the family members are still aggrieved, they can approach the Court concerned under Section 15-A(6)(b) of the Act, 1989.

Ordered accordingly. Order Date :- 26.07.2022

(2022)07ILR A1135
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Income Tax Appeal No. 51 of 2021
along with other connected Income Tax Appeals

Pr. Commissioner of Income Tax, (Central), Kanpur ...Appellant
Versus
M/s Shri Mehndipur Balaji Ent. Pvt. Ltd. ...Opp. Party

Counsel for the Appellant:
Sri Praveen Kumar

Counsel for the Opp. Party:
Sri Ashish Bansal, Sri Ashish Bansal, Sri Tarun Gulati(Senior Adv.)

A. Tax Law - Income Tax Act 1961 - Section 68- The initial burden of proof lies on

the appellant to prove three vital ingredients u/s 68 of the act i.e. the identity, credit capacity of the creditor and genuineness of the transactions. However, mere filing of confirmation or ITRs or Bank St.ments is not sufficient to prove the credit capacity of creditors and genuineness of the transaction. Whatever material taxing authorities collect will have to be placed before the tax paying assessee if adverse inference is going to be drawn against him - audi alteram partem is a well-known principle of natural Justice.

B. Tax Law - Income Tax Act 1961 - Section 132, 153-A - provides for assessment or reassessment of the total income and not merely computation of undisclosed income on the basis of evidence found as a result of search. Thus, for assessment or reassessment under Section 153A, it is not the mandatory requirement that assessment or reassessment has to be made only on the basis of incriminating materials found in the search. Section 153A does not exclude assessment or reassessment on consideration of other incriminating materials including incriminating materials available on record. in cases where the assessment or 34 reassessment proceedings have already been completed and assessment orders have been passed, which were subsisting when the search was made, the Assessing Officer has the power to reassess the returns of the assessee not only for the undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of the original assessment.

Appeal allowed. (E-12)

List of Cases relied upon:-

1. Commissioner of Income Tax Central Kanpur Vs Kesarwani Zarda Bhandar Sahson Allahabad. Income tax Appeal No. 270 of 2014

2. Commissioner of Income Tax Vs Raj Kumar Arora (2014) 367 ITR 517 (All)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. All these appeals are admitted on the following substantial questions of law :-

(i) Whether assessment or re-assessment under Section 153-A of the Income Tax Act 1961, can be framed only on the basis of incriminating material found during course of search under section 132 of the Act.

(ii) Whether assessment or re-assessment under Section 153-A of the Income Tax Act 1961 can be framed where no incriminating material has been found in the search under Section 132 of the Act.

2. Since substantial questions of law involved in all these appeals are similar, therefore, all these appeals have been heard together.

Facts:-

3. The facts with regard to disclosed and assessed income of the assessees involved in the "**First Set**' of appeals are briefly described as under:-

Sl. No.	First Set of Income Tax Appeal Nos.	Assessment Year	Income as per return (in Rs.)	Accommodation entries in the form of unsecured loan shown from/ entry provider/	Bogus LTCG/ STCG/Commission added under Sections 68/69

				bogus LTCG							6,79,384/-
1	51 of 2021	2012-13	Rs.1,06,500/-	Subodh Agarwal, Success Vyapar Ltd and Neil Industries Ltd.	Rs.3,67,59,615/- (bogus unsecured loan and interest)	3	46 of 2021	2011-12	Rs.86,500/-	Success Vyapar Ltd and Neil Industries Ltd.	Rs.2,69,43,868/- (bogus unsecured loan and interest) + Rs.56,68,482/- (bogus unsecured loan and interest)
2	45 of 2021	2011-12	Rs.9,18,941/-	Success Vyapar Ltd and Neil Industries Ltd.	Rs.63,35,927/- (bogus LTCG and commission) + Rs.4	4	29 of 2021 (defective)	2014-15	Rs.38,37,442/-	Success Vyapar Ltd and	Rs.5,28,78,477/- (bog

				Neil Industries Ltd.	us LTCG and commission) + Rs.73,50,000/- (bogus unsecured loan and interest)		tive)		r Ltd and Neil Industries Ltd.	(Disallowed interest,accommodation entry amount already added)
5	30 of 2021 (defective)	2012-13	Rs.6,15,440/-	Success Vyapar Ltd and Neil Industries Ltd.	Rs.21,02,540/- (Disallowed interest, accommodation entry amount already added)	7	32 of 2021 (defective)	2013-14	Rs.15,45,170/-	Success Vyapar Ltd and Neil Industries Ltd.	Rs.2,29,56,388/- (bogus LTCG and commission) + commission
6	31 of 2021 (defec	2013-14	Rs.2,02,890/-	Success Vyapa	Rs.6,78,969/-						

4. All these appeals arise out of assessment orders passed by the competent Assessing Officer under Section 153A of the Income Tax Act, 1961 (hereinafter referred to as "Act, 1961'). Common facts in all these appeals are that **a search and seizure operation under Section 132(1) of the Act, 1961** was carried out in Chaurasiya Group on 27.11.2015. Simultaneously, search was also conducted at the premises No.B-2, Surya Nagar, Ghaziabad in the

case of Ashish Kumar Chaurasia, Atul Kumar Chaurasia, Shree Mehandi Balaji Enterprises (P) Ltd., M/s Ghata Mehendipur Balaji Agri Extraction (P) Ltd., M/s Tejas Food (P) Ltd., Ashish Kumar Chaurasia HUF and Kanishk Iron (P) Ltd. Warrant of Authorisation was also issued and executed. Punchnama was also drawn. A survey under Section 133A of the Act, 1961 was also carried out in the case of M/s Mehndipur Balaji Enterprises (P) Ltd. at Kila No.202, Village Hasangarh, District Rohtak. Various incriminating documents were found and impounded. The cases were centralized to the office of the Deputy Commissioner of Income Tax, Central Circle-II, Kanpur vide order dated 14.09.2016 under Section 127 of the Act, 1961 passed by the Principal, CIT-18, Delhi. Thus, search operations were conduced in respect of the assessees who are respondents in the above noted income tax appeals. Notices under Section 153A of the Act, 1961 were issued to the assessees requiring them to furnish return of the Income for the Assessment Years and the assessees filed return of income. Thereafter, notices under Section 143(2)/142(1) of the Act, 1961 were also issued and served upon the assessees. Show cause notices were also issued to the assessees requiring them to explain as to why the L.T.C.G. or unsecured loans shown from Success Vyapar Ltd. and Neil Industries Ltd. or payment of interest or commission be not added in the income. The explanation submitted by the assessees were not accepted by the Assessing Officer and certain amounts shown as unsecured loan from the aforesaid two companies or L.T.C.G. and interest/ commission shown were added to the income of the assessees under Section 68 of the Act, 1961. Similarly, interest payment shown and commission shown were disallowed and added under Section 69 of the Act, 1961 on account of accommodation entries.

5. Against the Assessment Orders, the assessees filed appeals before the CIT (Appeals), Kanpur which were dismissed. The aforesaid appellate orders were challenged by the assessees before the Income Tax Appellate Tribunal, Lucknow Bench "B", Lucknow who vide consolidated order dated 27.05.2021 **allowed the appeal of the assessees by holding that the assessment for the assessment years under consideration stood concluded and the Assessing Officer has not made additions on the basis of any incriminating material, therefore, additions sustained by the CIT (A) are not sustainable. In the said order the Tribunal has relied its own order dated 16.12.2020 in the case of M/s. Sigma Casting Ltd. Vs. DCIT in ITA No.510 to 512 / LKW/ 2019.**

6. The facts with regard to disclosed and assessed income of the assessees involved in the "**Second Set**' of appeals are briefly described as under:-

Sl. No.	Second Set of Income Tax Appeal Nos.	Assessment Year	Income as per return	Bogus LTCG/ STCG/ Commission added under Sections 68/69
1	12 of 2022	2012-13	Rs.13,21,870/-	Rs.23,16,765/- (bogus LTCG) Rs.1,15,838/-

				(commission) Rs,13,00,000/- (bogus unsecured loans)					LTCG) Rs.1,060/- (commission) Rs,25,00,000/- (bogus unsecured loans)
2	2 2022	of	2011-12	Rs.40,38,840/-	Rs.9,66,00,000/- (bogus unsecured loans) Rs,72,97,989/- (interest disallowed)	6	18 2022	of	2011-12	Rs.8,95,140/-	Rs.4,03,656/- (bogus LTCG) Rs.20,180/- (commission) Rs,17,00,000/- (bogus unsecured loans)
3	11 2022	of	2012-13	Rs.3,91,20,210/-	Rs.6,01,00,000/- (bogus unsecured loans) Rs,1,82,27,831/- (interest disallowed)						
4	13 2022 (defective)	of	2012-13	Rs.21,32,660/-	Rs.6,28,961/- (bogus LTCG) Rs.31,448/- (commission) Rs,2,00,000/- (bogus unsecured loans)						
5	17 2022	of	2011-12	Rs.12,38,250/-	Rs.21,252/- (bogus						

7. All these appeals of "**Second Set**' relate to M/s Goldie Masale and Shree Santosh Kumar Agarwal group of cases. Common fact in all these appeals are that a search and seizure operation under Section 132 of the Act, 1961 was conducted in **M/s Goldie Masale and Shree Santosh Kumar Agarwal Group** at the residential/ business premises on 31.08.2015. Simultaneously, search and seizure operations were also carried out at the residential premises of Smt. Sapna Gupta wife of Sri Siddharth Gupta. During the course of proceedings, cash, jewellery and various incriminating documents were also found and seized. The cases were centralized to the Central Circle-I, Deputy Commissioner of Income Tax, vide Order No.02 of 2016-17, F.No.Pr.CIT-I/KNP/12-02/Cent./Goldie Masale Gr./2016-17/684

dated 27.05.2016 passed by the Principal CIT-I, Kanpur. Notices under Section 153A of the Act, 1961 were issued requiring the asssessees to file return of income. The notices were duly served upon the assessees. Thereafter, notices under Section 142(1) along with questionnaire were issued which were also duly served upon the assessees. Notices under Section 143(2) along with specific questionnaire were also issued which were also well served. The assessees filed their return of income in response to the aforesaid notice. After following due procedure of law, the assessment orders under Section 153A of the Act, 1961 were passed making certain additions. Aggrieved with the assessment orders, the assessees filed appeals before the CIT (Appeals), Kanpur, which were dismissed by common order. Aggrieved with the appellate orders, the assessees filed Income Tax Appeals before the Income Tax Appellate Tribunal, Lucknow which were allowed by the impugned common order dated 14.09.2021.

8. Aggrieved with the orders of the Income Tax Appellate Tribunal, Income Tax Department has filed the present appeals which have been admitted on the substantial questions of law aforenoted.

9. Thus, these appeals are in two sets. The "**First Set**' of appeals relates to "**Chaurasia Group**' and the "**Second Set**' of appeals relates to "Goldie Masale Group.' Facts have already been noted above. For deciding the controversy involved in these appeals in "**First Set' of appeals**, the Income Tax Appeal No.51 of 2021 is being treated as the leading appeal and in "Second Set' of appeals, the Income Tax Appeal No.12 of 2022 is being treated as the leading appeal.

Submissions on behalf of the appellants :-

10. Learned counsels for the appellants submits as under :

(i) Subsequent to completion of assessment of the respondent assessees, a search under Section 132 of the Income Tax Act, 1961 was carried on his premises in November, 2015. Another search was conducted on 28.04.2015 on Nikki Global Finance Ltd. Searches were also conducted on premises of certain other companies on 24.04.2014 and statement of one Sri Subodh Agrawal was recorded on 28.10.2015 who appeared to be the real operator of Success Vyapar Ltd. through his employee Sri Rishi Kant Awashty as a nominal Director. Several companies including one M/s. Neil Industries Ltd. were also found being run from the same premises at Kanpur. On the basis of certain incriminating material found regarding accommodation entries, the proceedings under Section 153 A of the Income Tax Act, 1961 was initiated by the Assessing Officer and unsecured loans as unexplained income were assessed to tax in the hands of the respondent assessee under Section 68 and 69 of the Act, 1961. The Assessment Orders passed by the assessing authority were affirmed by the CIT (Appeal) but it was upset by the impugned order passed by the Income Tax Appellate Tribunal.

(ii) The finding of the Tribunal that there was no incriminating material or that in the absence of any incriminating material found in search, no reassessment under Section 153 A can be made, is not only incorrect but also perverse and against the provisions of Section 153 A of the Act.

(iii) Reliance is placed upon the judgment of this Court i.e. the jurisdiction of High Court in Commissioner of **Income Tax VS. Raj Kumar Arora, (2014) 367 ITR 517 (Alld.) and Commissioner of Income Tax Vs. Kesarwani Zarda**

Bhandar in ITA No. 270 of 2014 decided on 06.09.2016, and the judgments in Assistant Controller of Estate Duty Vs. Devaki Ammal **(1995) 2012 ITR 395 SC, Taylor Instrument Co.(India) Ltd. Vs. Commissioner of Income Tax (1998) 99 Taxman 155 (Delhi) = (1998) 232 ITR 771(Delhi) and State of U.P. Vs. Aman Mittal and another 2019 (19) SCC 740 (para 24 and in ITA No.31 of 2016 E.N. Gopakumar Vs. Commissioner of Income Tax, decided on 3.10.2016 by Kerala High court (para 8).**

Submissions on behalf of the respondents/Assessees:-

11. Sri Tarun Gulati, learned Senior Advocate, assisted by Sri Ashish Bansal learned counsel for the respondent Assessee, has referred to the provisions of Section 153A and 153 C of the Acrt 1961 and certain judgments of Delhi High Court and submitted as under :-

(i) No incriminating material was found in the search on the assessee conducted by the Officers under Section 132 of the Act, 1961.

(ii) Since no incriminating material was found, therefore, provisions of Section 153-A of the Act, 1961 could not be invoked inasmuch as assessment of all the assessees for all the assessment years in question were already completed and finalised.

(iii) The original assessment proceeding of the assessee were completed by the Assessing Officer under Section 143 (3) of the Act. Therefore, on the pretext of proceedings under Section 153-A of the Act 1961 the assessing authority does not get jurisdiction for reappreciation or reappraisal of the assessment. Consequently, the Assessment Orders passed by the Assessing Officer under Section 153 A of the Act, 1961 were lawfully annuled by the Income Tax Appellate Tribunal.

(iv) There is distinction between proceedings **"abated"** and the proceedings which are **"concluded",** as evident from bare reading of Section 153-A of the Act, 1961. Since assessment proceedings of the respondent assessees fall under the category "concluded", therefore, provisions of Section 153-A could not have been invoked unless some specific incriminating material was found in the search. Since no incriminating material was found in the search conducted on the assessee, therefore, reassessment proceedings under Section 153-A of the Act could not have been initiated by the Assessing Officer and such initiation of proceedings was wholly without jurisdiction.

(v) Reliance is placed upon the judgments of Delhi High Court in **Commissioner of Income Tax Vs. Sinhgad Technical Education Society reported in (2017) 397 ITR 344 (SC) (paras 4,13,18); Commissioner of Income Tax Vs. Kabul Chawla reported in (2015) 380 ITR 573 (Delhi) (paras 2,14,15,17) and Principal Commissioner of Income Tax Vs. Ram Avtar Verma reported in (2017) 395 ITR 252 (Delhi) (para 4).**

(vi) No incriminating material against the assessee was found during the course of search conducted under Section 132 of the Act, for the Assessment Years in question. Therefore, no reassessment under Section 153 A of the Act 1961 could have been made. Consequently, the Income Tax Appellate Authority has lawfully and correctly set aside the order passed by the Assessing Authority.

Discussion and Findings

12. We have carefully considered the submission of learned counsel for the parties.

13. Before we proceed to decide the aforequoted substantial questions of law, it would be appropriate to reproduce the provisions of Section 153A and Section 153 C of the Act, 1961, as under :-

"153A. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person ***where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A*** *after the 31st day of May, 2003, but on or before the 31st day of March, 2021,* ***the Assessing Officer shall-***

(a) issue notice to such person ***requiring*** *him* ***to furnish*** *within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years and for the relevant assessment year or years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;*

(b) ***assess or reassess the total income of six assessment years*** *immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and for the relevant assessment year or years :*

Provided *that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years and for the relevant assessment year or years :*

Provided further *that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years and for the relevant assessment year or years referred to in this sub-section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate :*

Provided also that the Central Government may by rules made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso if any, relating to any assessment year falling within the period of six assessment years and for the relevant assessment year or years referred to), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years:

Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless-

(a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017.

Explanation 1.-For the purposes of this sub-section, the expression "relevant

assessment year" shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2.-For the purposes of the fourth proviso, "asset" shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.

***(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment** by the Principal Commissioner or Commissioner:*

Provided** that **such revival shall cease to have effect, if such order of annulment is set aside.

Explanation.-For the removal of doubts, it is hereby declared that,-

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such

***153C. (1)** Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, **where the Assessing Officer is satisfied** that,-*

*(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, **belongs to;** or*

*(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, **relates to**,*

***a person other than the person referred to in section 153A**, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years referred to in sub-section (1) of section 153A :*

***Provided** that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to sub-section (1) of section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person :*

***Provided** further that the Central Government may by rules made by it and published in the Official Gazette, specify the class or classes of cases in respect of such other person, in which the Assessing Officer shall not be required to issue notice*

for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years as referred to in sub-section (1) of section 153A except in cases where any assessment or reassessment has abated.

(2) Where books of account or documents or assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A and in respect of such assessment year-

(a) no return of income has been furnished by such other person and no notice under sub-section (1) of section 142 has been issued to him, or

(b) a return of income has been furnished by such other person but no notice under sub-section (2) of section 143 has been served and limitation of serving the notice under sub-section (2) of section 143 has expired, or

(c) assessment or reassessment, if any, has been made,

before the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue the notice and assess or reassess total income of such other person of such assessment year in the manner provided in section 153A.

(3) Nothing contained in this section shall apply in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A on or after the 1st day of April, 2021."

14. In the "**First Set**' of appeals (leading Income Tax Appeal No.51 of 2021) relating to Chaurasia Group of cases, we find that in assessement order passed under Section 153A of the Act, 1961 the Assessing Officer and in the Appellate order, the CIT(A) have very exhaustively dealt with evidences including incriminating materials found at the time of search/ survey and have recorded detailed findings of fact based on consideration of relevant evidences on the point of bogus unsecured loan and bogus LTCG/ STCG. It would be appropriate to reproduce the relevant portion of the order of the CIT(A) dated 29.11.2018 in Appeal No.CIT(A)-IV/10363, 10351, 10354, 10355 & 10358/DCIT-CC-II/KNP/2017-18/697 to 701. The relevant portion of the aforesaid order of the CIT(A) containing findings of fact are reproduced below:-

"Discussion & decision on legal grounds of these cases:

A.Y 2012-13 to A.Y. 2015-16:

5.1 Ground no. 1 to 3 for all the assessment years pertain to legal challenge to notice u/s 153A of the Act. It is also submitted by the ld. A.R. of the appellant that order u/s 153A of the Act is invalid in absence of incriminating material found as a result of search for these relevant assessment years in appeals.

5.2 Undersigned has carefully considered the submission and the case laws cited by the appellant. However, considering the express provisions of section 153A of the Act, undersigned would like to differ with the submission of the appellant, because section 153A of the Act clearly provides the power to AO to assess/reassess the cases of person searched u/s 132(1) of the Act for

immediately six preceding years. ***Section 153A of the Act does not provide existence of incriminating material as essential requirement****. In the opinion of the undersigned, the action u/s 132/132A of the Act would automatically trigger the provisions of section 153A of the Act for computation of total income of the appellant.* ***This provision does not restrict the Assessing Officer to take action in those cases where assessment has already been completed.*** *Since, the AO has rightly exercised his powers to assess/reassess the case u/s 153A of the Act.*

5.3 The contention of the ld. A.R. is also not acceptable after placing reliance on following Judicial pronouncement.

In the case of E.N. Gopakumar Vs CIT [(2016) 75 taxmann.com 215 (Kerala)]*- Hon'ble Kerala High Court held that assessment proceedings generated by issuance of a notice under section 153A(1)(a) can be concluded against interest of assessee including making additions even without any incriminating material being available against assessee in search under section 132 on basis of which notice was issued under section 153A(1) (a).*

The above order has been passed after considering cases of:

(i) CIT v Kabul Chawla [2016) 380 ITR 573/(20151 234 Taxman 300/61 taxmann.com 412 (Delhi).

(ii) CIT v Continental Warehousing Corpn. (Nhava Sheva) Ltd. [2015] 374 ITR 645/232 Taxman 270/58 taxmann.com 78 (Bom.),

(iii) Principal CIT v. Kurele Paper Mills (P.) Ltd. [2016] 380 ITR 571 (Delhi).

(iv) CIT v Lancy Constructions [2016] 383 ITR 168/237 Taxman 728/66 taxmann.com 264 (Kar.),

(v) CIT v ST. Francies Clay Decor Tiles [2016] 240 Taxman 168/70 taxmann.com 234 (Ker.) and

(vi) CIT v Promy Kuriakose [20l6] 386 ITR 597 (Ker.).

Further, in the case of ***CIT Vs Rai Kumar Arora [2014] 52 taxmann.com 172 (Allahabad)/(2014) 367 ITR 517 (Allahabad)-*** *Hon'ble Allahabad High Court held that* ***Assessing Officer has power to reassess returns of assessee*** *not only for undisclosed income found during search operation but also with regard to material available at time of original assessment.*

Similarly, in the case of ***ClT Vs Kesarwani Zarda Bhandar Sahson Alld. HTA No. 270 of 20141 (Allahabad)****- Hon'ble Allahabad High Court held that Assessing Officer has power to reassess returns of assessee not only for undisclosed income found during search operation but also with regard to material available at time of original assessment.*

Also, in the case of CIT Vs St. Francis Clay Decor Tiles (385 ITR 624)-Hon'ble Delhi Kerala Court held that notice issued under section 153A- return must be filed even if no incriminating documents discovered during search.

In the case of ***CIT Vs Anil Kumar Bhatia (24 taxmann.com 98. 211 Taxman 453. 352 ITR 493)-*** *Hon'ble Delhi High Court held that jurisdiction of AO under 153A is to assess total income for the year and not restricted to seized material. Post search reassessment in respect of all 6 years can be made even if original returns are already processed u/s 143(1)(a) - Assessing Officer has power u/s 153A to make assessment for all six years and compute total income of assessee, including undisclosed income, notwithstanding that returns for these years have already been processed u/s 143(1)(a). Even if assessment order had already been passed in respect of*

all or any of those six assessment years, either under section 143(1)(a) or section 143(3) prior to initiation of search/requisition, still Assessing Officer is empowered to reopen those proceedings under section 153A without any fetters and reassess total income taking note of undisclosed income, if any, unearthed during search.

In the case of ***Filatex India Ltd Vs CIT (49 taxmann.com 465)****- Hon'ble Delhi High Court held that during assessment under section 153A, additions need not be restricted or limited to incriminating material, found during course of search.*

*7.5 The undersigned has carefully gone through the assessment order, grounds of appeal, written submission of the ld. A.R. of the appellant submitted during these appeals proceedings. AO has noted, the following uncontroverted finding of fact in his assessment orders. T****he relevant observation of AO is extracted from the assessment order as follows:***

i) An incriminating dairy was seized during the course of Shri Subodh Agarwal, which was hand written by him and relevant incriminating entries and its explanation as follows,

a. At page number 45 " VMM-Sulabh+ Neil mein loss+ MKU mein. Profit"

b. At page number 43 "Gravity--> merger order

c. At page number 31, 32 and 33 names of Manoj Agrawal,.... i.e.. family members has been written in multiple places along with details of transactions where money has been received and given to them. The nature of entries are self-evident.

This clearly establishes that you have very close nexus with Sh. Subodh Agrawal who also has been one of the directors of your company M/s Sulabh Engineering & Services Limited along with Sh. Manoj Agrawal.

The above entries at page number 45 also clearly explain the nature of transactions in Neil industries limited is that of providing "accommodation entries' as in the case of Success Vyapar Limited.

Sh. Subodh Agrawal has already accepted that he has provided bogus LTCG in Oasis Cine Communication Limited, apart from Sulabh Engineering & Services Limited and Nikki Global Finance Limited *The above entries at page number 43 further clearly establishes that Sh. Subodh Agrawal has provided the bogus LTCG in Oasis Cine Communication Limited through merger/ amalgamation of Gravity Barter Limited and Makeover Vintrade Limited. All the three companies are registered at the same premise In Kolkata at Bijan Theatre, 5A, Raja RaJ Kissan Street, Kolkata- 700006.SO, it further cements the basic allegation that the LTCG/STCG/unsecured loans accrued to you through is nothing but your own cash routed as such."*

ii) "It is also observed that search u/s 132 was conducted by Investigation Directorate, Kanpur in Rich Udyog Group of Kanpur on 28.04.2015. Nikki Global Finance Limited is one of the companies of this group which was subjected to search u/s 132. This company has Sh. Subodn Agrawal as one of its directors, apart from Sh. Sashwat Agrawal and his family and friends. Nikki Global Finance Limited is also covered in total 84 scrips investigated by Investigation Directorate, Kolkata.

After Search, two of the group companies subjected to search u/s 132 challenged the same before the ***Hon'ble Allahabad High Court in WT No.458/459 of 2015. Hon'ble Allahabad High Court after perusing the satisfaction note and all the seized material dismissed the writ petitions and observed that this group is involved in ''clandestine activity of taking***

cash and making dubious transactions in cheque, thereby ''laundering the money'. *This group is also centralized with the Central Circle and you are hereby shown the page number 8, 9 and 11 of BK-8 of the seized material which mentions bogus transactions with Success Yapar Limited. The similar findings have been made by the AOs in Kolkata of Success Vyapar Limited and Neil Industries Limited where they have disallowed losses claimed by these two companies in sale of Nikki Golabl Finance Limited as being held bogus and Part of racket of LTCG/STCG/unsecured loan. The above evidence and findings further makes your loans from these two companies non-genuine".*

iii) "Careful Study of the assessment orders reveal that, there are three directors in M/s. Success Vyapar Ltd. i.e. "Shri Rishikant Awasthy, Shri Abhiset Basu and Shri Pradeep Dey" AO has scanned and reproduced the statements of Shri Abhiset Basu and Shri Pradeep Dey. From the perusal of these statements, it is evident that, actual business activity of their concerns is to provide the accommodation entries in the form of capital gains/share capital/share premium and unsecured loans. It is also accepted by them that, they are the dummy directors and they were acting on the behest and behalf of Raj Kumar Tharad and Anil Kumar - Khemka respectively. The statement of Raj Kumar Tharad and Shri Anil Kumar Khemka, which were recorded on oath reveals that, their concerns were engaged in providing the accommodation entries in various forms through their paper companies, which included the alleged creditors. As per statement of Mr. Subodh Agarwal related to the search of Godiee group by investigation wing of Kanpur, has accepted on oath that, Mr. Rishi Kant Awasthi was an employee in the office of Mr. Subodh Agarwal. Since, all the dummy directors and the details found at the office premises of the Mr. Subodh Agarwal, ***it is concluded that, creditor company M/s. Success Vyapar Ltd. is controlled by Mr. Subodh Agarwal. As discussed earlier, it is established that, Mr. Subodh Agrarwal is an entry provider through various paper companies including the M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd., which advanced unexplained unsecured loans to various group companies of this appellant group in the different financial years in the form of accommodation entry. The facts of another creditor M/s. Neil Industries Limited is no different. In fact hard evidence of payment of cash for providing the accommodation entries were found in the search of Shri Subodh Agarwal, Rich capital and Goldiee group.***

7.6 It is a settled preposition of law u/s 68 of the Act that, the initial burden of proof lies on the appellant to prove three vital ingredients u/s 68 of the act i.e. the identity, credit capacity of the creditor and genuineness of the transactions. In the present factual matrix of these cases, let us first, examine whether appellant has discharged the initial onus casted u/s 68 of the Act. Admittedly, appellant has filed the confirmation letters, ITRs and Bank statements of the creditors. However, mere filing of confirmation or ITRs or Bank statements is not sufficient to prove the credit capacity of creditors and genuineness of the transaction. On the other hand, AO has brought out the incriminating seized documents and statements of Directors of the alleged creditors i.e. M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd., who accepted on oath that, their companies are involved in providing the accommodation entries of LTCG/share capital/share premium and unsecured loans. All the incriminating

evidence including statements of Directors of alleged creditors i.e. M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd. have been confronted to the appellant, who could not submit any satisfactory explanation regarding the genuineness of the transaction and credit capacity of the creditors. The income and the Bank Statements of the creditors as disclosed and furnished for these relevant assessment years are summarized in the following tables;

S. No.	Name of the credit or	Creditors Income disclosed in ITR				
		A.Y. 2012-13	A.Y. 2013-14	A.Y. 2014-15	A.Y. 2015-16	A.Y. 2016-17
1	M/s Success Vyapar Ltd.	Rs.15864 58	Rs. 47812 13	Rs.5032 366	Rs. 64 29 09 7	Not sub mitte d
2	M/s Neil Industries Ltd	Not Sub mitte d	Rs. 81250 11	Rs.9662 615	Not sub mitted	Rs.1 2045 007

Thus, from the above table, it is evident that, creditors companies have furnished very meager income to inspire the confidence of credit of huge amount of unsecured loans. Also, there is no agreement or the co-lateral security arrangements between the appellant and creditors companies. A careful, perusal of ***Bank statements of these two lenders reveal the astonishing similarly in the pattern of fund flow. It is invariably noted that the creditors account were deposited with cheque of equivalent or more amount of credit on the same date or prior to advancing the loan to the appellant company. Thus, the evidence submitted by the appellant does not inspire the confidence regarding credit capacity of the creditors and genuineness of the transactions, especially considering the fact that, lenders have disclosed meager income in their returns and each credit of unsecured loans to the appellant company is preceded by the equivalent or more amount of deposits of credit on the same date or on the prior dates. Also, AO has recorded the finding of fact that, most of the lenders do not exist on the given address and are paper companies providing the accommodation entries of unsecured loans. Also, AO has dealt at length on the seized documents and the statements of directors of M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd., evidencing the non-genuine nature of transactions. Finding of Hon'ble Allahabad High Court in WT No. 458/459 of 2015,*** *wherein, it is held that, the creditor companies are dubious entities laundering the money in the garb of LTCG/share capital/share premium/unsecured loans. Thus, it is concluded that genuineness of the transaction and credit capacity of the creditors are unsubstantiated and transaction of unsecured loans are non-genuine. Appellant, on the other hand has not placed any material before the undersigned to dislodged the finding recorded by the AO. Therefore, considering the totality of facts and Circumstances of the case, it is concluded that, appellant has miserably failed to prove the credit capacity and genuineness of the transaction.*

7.7 Thus, from the above detailed discussion, it is concluded that, ***the***

Creditor's entities M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd. are paper companies, providing the accommodation entries in the form of capital gains/share capital/share premium and unsecured loans and according transactions of unsecured loans are non-genuine and unsubstantiated.

7.8 On the issue of cross examination, undersigned is of the view that, the incriminating dairy/documents found from the search of Shri Subodh Agarwal and the statement of dummy directors of the alleged creditors companies M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd. were shown and confronted to the appellant. It is also seen from the assessment orders that, AO has tried his best to call the persons, copies of whose statements in favour of the revenue were given to the appellant. Further, ***Hon'ble ITAT Mumbai*** *in the case of* ***GTC industries Ltd Vs. ACIT (1998] 65 ITD 380 [Bom.]*** *has observed and noted that,* ***where statements of witness were only secondary and subordinate material use to buttress main matter connected with the amount of addition, it had to be held that, there was no denial of principal of natural Justice, if witness were not allowed to cross examined by the appellant."*** *Therefore it is concluded that, AO has followed the principal of natural justice by producing and confronting all the incriminating seized documents and statements recorded in favour of revenue to the appellant.*

7.9 It is a settled preposition of law u/s. 68 of the IT Act that the initial burden of proof rest upon the appellant to establish the identity, credit capacity of the creditor and to establish the genuineness of transaction. For the sake of clarity provision of section 68 of the Act as amended read as under:

"68. Where any sum is found credited in the books an assessee maintained- for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax- as the income of the assessee of that previous year:

"Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by Such assessee-company shall be deemed to be not satisfactory, unless-

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10."

The present facts of the case are squarely covered by the provisions or law mentioned here-in-above, wherein it was imperative for the appellant to prove the identity and creditworthiness of the creditors along with the genuineness of transaction. ***In the instant case, appellant has miserably failed to prove genuineness of the transaction and creditworthiness of the creditors. Hence, addition made by Assessing Officer is perfectly justified.***

7.10 It is also an established law that mere filing of confirmation letter and the ITR copies are not enough to prove the credit capacity of the creditor. Hon'ble Kolkata High Court in the case of ***CIT Vs***

Korlav Trading Company Ltd.(Cal) 232 ITR 280 and CIT Vs Precision Finance P. Ltd. (Cal) 208 ITR 465 *have observed and held that mere filing of confirmation and transaction through the banking channel is not enough to prove the genuineness of cash credit and it can be assessed. Further, Hon'ble Apex Court in the case of* ***Shri Roshan D.Hatti Vs CIT (SC) 107 ITR 938*** *held that in the case of credits in the name of third party, it is the duty of the appellant to prove the identity or credit capacity of the creditors to advance money and genuineness of transaction. In the instant case, the undersigned is of the view that the credit capacity of the creditor and genuineness of the transaction is not proved by the appellant company.*

7.11 Further, Delhi ***High*** *Court in the case of* ***PCIT Vs Vikram Singh (2017)85*** *taxmann.com 104 has observed and held that even if transaction of loan is made through cheque, it cannot be presumed to be genuine in absence of any agreement, security and interest payment. Mere submission of the PAN and bank statements of the creditor does not establish the authenticity and genuineness of huge loan transaction particularly when the ITR of the lender does not inspire such confidence. Mere submission of ID proof and the fact that the loan transaction were through banking channel does not establish the authenticity of transaction.* ***The loan entries are generally masked to pump the black money into the banking channel and such practices continued to plague Indian Economy. Further, in the case of CIT Vs. N.R. Portfolio Pvt. Ltd. (ITA No. 1018,1019/2100 dated 22.11.2013) Hon'ble Delhi High Court*** *has observed and held that*

*"**mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive companies no doubt are artificial or juristic person but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the person behind the company who take the decisions, controls and manage them."***

The cases relied upon by the Ld. AR are on their own footings and distinguishable on facts and are not applicable to the present case. Further, Hon'ble Calcutta High Court has observed and held in the case of Pragati Financial Management Pvt. Ltd. Vs. CIT in C.A.887 & 998 of 2016 and others dated 07.03.2017, that, AO is entitled to make enquiry u/s. 68 of the Act regarding genuineness of the transaction. Further, it is held that, in the following Judicial pronouncements of the Honble High Courts that unsecured loans received from the entities involved in providing accommodation entries are liable to be taxed u/s 68 of the Act.

i) CIT vs. Nova Promoters & Finlese (P) Ltd. 342 ITR 169 [Delhi] 2013.

ii) CIT vs. D.K. Garg [2017] 84 taxmann.com 257 [Delhi]

7.12 In view of the above detailed discussion of the factual matrix of the case and considering the enumerated judicial pronouncements, ***it is concluded that appellant company has miserably failed to prove the vital ingredients of creditworthiness of the creditors' and genuineness of the transaction****. Therefore, undersigned find no reason to interfere with*

the addition made by Assessing Officer, u/s 68 of the Act. The same is therefore, confirmed and ground of appeal of the appellant is dismissed for each assessment year i.e. A.Y. 2012-13 for A.Y. 2016-17."

15. In the "**Second Set**' of appeals (leading Income Tax Appeal No.12 of 2022), relating to Goldie Masale Group of cases, we find that in assessement order passed under Section 153A of the Act, 1961, the Assessing Officer and in appeal, the CIT(A) have very exhaustively dealt with evidences including incriminating materials found at the time of search/ survey and have recorded detailed findings of fact based on consideration of relevant evidences on the point of bogus unsecured loan and bogus LTCG/ STCG. It would be appropriate to reproduce the relevant portion of the order of the CIT(A), dated 29.03.2019 in Appeal No.CIT(A)-IV/10334, 10335, 10375/DCIT-CC-I/KNP/2017-18/957 to 959 containing findings of fact are reproduced below:-

"6.3 The undersigned has carefully gone through the assessment order, grounds of appeal, written submission of the ld. A.R. of the appellant submitted during these appeals proceedings. AO has noted, the following uncontroverted finding of fact in his assessment orders. The relevant observation of AO is extracted from the assessment order as follows:

i) "An incriminating dairy was seized during the course of search of Shri Subodh Agarwal, which was hand written by him and relevant incriminating entries and its explanation as follows:

a. At page number 45 "VMM- Sulabh + Neil mein loss + MKU mein profit"

b. At page number 43 "Gravity -- > merger order

c. At page number 31, 32 and 33 names of, Manoj Agarwal,... i.e. family members has been written in multiple places along with details of transactions where money has been received and given to them. The nature of entries are self-evident.

The above entries at page number 45 also clearly explain the nature of transactions in Neil industries limited is that of providing "accommodation entries' as in the case of Success Vyapar Limited.

Sh. Subodh Agrawal has already accepted that he has provided bogus LTCG in Oasis Cine Communication Limited, apart from Sulabh Engineering & Services Limited and Nikki Global Finance Limited. The above entries at page number 43 further clearly establishes that Sh. Subodh Agrawal has provided the bogus LTCG in Oasis Cine Communication Limited through merger/amalgamation of Gravity Barter Limited and Makeover Vintrade Limited. All the three companies are registered at the same premise In Kolkata at Bijan Theatre, 5A, Raja Raj Kissan Street, Kolkata-700006. SO, it further cements the basic allegation that the LTCG/STCG/unsecured loans accrued to you through is nothing but your own cash routed as such."

ii) "It is also observed that search u/s 132 was conducted by Investigation Directorate, Kanpur in Rich Udyog Group of Kanpur on 28.04.2015. Nikki Global Finance Limited is one of the companies of this group which was subjected to search u/s 132. This company has Sh. Subodh Agrawal as one of its directors, apart from Sh. Sashwat Agrawal and his family and friends. Nikki Global Finance Limited is also covered in total 84 scrips investigated by Investigation Directorate, Kolkata.

After search, two of the group companies subjected to search u/s 132 challenged the same before the Hon'ble

Allahabad High Court in WP No. 458/459 of 2015. ***Hon'ble Allahabad High Court after perusing the satisfaction note and all the seized material dismissed the writ petitions and concluded that "this group is involved in ''clandestine activity of taking cash and making dubious transactions in cheque, thereby ''laundering the money".***

This group is also centralized with the Central Circle and at page number 8, 9 and 11 of BK-8 of the seized material which mentions bogus transactions with Success Vyapar Limited. The similar findings have been made by the AOs in Kolkata of Success Vyapar Limited and Neil Industries Limited where they have disallowed losses claimed by these two companies in sale of Nikki Global Finance Limited as being held bogus and part of racket of LTCG/ STCG/unsecured loan. The above evidence and findings further makes your loans from these two companies non-genuine."

iii) "Careful study of the assessment orders reveal that there are three directors in M/s. Success Vyapar Ltd. i.e. "Shri Rishikant Awasthi, Shri Abhishekh Basu and Shri Pradeep Dey" AO has scanned and reproduced the statements of Shri Abhishekh Basu and Shri Pradeep Dey. From the perusal of these statements, it is evident that, actual business activity of their concerns is to provide the accommodation entries in the form of capital gains/share capital/ share premium and unsecured loans. It is also accepted by them that, they are the dummy directors and they were acting on the behest and behalf of Raj Kumar Tharad and Anil Kumar Khemka respectively. The statement of Raj Kumar Tharad and Shri Anil Kumar Khemka, which were recorded on oath reveals that, their concerns were engaged in providing the accommodation entries in various forms through their paper companies, which included the alleged creditors. As per statement of Mr. Subodh Agarwal related to the search of Godiee group by investigation wing of Kanpur, has accepted on oath that, Mr. Rishi Kant Awasthi was an employee in the office of Mr. Subodh Agarwal. Since, all the dummy directors and the details found at the office premises of the Mr. Subodh Agarwal, it is concluded that, creditor company M/s. Success Vyapar Ltd. is controlled by Mr. Subodh Agarwal. As discussed earlier, it is established that Mr. Subodh Agrarwal is an entry provider through various paper companies including the M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd., which advanced unexplained unsecured loans to various group companies of this appellant group in the different financial years in the form of accommodation entry. The facts of another creditor M/s. Neil Industries Limited is no different. In fact hard evidence of payment of cash for providing the accommodation entries were found in the search of Shri Subodh Agarwal, Rich capital and Goldiee group.

6.4 It is a settled preposition of law u/s 68 of the Act that, the initial burden of proof lies on the appellant to prove three vital ingredients u/s 68 of the act i.e. the identity, credit capacity of the creditor and genuineness of the transactions. In the present factual matrix of these cases, let us first, examine whether appellant has discharged the initial onus casted u/s 68 of the Act. Admittedly, appellant has filed the confirmation letters, ITRs and Bank statements of the creditors. However, mere filing of confirmation of ITRs or Bank statements is not sufficient to prove the credit capacity of creditors and genuineness of the transaction. On the other hand, AO has brought out the incriminating seized documents and statements of Directors of the alleged creditors i.e. M/s. Success Vyapar Ltd. and

*M/s. Neil Industries Ltd. who accepted on oath that, their companies are involved in providing the accommodation entries of LTCG/share capital/share premium and unsecured loans. All the incriminating evidence including statements of Directors of alleged creditors i.e. M/s Success Vyapar Ltd. and M/s. Neil Industries Ltd. have been confronted to the appellant, who could not submit any satisfactory explanation regarding the genuineness of the transaction and credit capacity of the creditors. Also, there is no agreement or the co-lateral security arrangements between the appellant and creditors companies. A careful, perusal of Bank statements of these two lenders reveal the astonishing similarity in the pattern of fund flow. It is invariably noted that the creditors account were deposited with cheque of equivalent or more amount of credit on the same date or prior to advancing the loan to the appellant company. Thus, the evidence submitted by the appellant does not inspire the confidence regarding credit capacity of the creditors and genuineness of the transactions, especially considering the fact that, lenders have disclosed meager income in their returns and each credit of unsecured loans to the appellant company is preceded by the equivalent or more amount of deposits of credit on the same date or on the prior dates. Also, AO has recorded the finding of fact that, most of the lenders do not exist on the given address and are paper companies providing the accommodation entries of unsecured loan. Also, AO has dealt at length on the seized documents and the statements of directors of M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd. evidencing the non-genuine nature of transactions. Finding of Hon'ble Allahabad High Court in WT No. 458/459 of 2015, wherein, it is held that, "**the creditor companies are dubious entities laundering the money in the garb of LTCG/share capital/share premium/ unsecured loans.**" Thus, it is concluded that, genuineness of the transaction and credit capacity of the creditors are unsubstantiated and transaction of unsecured loans are non-genuine. Appellant, on the other hand has not placed any material before the undersigned to dislodged the finding recorded by the AO. Therefore, considering the totality of facts and circumstances of the case, it is concluded that, appellant has miserably failed to prove the credit capacity and genuineness of the transaction.*

6.5 It is a settled preposition of law u/s. 68 of the IT Act that the initial burden of proof rest upon the appellant to establish the identity, credit capacity of the creditor and to establish the genuineness of transaction. For the sake of clarity provision of section 68 of the Act as amended read as under:

"68. Where any sum is found credited in the books of an assessee maintained for any previous year and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:

"Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assesseee-company shall be deemed to be not satisfactory, unless-

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory.

Provided further that nothing contained in the first proviso shall apply if the person in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred in clause (23 FB) of section 10."

The present facts of the case are squarely covered by the provisions of law mentioned here-in-above, wherein it was imperative for the appellant to prove the identity and creditworthiness of he creditors along with the genuineness of transaction. Examination of financial statements like balance sheet & Profit & loss account, as reproduced by AO in assessment order reveal that this alleged company is not carrying any genuine business activities and are disclosing meager profits for last 5 assessment years including the relevant assessment year under appeal. This fact is apparent from discussion in para-4, page 24 to 31 of the assessment order. In the instant case, appellant has miserably failed to prove genuineness of the transaction and creditworthiness of the creditors. Hence, addition made by Assessing Officer is perfectly justified.

6.9 On the issue of cross examination, undersigned is of the view that, the incriminating dairy/documents found from the search of Shri Subodh Agarwal and the statement of dummy directors of the alleged creditors companies M/s. Success Vyapar Ltd. were shown and confronted to the appellant. Hence, the principal of natural justice is followed by the AO. It is also seen from the assessment orders that, AO has tried his best to call the persons, copies of whose statements in favour of the revenue were given to the appellant. Further, ***Hon'ble Supreme Court, in the well-known Dhakeswari Cotton Mills (26 ITR 775 at 782)*** *case, ruled that the Evidence Act may have no application to tax assessment proceedings. However, the court also clarified later, in Chuharmal vs CIT (172 ITR 250 at 255 SC), that when the taxing authorities are desirous of invoking the principles of the Evidence Act in proceedings before them, they are not prevented from doing so. All that is required is that whatever material they collect will have to be placed before the tax paying assessee if adverse inference is going to be drawn - audi alteram partem is a well-known principle of natural Justice. This principle is established by the judgment of the Supreme Court in* ***Dhakeswari Cotton Mills Ltd. v. C.I.T. (26 ITR 775, 783)****, and applied by that court in* ***Kishinchand Chellaram v, C.I.T. (125 I.T.R. 713),*** *where An assessment based on the result of private inquiries conducted behind the back of the assessee was set aside because the evidence so gathered was not placed before the assessee. In* ***Gunda Subbayya v. C.I.T. (7 I.TR. 21, 28),*** *Leach CJ said:*

"Information which the Income-Tax Officer has received may not always be accurate and it is only fair when he proposes to act on material which he has obtained from an outside source that he should give the assessee an opportunity of showing, if he can, that the Income-Tax Officer has been misinformed, but the Income-Tax obviously not bound to disclose the source of his information."

In the case of ***P. S. Barkathali v. Directorate of Enforcement, New Delhi AIR KER 81,*** *the Hon'ble High Court observed as under:*

"Even though the statement was subsequently retracted, the significance of

admission in the first place cannot be under-mined. It is well established that mere bald retraction cannot take away the importance and evidentiary value of the original confession, specially in view of the fact that in this case, the deponent of the statement had provided the minute details relating to the transactions, It appears that the retraction statement was made purely to avoid clutches of law which had caught up with him and laid bare his nefarious activities."

*Further, jurisdictional H**on'ble Allahabad High Court in the case of Moti Lal Padampat Udyog Ltd. Vs. CIT 293 ITR 656** has laid down the correct preposition of law of cross examination and held as follows:*

"Right of cross-examination of persons from whom the Assessing Officer has collected the evidence is not required by law. The requirement of the statute for a valid assessment would be met if all the evidence collected which is to be used against the assessee while framing the assessment order is placed before the assessee and he is given opportunity to rebut the evidence."

Therefore it is concluded that, AO has followed the principle of natural justice by producing and confronting all the incriminating seized documents and statements recorded in favour of revenue to the appellant.

For A Y. 2012-13 & AY 2014-15 on account of Long/Short Term Capital Gain (LTCG/STCG):-

7.1 Ground no. 6 to 13 for A.Y. 2012-13 & ground no. 4 to 17 for A.Y. 2014-15 pertain to addition on account of Long/Short Term Capital Gain (LTCG/STCG). The details of various addition made by AO are depicted in tabular form mentioned here-in-under:

S. No	NAME & CODE OF THE SCRIP	A.Y	LTCG/LTCL (In Rs.)	STCG/STCL	*Commission on LTCG (In Rs.)*
1.	M/s. Nikki Global Finance Limited (531272)	2012-13	23,16,765/-		1,15,838/-
2.	M/s. Nikki Global Finance Ltd. (531272)	2014-15	1,71,08,122/-	-	8,55,406/-

It is seen that, the A.O. has recorded very elaborate finding about the scam of laundering money in the Garb of Long/Short Term Capital Gain (LTCG/STCG). It is noted by the A.O. that, the Pr. DIT (Inv.), Kolkata has conducted the elaborate investigation and enquiries in case of 84 Penny Stock's cases to conclude that the unaccounted money of the beneficiary were routed through certain stock brokers/ entry operators in the script of penny stock, to generate the illusionary facade of exempted income in the form of LTCG/STCG. Further, a search was conducted on M/s. Rich Udyog Group of Kanpur on 28.04.2015, which reveals that, Shri. Subodh Agarwal is acting as the entry provider in the scrip of M/s. Nikki Global Finance Ltd. It is also investigated that, the purchasers or the exit provider of such Penny Stock's do not have the credit capacity to purchase the shares. Thus, it

was concluded by the A.O. that, the appellant has miserably failed to prove the genuineness of the transaction LTCG/STCG. Therefore, the credit entries in the form of LTCG are nothing but the unexplained credits u/s 68 of the Act.

7.2 On the other hand, ld. A.R. of the appellant has submitted detailed written submissions, which revolves around two points. Firstly, the sales of shares are supported by the contract notes issued by the brokers, hence, appellant has correctly claimed the exemption u/s 10(38) of the Act or paid lesser tax as STCG and secondly, opportunity of cross examination of the persons, whose statements were relied by AO, were not provided. Various case laws were also cited by the appellant in his favour. Therefore, it was submitted that, the addition made by the A.O. is unjustified and liable to be deleted.

7.3 The undersigned has carefully gone through the assessment order, written submission as well as verbal argument of the ld. A.R. of the appellant. Appellant is one of the entities belonging to Shri Santosh Agrawal & Goldiee group, who has obtained bogus entries of LTCG/STCG amounting to Rs 1,94,24,887/-. It is seen that share of M/s. Nikki Global Finance Ltd. was sold by appellant gaining astronomical LTCG of Rs.23,16,765/- & Rs.1,71,08,122/- for A.Y. 2012-13 & A.Y. 2014-15 respectively. Examination of financial statements like balance sheet & Profit & loss account, as reproduced by AO in assessment order reveal that this alleged company is not carrying any genuine business activities and are disclosing meager profits for last 5 assessment years including the relevant assessment year under appeal. This fact is apparent from discussion in para-4, page 24 to 31 of the assessment order. Astronomical increase in share price without any economic or financial prudence, shows, share price of alleged companies are rigged, manipulated and non-genuine. Thus, it is concluded that alleged shares are "penny stock."

7.4 Considering the totality the factual matrix of the case, as mentioned by A.O., following uncontroverted factual picture emerges:

(i) Investigation wing of Kolkata has carried out investigation in 84 scrips of Penny Stocks, which included scrips of M/s. Nikki Global Finance Ltd. from which, appellant and his group company has taken the entries of LTCG/STCG.

(ii) Investigation wing of the revenue at Kolkata had recorded statements of various share brokers, operators & beneficiaries, who has dealt with the scrip of ***M/s. Nikki Global Finance Ltd.***, as per below details:

Sl. No.	Name	Q. NO. IN WHICH THE CO. NAME IS MENTIONED	STATEMENT UNDER SECTION	STATEMENT DATE
SHARE BROKER				
1	Soumen Sen	19	131	10.02.2015
2	Anil Kedia	15	131	15.06.2015
3	Nikhil Jain	23	131	02.06.2015
OPERATOR				
1	Anil Kedia	15	131	15.06.2015

2	Nikhil Jain	23	131	02.06.2015
BENEFICIARY				
1.	DEEPAK KUMAR AGARWAL	4,5,6,7,10,11,15,17,19	131	05.06.2015

in which, it was admitted by them that, in connivance with the promoters/broker of some listed companies, we trade in scrips of shares of these listed companies of promoters which are manipulated to artificially create either gain or loss to beneficiaries to whom entry of either long term capital gain or loss has to be provided. After holding these shares for some time, the clients sell such shares at either higher rates or very low rates. Such shares are bought from beneficiary clients. When party/beneficiary, come to us for having accommodation entry, we used to get/give cash from/to them which is collected from the promoters/brokers. For doing so, we get a commission income in cash from party.

iii) Appellant has not substantiated purchase of shares with cogent evidences including bank statement.

iv) Further, during the assessment proceeding, the AO very specifically analyzed the price movement of shares of these companies and found that contrary to the market trends (BSE, Sensex), rates of above said companies moved at unexpectedly high end. The AO in his assessment order has mentioned it elaborately. AO also analyzed the basis and frequency of rising share price in market trend but she found that there was no change in the basic fundamentals of the company's balance sheet nor any new business opportunities were with these companies and even no any new step towards any business expansion or any other idea was there, which may attract the public to purchase of shares of these companies. Further, the volume of shares traded for these companies was found very low. Apart from the above, AO also found that trading of this company was questioned by the BSE for the reason that SEBI found that these companies were indulged in manipulation of share market for providing accommodation entries of bogus LTCG/STCG. The same is elaborated by AO in his assessment order.

v) Hon'ble Allahabad High Court in WP No. 458/459 of 2015. Hon'ble Allahabad High Court after perusing the satisfaction note and all the seized material dismissed the writ petitions and concluded that "this group is involved in ''clandestine activity of taking cash and making dubious transactions in cheque thereby 'laundering the money."

vi) AO has elaborately discussed and demonstrated that, the higher quoted price of the Penny Stock's was the result of rigging of scrip through circular trading without any intrinsic value of the shares of such Penny stock's.

vii) Independent enquires of Stock Exchange of Board of India (SEBI) has confirmed that, such scheme of Penny Stock's is prevalent for converting black money into white.

viii. Numerous statements of the brokers/operators/ Directors of the papers companies/directors of penny stock companies have confessed and accepted in statements recorded on oath regarding the modus operandi adopted in the scam of bogus LTCG/STCG. The same is elaborated and reproduced by the AO in his assessment order.

ix) The exit provider or the entities, who has purchased the alleged shares are entities with unsubstantiated

creditworthiness of genuineness of business activities. The same is elaborated by AO in his assessment order.

x) Many individuals/entities have admitted the bogus claim of LTCG/STCG without any enquiry by any authority and also withdrawn their claim by filing the revised returns there by accepting there wrong claim of exemption u/s 10(38) of the Act for LTCG or payment of lesser tax for STCG. This strengthens the case of revenue.

7.5 Thus, from the above detailed observations, it is evident that appellant was one of the beneficiary of such bogus Penny Stocks Scheme for converting his black money into white without the payment of taxes in the garb of bogus claim of exemption u/s 10(38) of the Act for LTCG or payment of lesser tax for STCG. Appellant purchased shares through off market trade and could not substantiate the purchases of shares. Appellant has nothing except the paper work of contract note to explain his case. It is settled preposition of law that, if an, exemption is claimed by the appellant then it is for the appellant to prove that, such claim is genuine. AO has dealt with at length to successfully establish that, the cheque received for the sale of penny stocks shares are part and parcel of scam of bogus Penny Stock. Also, AO. has discussed at length the methodology adopted by the appellant to artificially rigged the share price of Penny Stock through circular trading. The astronomical increase in share prices of the Penny Stock is against the proportional increase in share market and against the intrinsic value of the share at that relevant time. Various share broker/operator/director of paper entities/exit operator have accepted their wrong doing in the sworn statement recorded before statutory authorities, which is very relevant evidence against the appellant. Independent investigation conducted by investigation directorate, Kolkata and SEBI have corroborated the findings of A.O, regarding the scam of bogus claim of LTCG/STCG. A.O. has recorded the finding of fact that exit provider or the purchasers of Penny Stock at such astronomical prices are person without established credit capacity or creditworthiness. A.O. has also established the fact that exceptionally high share prices of Penny Stock are without any economic and financial basis. Therefore, in the present fact of the case, undersigned is of the view that, the claim of appellant is non-genuine, concocted bogus and fabricated....."

16. In "**First Set**' of appeals, the Income Tax Appellate Tribunal (ITAT), by common order dated 27.05.2021, has set aside the orders of the CIT(A) and allowed the appeals of the assessees, observing as under:-

"11. It is seen that assessment in these years stood concluded and Assessing Officer has not made additions on the basis of any incriminating material and therefore the additions sustained by the ld. CIT(A) are not sustainable and therefore, Ground No.2 in all these appeals is allowed.

12. We have allowed the appeals of the assessees on Ground No.2 only. The other grounds of appeal taken by the assessee were neither argued nor adjudicated and hence they are dismissed as infructuous."

17. On similar grounds, the ITAT allowed the appeals of the assessees in the "Second Set' of appeals.

18. The findings recorded by the Assessing Officer and the CIT(A) as

evident from the relevant portion of the orders aforequoted, it is evident that findings on the point of incriminating materials and all other materials available on record were recorded by the Assessing Officer and the CIT(A) after due consideration of evidences on record and principles of natural justice were well followed. The findings of fact recorded by the Assessing Officer and the CIT(A) have not been set aside by the ITAT and merely following its earlier decision in another case, the appeals have been allowed assuming that there was no incriminating materials found in the search.

19. So far as the provisions of Section 153A of the Act, 1961 are concerned, we find that sub-Section (1) of Section 153A starts with the non-obstante clause providing for assessment or reassessment. Clause (a) of sub-Section (1) empowers the Assessing Officer to issue notice to such person requiring him to furnish the return of income within such period, as may be specified in the notice, in respect of each assessment year falling within six assessment years and for the relevant assessment year or years in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139. Clause (b) of sub-Section (1), empowers the Assessing Officer to assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and for the relevant assessment year or years, provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years and for the relevant assessment year or years. The second proviso to clause (b) provides that assessment or reassessment or proceedings for any assessment year falling within the period of six assessment years or for the relevant assessment year or years pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.

20. Undisputedly, the respondents-assessees filed return of income in response to the notice issued by the Assessing Officer under Section 153A(1) of the Act, 1961. Section 153A provides for assessment or reassessment. To avoid double proceedings, it has been provided by the second proviso to clause (b) of sub-Section (1) that assessment or reassessment proceedings relating to any assessment year falling within the period of six assessment years or for the relevant assessment year or years pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate. Section 153A(1) of the Act, 1961 does not require that assessment or reassessment under this section can be made only on the basis of incriminating materials found in the search.

21. Facts of the present case show that incriminating materials were available on record, which have been used to make assessment/ reassessment of the respondents-assessees. In the absence of any bar under Section 153A of the Act, 1961, it cannot be said that assessment or reassessment under Section 153A cannot be made if incriminating material itself has not been found in the search but is otherwise available on record or it has been brought on record during the course of

investigation. Findings of fact recorded in the assessment order and in the order of the CIT(A) clearly reveal voluminous incriminating materials were not available in the hands of the Assessing Officer and on the basis of such incriminating materials, the Assessing Officer assessed the respondents-assessees under Section 153A of the Act, 1961. The incriminating materials found have been well discussed by the Assessing Officer in the assessment order and by the CIT(A) in the appellate order. Relevant portion of the order of CIT (A) has already been reproduced above and are not being referred here again so as to avoid repetition.

22. Findings of fact recorded in the assessment order and order of CIT (A), also clearly show that the incriminating materials relating to the respondents-assessees were available on record and were also found in the search/ investigation relating to certain other person.

23. Bare reading of Section 153A of the Act, 1961 reveals that it provides for assessment or reassessment of the total income and not merely computation of undisclosed income on the basis of evidence found as a result of search. Thus, for assessment or reassessment under Section 153A, it is not the mandatory requirement that assessment or reassessment has to be made only on the basis of incriminating materials found in the search. If Section 153A is interpreted in the matter that the assessment or reassessment can be made only on the basis of incriminating materials found in the search, it would mean that it is not assessment or reassessment of total income but it would be assessment or reassessment of merely undisclosed income on the basis of incriminating materials found in the search. Section 153A does not exclude assessment or reassessment on consideration of other incriminating materials including incriminating materials available on record. Therefore, when the language of Section 153A is plain and unambiguous, it cannot be given a restricted meaning. To do so, it would amount to legislation by court or authority under the Act, which is not permissible.

24. It is admitted case of the respondents - assessees that search under Section 132 of the Act, 1961 was conducted in their premises in November, 2015. Another search was conducted on 28.04.2015 on Nikki Global Finance Ltd. Searches were conducted on premises of certain other persons on 24.04.2014 and statement of one Sri Subodh Agarwal was also recorded who appeared to be the real operator of the Success Vyapar Ltd. through his employee Sri Rishikant Awasthi, a nominal Director. Neil Industries Ltd. was also found being run from the same premises at Kanpur. On the basis of certain incriminating materials found regarding accommodation entries, the proceedings under Section 153A of the Act, 1961 was initiated by the Assessing Officer. Bogus unsecured loans and bogus LTCG/ STCG were assessed in the hands of the respondents-assessees. Thus, it cannot be said that either no incriminating materiel was found or that no incriminating material was available on record against the respondents - assessees on the basis of which assessment orders under Section 153A of the Act, 1961 have been passed. Thus, findings recorded and conclusion drawn by the ITAT, cannot be sustained.

25. In the case of **Commissioner of Income Tax vs. Raj Kumar Arora, (2014) 367 ITR 517 (Alld.),** a Division Bench of this Court considered the question as to

whether Assessing Officer has power to reassess income of an assessee not only for undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of the original assessment and held as under:-

"8. Section 153A of the Act along with Section 153B and 153C replaced the "Post Search Block Assessment Scheme" in respect of any search under Section 132A or requisition under Section 132A made after 31.05.2003. CBDT explained these provisions through circular dated 5.9.2003, which is reported in (2003) 263 ITR (St) 62. The said circular is as under:

"65. The special procedure for assessment of search cases under Chapter XIV-B be abolished:

65.1 The existing provisions of the Chapter XIV-B provide for a single assessment of undisclosed income of a block period, which means the period comprising previous years relevant to six assessment years preceding the previous year in which the search was conducted and also includes the period up to the date of the commencement of such search, and lay down the manner in which such income is to be computed.

65.2 The Finance Act, 2003, has provided that the provisions of this Chapter shall not apply where a search is initiated under section 132, or books of account, other documents or any assets are requisitioned under section 132A after May 31, 2003, by inserting a new section 158BI in the Income-tax Act.

65.3 Further three new sections 153A, 153B and 153C have been inserted in the Income-tax Act to provide for assessment in case of search or making requisition.

65.4 The new section 153A provides the procedure for completion of assessment where a search is initiated under section 132 or books of account, or other documents or any assets are requisitioned under section 132A after May 31, 2003. In such cases, the Assessing Officer shall issue notice to such person requiring him to furnish, within such period as may be specified in the notice, return of income in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search was conducted under section 132 or requisition was made under section 132A.

65.5 The Assessing Officer shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or requisition under section 132A, as the case may be, shall abate. It is clarified that the appeal, revision or rectification proceedings pending on the date of initiation of search under section 132 or requisition shall not abate. Save as otherwise provided in the proposed section 153A, section 153B and section 153C, all other provisions of this Act shall apply to the assessment or reassessment made under section 153A. It is also clarified that assessment or reassessment made under section 153A shall be subject to interest, penalty and prosecution, if applicable. In the assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.

65.6 The new section 153B provides for the time limit for completion of search assessments. It provides that the Assessing Officer shall make an order of assessment or reassessment in respect of each assessment year, falling within six

assessment years under section 153A within a period of two years from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed.

65.7 This section also provides that assessment in respect of the assessment year relevant to the previous year in which the search is conducted under section 132 or requisition is made under section 132A shall be completed within a period of two years from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed.

65.8 It also provides that in computing the period of limitation for completion of such assessment or reassessment, the period during which the assessment proceeding is stayed by an order or injunction of any court ; or the period commencing from the day on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending on the day on which the assessee is required to furnish a report of such audit under that sub-section, or the time taken in reopening the whole or any part of the proceeding or giving an opportunity to the assessee of being re-heard under the proviso to section 129, or in a case where an application made before the Settlement Commission under section 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing on the date on which such application is made and ending with the date on which the order under sub-section (1) of section 245D is received by the Commissioner under sub-section (2) of that section, shall be excluded. If, after the exclusion of the aforesaid period, the period of limitation available to the Assessing Officer for making an order of assessment or reassessment, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the period of limitation shall be deemed to be extended accordingly.

65.9 The new section 153C provides that where an Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belong or belongs to a person other than the person referred to in section 153A, then the books of account, or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against such other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of section 153A.

65.10 An appeal against the order of assessment or reassessment under section 153A shall lie with the Commissioner of Income-tax (Appeals).

65.11 Consequential amendments have also been made in sections 132, 132B, 140A, 234A, 234B, 246A and 276CC to give reference to section 153A in these sections.

65.12 These amendments will take effect from June 1, 2003."

Earlier, Chapter XIV-B provided for assessment to be made in cases of search and seizure, which was known as Post Search Block Assessment Scheme because this Chapter provided for single assessment to be made in respect of a block period of 10 assessment years prior to the assessment in which the search was made. With the introduction of Section 153A to Section 153C of the Act, the single

block assessment concept was given a go-by. Under Section 153A of the Act, in case where a search was initiated under Section 132 of the Act or requisition of books of account, documents or assets was made under Section 132A after 31.5.2003, the Assessing Officer was required to exercise the normal assessment powers in respect of the previous year in which the search took place. A perusal of Section 153A of the Act clearly indicates that it starts with a non obstante clause relating to normal assessment procedure which is covered by Sections 139, 147, 148, 149, 151 and 153 in respect of searches made after 31.5.2003.

9. Under Section 153A of the Act, the Assessing Officer is bound to issue notice to the assessee to furnish return for each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. The Assessing Officer is required to assess or reassess the total income of the aforesaid years.

10. Under the block assessment proceeding under Chapter XIV-B only the undisclosed income found during the search and seizure operation were required to be assessed and the regular assessment proceedings were preserved. The introduction of Section 153A of the Act provides a departure from this proceeding. Under Section 153A of the Act, the Assessing Officer has been given the power to assess or reassess the total income of the assessment years in question in separate assessment orders. Consequently, there would be only one assessment order in respect of six assessment years in which total disclosed or undisclosed income would be brought to tax. Consequently, even though an assessment order has been passed under Section 143(1) (a) or under Section 143(3) of the Act, the Assessing Officer would be required to reopen these proceedings and reassess the total income taking notice of undisclosed income even found during the search and seizure operation. The fetter imposed upon the Assessing Officer under Sections 147 and 148 of the Act have been removed by the non obstante clause under Section 153A of the Act.

Consequently, we are of the opinion that in cases where the assessment or reassessment proceedings have already been completed and assessment orders have been passed, which were subsisting when the search was made, the Assessing Officer would be competent to reopen the assessment proceeding already made and determine the total income of the assessee. The Assessing Officer, while exercising the power under Section 153A of the Act, would make assessment and compute the total income of the assessee including the undisclosed income, notwithstanding the assessee had filed the return before the date of search which stood processed under Section 143(1)(a) of the Act.

11. In the light of the aforesaid, the reasons given by the Tribunal that no material was found during the search cannot be sustained, since we have held that the Assessing Officer has the power to reassess the returns of the assessee not only for the undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of the original assessment. *We find that the Tribunal dismissed the appeal while relying upon the decision of a Coordinate Bench of the Tribunal in the case of Anil Kumar Bhatia Vs. ACIT (2010) 1 ITR (Trib.) 484 (Delhi). We find that the said decision of the Coordinate Bench of the Tribunal was set aside by the Delhi High Court in Commissioner of Income Tax Vs. Anil*

Kumar Bhatia (2012) 24 taxmann.com 98 (Delhi). We find that the Tribunal only dismissed the appeal on this legal issue and had not considered the matter on merits."

26. In **Income Tax Appeal No.270 of 2014 (Commissioner of Income Tax Central Kanpur vs. Kesarwani Zarda Bhandar Sahson Alld.) and other connected appeals, decided by Division of this Court on 06.09.2016**, the substantial question of law involved was similar to those as involved in the present appeal and the Division Bench answered the questions as under:

*"**8. Appeal was admitted on following substantial questions of law:***

(1) Whether the Hon'ble Income Tax Appellate Tribunal had erred in law and on facts in setting aside the assessment completed under Section 153A of the Income Tax Act, 1961 and not following the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Raj Kuamr in ITA No. 56 of 2011 wherein it is held that the Assessing Officer has the power to re-assess the returns of the assessee not only for the undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of original asseessment.

(2) Whether in view of the law laid down by this Hon'ble Court in the case of CIT Vs. Raj Kumar (supra), the Assessing Officer would be competent to re-open the assessment proceedings already made and determine the total income of the assessee ; the Assessing Officer, while exercising the power under Section 153A of the Act, would make assessment and compute the total income of the assessee including the undisclosed income, notwithstanding the assessee had filed the return before the date of search which stood processed under Section 143(1)(a) of the Act ?

*10. As is evident Section commenced with the words notwithstanding anything contained in Section 139, 147, 148, 149, 151 and 153, meaning thereby whatever has been provided in the aforesaid provisions that will not bar Assessing Officer in proceeding with the assessment or reassessment of total income for six assessment years, immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. The word 'assess' or 'reassess' not only suggest but show that power under Section 153A includes reassessment and that would be done only when assessment has already been finalized. There is inherent hint in Section 153A and there is no reason to restrict its scope. Tribunal has relied on the decision of Special Bench of Mumbai Tribunal in **All Cargo Global Logistics Ltd. Vs. DCIT, 147 TTJ 513** wherein it was held that no addition can be made for any assessment year under Section 153A, the assessment which, is not pending on the date of search, unless any incriminating material is found in the course of search. Tribunal has decided the issue in favour of Assessee and deleted all the additions made in assessment orders up for consideration in various appeal for Assessment Years 2004-05 to Assessment Year 2007-08.*

*11. We find that this issue has now been finalized by a Division Bench of this Court in **Commissioner of Income Tax Vs. Raj Kumar Arora, (2014) 367 ITR 517 (All)** wherein it has been held as under :-*

"Consequently, even though an assessment order has been passed under Section 143(1) (a) or under Section 143(3) of the Act, the Assessing Officer would be required to reopen these proceedings and reassess the total income taking notice of

undisclosed income even found during the search and seizure operation. The fetter imposed upon the Assessing Officer under Sections 147 and 148 of the Act have been removed by the non obstante clause under Section 153A of the Act.

Consequently, we are of the opinion that in cases where the assessment or reassessment proceedings have already been completed and assessment orders have been passed, which were subsisting when the search was made, the Assessing Officer would be competent to reopen the assessment proceeding already made and determine the total income of the assessee. The Assessing Officer, while exercising the power under Section 153A of the Act, would make assessment and compute the total income of the assessee including the undisclosed income, notwithstanding the assessee had filed the return before the date of search which stood processed under Section 143(1)(a) of the Act.

In the light of the aforesaid, the reasons given by the Tribunal that no material was found during the search cannot be sustained, since we have held that the Assessing Officer has the power to reassess the returns of the assessee not only for the undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of the original assessment."

12. In view of above decision which squarely clinches both the substantial questions of law pressed in these appeals, we find no reason to take a different view and hence answer the above questions in favour of Revenue and against Assessee."

27. The aforesaid two Division Bench judgments in the case of ***Raj Kumar Arora (supra) and Kesarwani Zarda Bhandar (supra)*** being judgments of coordinate bench, are binding on this bench. That apart, on consideration of the provisions of Section 153A of the Act, 1961 and the findings of fact recorded by the Assessing Officer and the CIT (A), we find that the impugned orders of the Tribunal cannot be sustained and are, therefore, liable to be set aside.

28. For all the reasons aforestated, we answer the substantial question of law No.(i) in negative and the substantial question of law No.(ii) in affirmative, i.e. in favour of the Revenue and against the assessee.

29. For all the reasons aforestated, **all the appeals filed by the Revenue are allowed** following the law laid down by this Court in the case of **Raj Kumar Arora (supra) and Kesarwani Zarda Bhandar (supra)**. The impugned orders of the Income Tax Appellate Tribunal are hereby set aside and all the appeals before the ITAT are restored to its original numbers. The ITAT is directed to decide the appeals afresh on merit in accordance with law, after affording reasonable opportunity of hearing to the parties, without being influenced by any of the observations made in the body of this order on merit.

(2022)07ILR A1166
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.07.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Sale/Trade Tax Revision No. 124 of 2007
Connected with Sale/Trade Tax Revision Nos. 125 of 2007, 126 of 2007

M/s The Seksaria Biswan Sugar Fact. Ltd.
...Revisionist
Versus
Commissioner of Trade Tax U.P.
...Opp. Party

Counsel for the Revisionist:
P. Agarwal

Counsel for the Opp. Party:
C.S.C.

Tax Law - U.P. Trade Tax Act, 1948 - Section 4(B) - The word 'consumable' in the said provision refers only to material which is utilized as an input in the manufacturing process namely 'raw material', 'component part', 'sub-assembly part' and ' intermediate part' etc. but is not identifiable in the final product by reason of the fact that it has got consumed therein. Consumption must be in the manufacture as raw material. In the present case it is noticed that paints are utilized only for maintenance of plants and machinery and are used as input in the manufacturing process of sugar and hence clearly there are not used in the manufacture of sugar and also not involved in making o any product and hence it cannot be said that they are consumable. Therefore, the revisionist was not entitled to purchase the same utilizing Form -3B

Revisions dismissed. (E-12)

List of Cases relied upon:-

1. Coastal Chemicals Ltd. Etc. Vs Commercial Tax Officer, A.P., (2000) 117 STC 12

2. Kisan Sahkari Chini Mills Vs Commissioner of Sales Tax, 2002 (125) STC 216 (Alld.)

3. Ballarpur Industries Ltd. Vs St. of Karn., (1978) 42 STC 401 (Kar)

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Pradeep Agarwal, learned counsel for the revisionist as well as Sri Rohit Nandan Shukla, learned counsel appearing for the opposite party.

2. The present revision has been preferred assailing the order of the Commercial Tax Tribunal (*hereinafter referred to as "the Tribunal*") dated 07.07.2007, whereby by means of common judgment, the second appeals preferred by the revisionist pertaining to assessment years 1999-2000, 2000-2001 and 2001-2002, have been dismissed on common question of law arising for determination before the Tribunal.

3. Against the impugned judgment of the Tribunal dated 07.07.2007 three revisions have been preferred and considering that common question of law are involved, they are being disposed of by this common judgment.

4. Brief facts of the case are that the revisionist firm is registered dealer under the U.P. Trade Tax Act, 1948 (*hereinafter referred to as "the Act, 1948"*) and is engaged in manufacture and sale of sugar. The revisionist had applied for grant of "recognition certificate" under Section 4-B of the Act, 1948 read with U.P. Trade Tax Rules, 1948 and was granted recognition certificate no. ST433, dated 28.07.1994. Further applications were made for adding certain goods and by means of order dated 16.12.1998, recognition certificate was amended and revisionist was entitled to purchase the goods on concessional rate of tax, which were to be utilized by him for manufacture of notified goods.

5. It is during course of assessment proceedings it came to the notice that revisionist had purchased 'paint' on concessional rate of tax at the rate 2.5% (normal rate of tax 15%) against Form-3B and hence he was put under notice asking him to reply as to why he has purchased Paint utilizing Form-3B, despite the fact that Paint is not a raw material used for manufacture of sugar and hence why should difference of tax of 12.5% be not realised from him.

6. The revisionist responded to the said notice and in his defence stated that he had purchased Paint as it was covered

under the heading "Consumable Stores" for which he had duly applied and in the recognition certificate issued on 28.07.1994 the said article was indicated at item no. 1. It was further stated that items no. 4 of amended certificate dated 16.12.1999 "material for consumable stores".

7. The Assessing Authority rejected the explanation given by the revisionist and imposed penalty under Section 3(b) of the Act, 1948, holding that Paint is not a material which is utilized in the manufacture of sugar, but it is only used for maintenance of machinery and hence it is not covered under the definition of "consumable stores" and the revisionist was not eligible to purchase Paint against Form-3B on concessional rate of tax as it is not covered under the definition of "consumable stores".

8. Aggrieved by the aforesaid order dated 23.01.2020, the revisionist preferred first appeal before the Joint Commissioner (Appeals), Sitapur which was dismissed by means of order dated 16.07.2003, and subsequently, second appeal was preferred before the Tribunal and all the three appeals were dismissed by means of common judgment and order dated 07.07.2007, which is impugned in the present revisions.

9. The only question which arise for determination by this Court is "as to whether the revisionist was entitled to purchase 'paint' at concessional rate of tax under Section 3(b) of the Act, treating it to be "consumable store", which is utilized in the manufacture of sugar.

10. Learned counsel for the revisionist has submitted that Paints are used to protect the plant and machinery as sugar juice is acidic in nature and sulphur-di-oxide is also used for clarification of sugar cane juice in the second stage of removal of colour which is also acidic in nature and corrodes the machinery and for prevention of which paints are necessary. He submits that in order to protect the plant and machinery, Paints are utilized and hence it cannot be said that they are not essential for manufacturing sugar and consequently revisionist is entitled to purchase Paints at concessional rate of tax utilizing Form-3B and submits that finding of the Assessing Authority, first Appellate Authority as well as the Tribunal are perverse, illegal and arbitrary and deserve to be interfered with by this Court in exercise of its revisional powers.

11. Learned counsel for the revisionist further submitted that similar controversy has also been determined by the Tribunal in the case of Commissioner of Commercial Tax Vs. Awadhesh Sugar Mills Ltd., Hargaon, by means of judgment passed in Appeal No. 307-2001, dated 01.01.2004, wherein the Tribunal held that Paints are included in the definition of "consumable store" and has set aside the penalty order while allowing the said appeal.

12. Sri Rohit Nandan Shukla, learned counsel appearing for the Revenue has supported the impugned judgment and order as well as the orders passed by the Assessing Authority as well as first Appellate Authority and has submitted that for manufacture of sugar 'paints' is not a raw material which is utilized for manufacture of sugar and hence revisionist has purchased the 'paints' utilizing Form-3B in clear violation of provisions of Section 4(b) of the Act and hence there is no infirmity in the orders passed by the authority below. He further submits that

definition of "consumable store" was interpreted by the Hon'ble Supreme Court in the case of **Coastal Chemicals Ltd. Etc. Vs. Commercial Tax Officer, A.P., (2000) 117 STC 12**, wherein the Court has held as follows :-

"The word 'consumables' in the said provision takes colour from and must be read in the light of the words that are its neighbours, namely, 'raw material', 'component part', 'sub-assembly part' and 'intermediate part' so read, it is clear that the word 'consumables' therein refers only to material which is utilized as an input in the manufacturing process but is not identifiable in the final product by reason of the fact that it has got consumed therein. It is for this reason that 'consumables' have been expressly referred to in the said provision, though they would fall within the broader scope of the words 'raw material'.

In the case of Thomas Stephen & Co., relied upon in the impugned judgment, it was held that cashew shells used as fuel did not get consumed in the manufacture of other goods and that "consumption must be in the manufacture as raw material".

To use the words of Thomas Stephen & Co. the natural gas used by the appellant does "not tend to the making of the end-product". it is not a 'consumable'."

13. The provisions of Section 4-B(2) of the Act, 1948 provide that "where a dealer requires any goods, referred to in sub-section (1) for use in the manufacture by him in the State, of any notified goods, or in the packing of such notified goods manufactured or processed by him, and such notified goods manufactured or processed by him, and such notified goods are intended to be sold by him in the State or in the course of inter-State trade or commerce or in the course of export out of India, he may apply to the assessing authority in such form and manner and within such period as may be prescribed, for the grant of a recognition certificate in respect thereof, and if the applicant satisfied such requirements including requirement of depositing lat fee, and conditions as may be prescribed, the assessing authority shall grant to him in respect of such goods a recognition certificate in such form and subject to such conditions, as may be prescribed."

14. The word 'goods' as mentioned above, have been defined in Explanation (a) to Section 4-B(2) of the Act, 1948 according to which :-

*"**Explanation.**- For the purposes of this sub-section-*

(a) 'goods required for use in the manufacture' shall mean raw materials, processing materials, machinery, plant, equipment, consumable stores, spare parts, acessories, components, sub-assemblies, fuels or lubricants;"

15. It is further provided in Section 4-B(5) of the Act, 1948 that :-

"(5) Where a dealer in whose favour a recognition certificate has been granted under sub-section (2) has purchased the goods after payment of tax at concessional rate under this section or, as the case may be, without payment of tax and has used such goods for a purpose other than that for which the recognition certificate was granted or has otherwise disposed of the said goods, such dealer shall be liable to pay as penalty such amount as the assessing authority may fix, which shall not be less than the difference between the amount of tax on the sale or purchase of such goods payable under this section and

the amount of tax payable under any other provisions of this Act but not exceeding three times the amount of such difference."

16. The Apex Court in the case of **Coastal Chemicals Ltd. Etc. (supra)** has clearly stated that word 'consumables' refers only to material which are utilized as an input in the manufacturing process namely 'raw material', 'component part', 'sub-assembly part' and 'intermediate part' etc.

17. Applying the aforesaid definition to the facts of the present case, it is noticed that 'Paints' are not utilized either as raw material or processing material such as raw material, plant, machinery, equipments, spare parts, but as per the revisionist 'paints' are utilized only for maintenance of plant and machinery.

18. It is also clear that 'Paints' are not used as input in the manufacturing process of sugar and hence clearly they are not consumed in the process of manufacture of sugar and are also not involved in making of end product and hence it cannot be said that they are 'consumables'.

19. Similar controversy was determined by this Court in the case of **Kisan Sahkari Chini Mills Vs. Commissioner of Sales Tax, 2002 (125) STC 216 (Alld.)**, where cement, steel and paints were sought to be included as goods which are directly involved in the manufacture of sugar. This Court relying upon the judgment of Ballarpur Industries Ltd. Vs. State of Karnataka, (1978) 42 STC 401 (Kar), wherein the Apex Court held as follows :-

"--- One of the valid tests, in our opinion, could be that the ingredient should be so essential for the chemical processes culminating in the emergence of the desired end-product, that having regard to its importance in and indispensability for the process, it could be said that its very consumption on burning up is its quality and value as raw material. In such a case, the relevant test is not its absence in the end-product, but the dependence of the end-product for its essential presence at the delivery end of the process. The ingredient goes into the making of the end-product in the sense that without its absence the presence of the end-product, as such, is rendered impossible. This equality coalesce with the requirement that its utilisation is in the manufacturing process as distinct from the manufacturing apparatus."

20. This Court in the case of **The Kisan Sahkari Chini Mills Ltd. (supra),** has observed as under :

"20. It is not the case of the applicant that the three items mentioned above are either raw material or consumables. On the other hand it is the specific case taken by the applicant that they fall under the description of the word "stores". The word "store" has not been defined under the Act or the Rules framed thereunder. In Webster's Third New International Dictionary of the English Language, Unabridged, 1971 Edition, the word "stores" has been defined as under:

"articles (as of food) accumulated or some specific object and issued or drawn upon as needed : the raw or unworked material supplies of a manufacturing concern."

21. Thus, the dictionary meaning of the word "stores" is material supplies of a

manufacturing concern or articles accumulated for some specific object and issued or drawn upon as needed.

22. -------

23. Applying the aforementioned principles, I find that the cement which is required by the applicant for use in the construction of factory building and or foundation, as held by the honourable Supreme Court in the case of J.K. Cotton Spinning & Weaving Mills Co. Ltd. [1965] 16 STC 563 ; AIR 1965 SC 1310, which has been followed by the honourable Karnataka High Court in the case of Ballarpur Straw Board Mills Ltd. [1978] 42 STC 401 and this Court in the case of Sivalik Collulose Ltd. 1992 UPTC 1 cannot be said that it is used either directly or even remotely in the manufacture of finished goods. Similar is the case of steel and paints, which too is required only in the repairs of boiler and protection of machineries. They cannot be said to be used even indirectly in the manufacture or processing of goods for sale. Thus, all the three items would not fall under the description of the word "stores", which are used in the manufacture of finished goods."

21. The High Court rejected the contention of the revisionist and held that cement, steel and paints were included in the definition of "consumable stores".

22. The judgment of the Tribunal in the case of **Awadh Sugar Mills Hargaon (supra)** is firstly distinguishable on the facts inasmuch as interpretation of 'Industrial Paints" is distinguished from 'Paints' which is sought to be included as "Consumable Stores" by the revisionist and secondly, in the said judgment there is no discussion as to whether "Industrial Paints" are utilized in the manufacture of sugar and the revision has been allowed only on the ground that recognition certificate was granted to the revisionist therein.

23. The aforesaid judgment of Tribunal, in out considered view does not lay down the law correctly and we do not approve of the said decision.

24. This Court is of the considered view that "Paints" are not utilized either as raw material utilized for manufacture of sugar nor is so closely connected with the manufacturing process so as to be included as "consumable stores" and therefore the revisionist was not entitled to purchase the same utilizing Form - 3B, and we do not find any infirmity in the judgment of the Tribunal and hence the revisions are **dismissed.**

24. The question of law is answered in favour of Revenue and against the revisionist.

(2022)07ILR A1171
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.04.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

SALE/TRADE Tax Revision No. 163 of 2007

M/S Suresh & Co. ...Revisionist
Versus
Commissioner of Trade Tax ...Opp. Party

Counsel for the Revisionist:
P. Agarwal

Counsel for the Opp. Party:
C.S.C.

A. Tax Law - U.P. Trade Tax Act 1948 - Section 11 - Merely because the said transaction is reflected in the books of account

of one party, does raise a presumption about participation of the other party in the said transaction, but solely on the basis of said entry, without any other supporting material in form of documents, independent material evidencing the said transaction, books of account of the other party, an assesse cannot be saddled with tax liability merely on the basis of presumption.

Revision allowed. (E-12)

List of Cases relied upon:-

Om Prakash Sharma Vs Commissioner of Trade Tax, 2009 UPTC 578

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Pradeep Agrawal, learned counsel for the revisionist as well as Sri Rohit Nandan Shukla, learned counsel appearing for the revenue.

2. Present revision under Section 11 of the U.P. Trade Tax Act, 1948, has been preferred against order dated 27.07.2007, passed by the Trade Tax Tribunal, Bench 2, Lucknow (hereinafter referred to as "the Tribunal") in Appeal No. 367 of 1993 for the assessment year 1984-85. Following questions of law are involved in the present revision :

I. Whether the Tribunal was justified in merely interpreting the facts in a different manner and holding that the revisionist is liable to be taxed with regard to a transaction which was recorded in the books of account of third party despite the fact that no co-relation between the third party and the revisionist could be established for the said transaction.

II. Whether the Tribunal was justified to assess the revisionist with regard to a transaction found in the books of account of a third party despite the specific finding that third party has been using the name of different parties to carry on business out of books of account for which he has been assessed on best judgment basis.

3. Facts in brief of this case are that revisionist is involved in sale and purchase of 'supari' and during course of business same was purchased from M/s Campco Ltd., Kanpur. In the assessment year 1984-85, in the books of account of M/s Campco Ltd., it is shown that revisionist has purchased 'supari' for an amount of Rs.16,70,552.25, while in the books of account of revisionist 'supari' worth Rs.8,44,552.50 is entered, but there was no entry relating to sale of remaining 'supari' worth Rs.8,25,999.75. It is stated that consignment of 'supari' worth Rs.8,25,999.75 was brought thorough Railways and was not entered into the books of account of the revisionist and the assessing officer assessed the revisionist and raised demand on the aforesaid amount, treating it to have been purchased by the revisionist.

4. The revisionist filed appeal against the aforesaid assessment before the first appellate authority, who after scrutinizing the accounts of revisionist and M/s Campco Ltd., came to the conclusion that there was no material which can relate the transaction of sale of 'supari' to the revisionist. The first appellate authority further recorded that it is the onus of the assessing authority to prove that a purchase has been made and therefore the assessing authority should obtain the necessary evidence against the assessee and if it is found that the assessee had made payment or any other evidence is found against the assessee then only the said transaction shall be liable to tax otherwise not.

5. It was assumed by the assessing authority that the revisionist had paid for the said transaction in cash holding that

said portion of sale cannot be shown from the books of account of the revisionist. The first appellate authority came to the conclusion that there was no material or evidence from which it can be ascertained that the revisionist was involved in purchase of said 'supari' and allowed the appeal of the revisionist.

6. The order of first appellate authority was challenged by the revenue before the Tribunal and in the first round the matter was remanded back to the first appellate authority for re-consideration. After remand of the matter, the first appellate authority again came to same conclusion and passed order in favour of assessee-revisionist.

7. By means of impugned judgment and order, the Tribunal has recorded finding that books of account of M/s Campco Ltd. clearly indicate that said transaction relate to revisionist-assessee and only on the basis of books of account of M/s Campco Ltd., allowed the appeal of the revenue, attributing the said transaction to the assessee-revisionist and upheld the assessment order passed in the present case.

8. Learned counsel for the revisionist while assailing the order of Trade Tax Tribunal dated 27.07.2007, submits that perusal of the record would indicate that no evidence much less credible evidence was available relating to the purchase of 'supari' by the assessee and consequently the order of Tribunal is without any basis or application of mind and there is no material available on record which can relate the revisionist to the said purchase of 'supari', hence said assessment cannot be made by the assessing authority.

9. While replying to the contentions of the assessee-revisionist, the Tribunal has recorded that there was regular and continuous transaction of purchase of 'supari from M/s Campco Ltd. by the assessee, the consignment of 'supari' was sent from the Banglore to Kanpur. The Tribunal assumed that after paying cash to M/s Campco Ltd. the assessed had obtained benami and fake possession of the said transaction and consequently the assessee never demonstrated the said entry in his books of account, but from the books of account of M/s Campco Ltd., it is established that it is the assessee-revisionist who is the person who has purchased the said goods and hence there was no infirmity with the order of assessing authority.

10. Learned counsel for the revenue has defended the judgment of the Tribunal. He has submitted that there were ample evidence in the form of number of transactions between the assessee-revisionist and M/s Campco Ltd., to come to the conclusion that it is the revisionist who has purchased 'supari' worth Rs.8,44,552.50, which goods were brought against Form-31, which indicates that purchase was made by the revisionist. The said transaction was also recorded in the books of account of revisionist and therefore, there is no infirmity with the order of the Tribunal.

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

12. From the perusal of order passed by the assessing authority, first appellate authority as well as the Tribunal, it is clear that there is no entry in the books of account of the revisionist with regard to the said transaction worth Rs.8,44,552.50. Even if it is believed, that the revisionist had paid in cash for purchase of said 'supari', then also there is no material which

can indicate that the revisionist had tendered the said amount in cash. It is only on the basis of presumption that the said transaction has been taxed by the revenue.

13. It is noted that the revenue has relied only on the books of account of M/s Campco Ltd., wherein the said transaction has been shown in favour of the revisionist. It is also noticed that the first appellate authority has noted that it was habit of M/s Campco Ltd. to maintain fake entries of sale, and merely on the basis of the said entry appearing in the books of account of M/s Campco Ltd., it cannot be said that it is the revisionist who had purchased the said 'supari'.

14. Be that as it may, there is no evidence or material available on record which can link the said transaction to the revisionist. In this regard learned counsel for the revisionist has relied upon the judgment of this Court in the case of **Om Prakash Sharma Vs. Commissioner of Trade Tax, 2009 UPTC 578**, wherein this Court in para 7 has held as under :

"7. The fundamental defect in the three orders of the authorities below is that there is no cogent and positive evidence on the record of the Department to show that it is the dealer-applicant, who carried on any business of sale or purchase of silver ornaments by receiving those parcel. The authorities below have sought to tax the dealer-applicant on the basis of presumptions and assumptions. Suspicion, howsoever strong may be, cannot be relied upon. The applicant-dealer is not a registered dealer under the Act and the burden lay on the shoulders of the Department to prove on the basis of the relevant and cogent material that the applicant is a dealer whose turnover is above the exemption limit as prescribed under the Act."

15. Merely because he said transaction is reflected in the books of account of one party, does raise a presumption about participation of the other party in the said transaction, but solely on the basis of said entry, without any other supporting material in form of documents, independent material evidencing the said transaction, books of account of the other party, an assessee cannot be saddled with tax liability merely on the basis of presumption.

16. Considering the aforesaid this Court is of the considered view that there was no material either in the books of account or any other material which can link the said sale of 'supari' to the revisionist and consequently, this Court do not find any infirmity in the findings recorded by the first appellate authority and the Tribunal has come to a erroneous conclusion only on the basis of entries in the books of account of M/s Campco Ltd., Kanpur.

17. In the light of above, revision is **allowed**. Judgment and order of Tribunal dated 27.07.2007, is hereby set aside. The questions of law are decided in favour of revisionist and against the revenue.

(2022)07ILR A1174
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Jail Appeal No. 75 of 2021

Sonu Kanoujia ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

From Jail, Ms. Beena Mishra

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

Criminal Law- Indian Penal Code, 1860- Section 376 - POCSO Act, 2012 - Section 5 (f), (m)/6- Section 29 - Section 30- In the cases of POCSO Act, the burden of proof lies on the accused and there is no presumption of innocence of the accused- However, the presumption, under Section 30 of the Act, as to the existence of motive, intention, knowledge etc., can be rebutted by an accused. It may be noticed that under Section 30 (2) of the Act a fact must be proved, like in all criminal prosecutions, beyond reasonable doubt.

In offences under the POCSO Act although there is no presumption of the innocence in favour of the accused but the same is rebuttable.

Criminal Law- Indian Evidence Act, 1872- Sections 3 , 118 & 145- The Oaths Act, 1969- Proviso to Section 4(1) - Sec. 7- The prosecutrix, P.W. - 3 shall be treated to be an injured witness-The evidence of the injured prosecutrix, P.W. - 3, also finds support from the medical report and evidence of P.W.-4, Dr. Deepa Tyagi-The evidence of the prosecutrix is wholly reliable, trustworthy and admissible in evidence which alone proves the guilt of the accused beyond reasonable doubt-

Settled law that the prosecutrix stands on the same footing as an injured witness and where her testimony is consistent and cogent, the same corroborated by other materials, then it is sufficient to bring home the guilt of the accused.

Criminal Law - Code of Criminal Procedure, 1973- Section 154- First Information Report- Delay in lodging if fatal-Delay of two days in lodging the first information report-In this case, there is an allegation of sexual assault upon a girl child. In the event of a sexual offence with a woman or a girl child of a family, before lodging a first information report the family thinks twice before taking any action. So the delay in lodging the first information report was very normal.

Delay in lodging of FIR in cases of sexual assault cannot be held to be fatal since there is a natural hesitancy in reporting the occurrence due to social factors.

Criminal Law - Indian Penal Code, 1860- Section 376 , POCSO Act, 2012 - Section 5 (f), (m)/6- Conviction under- Quantum of Punishment- Since the case of the accused -Appellant is covered by Section 376 (2) where, the minimum imprisonment of 10 years has been provided, therefore, the Court is of the opinion that considering the conditions that the accused-appellant is the sole bread earner of his family and he is a young man, having no previous criminal antecedents, there is possibility of reform and therefore, it would be appropriate that punishment be reduced and a minimum punishment be awarded to the accused-appellant-Under Section 376 IPC, punishment with rigorous imprisonment for a term not less than 10 years and a fine of Rs. 5,000/- and under Section 6 of the POCSO Act, a punishment with rigorous imprisonment for a term of 10 years and a fine of Rs. 5,000/- would be sufficient to meet the ends of justice.

As the reformative theory of punishment has been adopted in India, hence in view of the mitigating factors involved, the quantum of punishment is reduced to the minimum prescribed under Section 376 and Section 6 of the POCSO Act. (Para 10, 12, 15, 16, 18, 19, 22, 23, 34, 45, 47, 49, 54)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case Law relied upon:-

1. St. of Har. Vs Krishan, AIR 2017 SC 3125

2. Mukesh Vs St. for NCT of Delhi & ors. AIR 2017 SC 2161

3. Bhagwan Jagannath Markad Vs St. of Maha. 2016 (10) SCC 537

4. Veer Singh Vs St. of U.P. 2014 (2) SCC 455

5. Shyam Babu Vs St. of U.P. AIR 2012 SC 3311

6. Mano Dutt & anr Vs St. of U.P. 2012 (77) ACC 209 (SC)

7. Mohammad Mian Vs St. of U.P. 2011 (72) ACC 441 (SC)

8. Abdul Sayeed Vs St. of M.P. 2010 (10) SCC 259

9. Balraje Vs St. of Maha. 2010 (6) SCC 673

10. Jarnail Singh Vs St. of Punj. 2009 (6) Supreme 526.)

11. Gul Singh Vs St. of M.P., 2015 (88) ACC 358 (SC)

12. Paras Ram Vs St. of H.P., 2001 (1) JIC 282 (SC).

13. 2013 CrLJ 2658 (SC)

14. Suryanarayan Vs St. of Kar. (2001) 9 SCC 129

15. St. of U.P. Vs Manoj Kumar Pandey ,AIR 2009 SC 711

16. Santosh Moolya Vs St. of Kar. 2010 (5) SCC 445

17. Ravindra Vs St. of M.P (AIR 2015 SC 1369)

18. Baldev Singh Vs St. of Punj., AIR 2013 SC (Supp) 28

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

1. We have heard Ms. Beena Mishra, the Amicus Curiae for the appellant and Sri Nagendra Kumar Srivastava the learned AGA for the State.

2. This jail appeal arises out of a judgment and order dated 21.12.2020 passed by the Special Judge POCSO Act/Additional District & Sessions Judge, Ghaziabad in Sessions Trial No.121 of 2015 (State of UP vs. Sonu Kanaujiya), arising out of Crime No.119 of 2015, Police Station Indirapuram, District Ghaziabad, convicting the appellant under Section 376 of IPC and Section 5 (f), (m)/6 of POCSO Act, 2012 and sentencing him to undergo imprisonment for life under Section 5 (f) (m)/6 of the POCSO Act, 2012, with a fine of Rs.1,00,000/- and, in default thereof, he was to undergo one year's additional simple sentence.

3. As per prosecution case, on 31.1.2015, FIR (Ex.Ka.1) was lodged by Satya Narayan Sharma, grandfather of the prosecutrix, alleging in it that the prosecutrix was studying in Paradise Play School, 120 Sector-1, Vaishali and on 31.1.2015, she informed him that she was feeling pain in her private part because of the fact that on 29.1.2015, accused appellant had inserted his finger in her private as a result of which, she had bled. The prosecutrix was immediately taken to Doctor, who had informed him that some foul play had been played with her private part. On the basis of this report, FIR under Sections 376 of IPC and Sections 3 & 4 of the POCSO Act, was registered against the accused appellant.

4. While framing charge, the trial Judge had framed charges against the appellant under Section 376 of IPC and Section 5 (f)&(m) & Section 6 of POCSO Act. Section 376 of IPC and Section 5(f)&(m) & 6 of the POCSO Act are being reproduced here as under:-

376. Punishment for rape:- (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of

either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,-

(a) being a police officer, commits rape -

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a women in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman;or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman;

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Section 5 (f) & (m) & Section 6 of POCSO Act:-

5. (f):- whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution.

5. (m):- whoever commits penetrative sexual assault on a child below twelve years;

6. Punishment for aggravated penetrative sexual assault.-- (1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

5. So as to hold the accused appellant guilty, prosecution had examined six witnesses. No defence witness had been examined by the accused appellant. Statement of the accused appellant was recorded under Section 313 Cr.P.C. in which, he had pleaded his innocence and had stated that there was false implication.

6. By the impugned judgment, the trial Judge had convicted the accused appellant under Section 376 of IPC and Section 5 (f) & (m) & 6 of POCSO Act and sentenced him, as mentioned in paragraph no.1 of this judgment. Hence, this appeal.

7. Learned counsel for the appellant submits:

(i) that the prosecutrix (PW-3) being a child witness, was not trustworthy and her statement does not inspire confidence;

(ii) that the accused appellant had been falsely implicated at the instance of her father, who looks after the News work;

(iii) that the medical report of the prosecutrix did not fully support the prosecution case;

(iv) that the accused appellant was alleged to have inserted his finger in the private part of the prosecutrix and his act is not that serious where he should have been punished with the excessive punishment which had been given by the Trial Court;

(v) that the accused appellant is a young man, aged about 24 years and, if even assuming that out of anxiety, he committed the offence, he deserved sympathetic treatment and the sentence awarded to him being excessive be reduced; and

(vi) that there is two days' delay in lodging the FIR and the said delay had not been explained by the prosecution.

8. On the other hand, supporting the impugned judgment, it has been argued by learned State Counsel that the conviction of the appellant was in accordance with law and there was no infirmity in the same. He submits that inserting of finger by a man in the private part of a girl amounts to commission of offence and it is not necessary that a private part of a man had to be inserted in the private part of a girl to constitute the offence. He further submits that the accused appellant is a mature person, aged about 24 years, and for the act which he had committed, he did not deserve any sympathy.

9. We have heard learned counsel for the parties and perused the record.

10. First of all, it would be appropriate to make it clear that in the cases of POCSO Act, the burden of proof lies on the accused and there is no presumption of innocence of the accused.

11. **Section 29 of the POCSO Act:- Presumption as to certain offences:** - When a person is prosecuted for committing an offence of sexual assault under Section 3, 5, 7 and 9 of this Act, against a minor, the special court trying the case shall presume the accused to be guilty.

12. There shall be presumption of guilt on the part of the accused if he is prosecuted for committing, abetting or attempting offences under Section 3, 5, 7 & 9 of the Act.

13. **Section 30 of the POCSO Act:- Presumption of culpable mental state:-** (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.-In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

14. The Supreme Court held (in State of Maharashtra vs. Mayer Hans George AIR 1965 SC 722) that the legislature can legislate an offence without an ingredient of mens rea and the requirement of actual knowledge/mens rea that the act is in contravention of law can be done away with in respect of an offence.

15. However, the presumption, under Section 30 of the Act, as to the existence of motive, intention, knowledge etc., can be rebutted by an accused. It may be noticed that under Section 30 (2) of the Act a fact must be proved, like in all criminal prosecutions, beyond reasonable doubt.

16. This Court is deciding the appeal keeping in mind the aspects of Sections 29 & 30 of the POCSO Act that firstly primary burden of proof had to be discharged by the prosecution.

17. Prosecutrix (PW-3), in her Court statement, has stated that at the relevant time she was studying in Renainsa Public School, Sector-1, Vaishali and on the date of incident, she was subjected to bad work. She has clarified as to what is the meaning of 'bad work'/habit'. She has further stated that in the Court, one is supposed to narrate truth. After recording satisfaction about the mental knowledge and strength of the prosecutrix, her statement was recorded by the learned Trial Judge. She has stated that the accused appellant was working in the same School, where she was studying; he took her on the rooftop of the School; removed her underwear and inserted his

finger in her private part as a result of which, she felt pain and the blood started oozing out from her private part. After reaching home, she narrated the entire incident to her mother and her mother and aunt took her to the Doctor and then, she had gone to Police Station. She has further clarified as to the manner in which the entire incident had occurred. In the Court, she had identified the accused appellant by saying that he was the same person, who took her to the rooftop of the School, had removed her underwear and had committed the bad work with her. When she was confronted with her statement under Section 164 of Cr.P.C., she had made the same statement before the Court.

18. In the cross examination, she was confronted by the defence regarding her mental status and she answered all the questions in a proper manner. No question had been put to the prosecutrix regarding commission of offence with her and she was subjected to cross-examination by putting various unnecessary questions. No proper evidence had been adduced by the defence. Prosecutrix has reiterated that on the pretext of offering Chocolate to her, she was taken to the rooftop of the School and she was alone there. She had further reiterated that she had gone to the Doctor for her medical examination.

19. In our view, the prosecutrix, P.W. - 3 shall be treated to be an injured witness. In several cases (some of them mentioned below), the hon'ble Supreme Court has observed that "deposition of an injured witness should be relied upon unless there are strong grounds for rejection of his/her evidence on the basis of major contradictions and discrepancies." (**State of Haryana vs. Krishan reported in AIR 2017 SC 3125, Mukesh vs. State for NCT of Delhi & Others reported in AIR 2017 SC 2161(three judges Bench), Bhagwan Jagannath Markad** vs. **State of Maharashtra** reported in **2016 (10) SCC 537, Veer Singh vs. State of U.P**. reported in **2014 (2) SCC 455, Shyam Babu vs. State of U.P.** reported in **AIR 2012 SC 3311, Mano Dutt & another vs. State of U.P.** reported in **2012 (77) ACC 209 (SC), Mohammad Mian vs. State of U.P.** reported in **2011 (72) ACC 441 (SC), Abdul Sayeed vs. State of M.P.** reported in **2010 (10) SCC 259, Balraje vs. State of Maharashtra** reported in **2010 (6) SCC 673 and Jarnail Singh vs. State of Punjab** reported in **2009 (6) Supreme 526.)**

20. In this case, the evidence of the injured prosecutrix, P.W. - 3, also finds support from the medical report and evidence of P.W.-4, Dr. Deepa Tyagi. Regarding the objection about the child witness not being mature enough to be testify the following citations and provisions are important and they are relied on:-

A**. <u>Testimony of child witness not to be rejected unless found unreliable & tutored:</u> (Sec. 118, Evidence Act):** The testimony of a child witness cannot be rejected unless found unreliable & tutored (Gul Singh vs. State of M.P., reported in 2015 (88) ACC 358 (SC).

B. **<u>Oath to child witness</u>**: Proviso to Section 4(1) of the Oaths Act, 1969 reads as under ----- "provided that, where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of the opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an

oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth."

C. **Omission to administer oath (Sec. 7 of the Oaths Act, 1969):** reads as under: - "No omissions to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the administration of any oath or affirmation or in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

D. **Child witness when not understanding the meaning of oath**: It has been laid down by the Supreme Court that there is no legal bar against relying on the testimony of a child witness to whom oath could not be administered due to her incapacity to understand the meaning of oath. (see: **Paras Ram vs. State of H.P., 2001 (1) JIC 282 (SC).**

E. **Corroboration of testimony of child witness not required if credible**: Conviction on the basis of testimony of a child witness is permissible if evidence of such child witness is credible, truthful and corroborated. Corroboration is not must. It is under rule of prudence. (See: 2013 CrLJ 2658 (SC).

21. In this case, the testimony of the P.W.-3, the prosecutrix, is supported and corroborated with the evidence of P.W. - 1 Satya Narain Sharma, the grandfather, the P.W. - 2 Smt. Arti Sharma the mother, the P.W. - 4, Dr. Deepa Tyagi and formal witnesses P.W. -5 & P.W.6 and the Medical Report.

22. Thus, it is concluded that the evidence of the prosecutrix is wholly reliable, trustworthy and admissible in evidence which alone proves the guilt of the accused beyond reasonable doubt.

23. From the above evidence, it is also proved that the accused put finger into the vagina of the prosecutrix and not his penis. However, only fingering into the private part of a girl or woman unnecessarily with evil motive is sufficient to prove the charge under Section 376 (3) IPC and Sections 5 (f)&(m) and 6 of the POCSO Act.

24. It was observed by the Supreme Court in **Suryanarayan vs. State of Karnataka (2001) 9 SCC 129** that : (the witness) *who at the time of occurrence was about four years of age, is the only solitary eye-witness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eye-witness.*

25. The evidence of the child witness cannot be rejected per se, but the Court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. *"if she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone.*

Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the Courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the Courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not."

26. Dr. Deepa Tyagi (PW-4) has medically examined the prosecutrix, vide Ex.Ka.3 (Medico Legal Examination Report) and Ex.Ka.5 (Supplementary Medico Legal Report). She states that she noticed injuries on the outer private part of the prosecutrix.

27. In the cross examination, this witness has reiterated her statement that she noticed injuries on the private part of the prosecutrix. Though she has stated that she had not medically examined the internal portion of the private part of the prosecutrix, but no further question has been put to this witness. Even question to the effect that the prosecutrix might have sustained such injuries because of some other activities had not been put to this witness.

28. Satya Narayan Sharma (PW-1) is the grandfather of the prosecutrix who lodged the FIR. While supporting the prosecution case, he has stated that the prosecutrix made a complaint to her mother about the pain felt by her in her private part and she also narrated to her mother that it was the accused appellant, who had inserted his finger in her private part. While supporting the FIR, he has categorically stated that on 31.1.2015, he had lodged the report.

29. Smt. Arti Sharma (PW-2) is the mother of the prosecutrix. While supporting the prosecution case, she had stated that after returning home from School, the prosecutrix had informed her about the act/offence committed by the accused appellant and she had noticed blood on the underwear of the prosecutrix. She has described the manner in which the entire incident was narrated to her by the prosecutrix.

30. In the cross-examination, this witness remained firm and nothing could be elicited from her.

31. Vijay Kumar and Vimal Kumar (PW-5 and PW-6) are the Investigating Officers and have duly supported the prosecution case.

32. In the statement under Section 313 of Cr.P.C., all the relevant questions were put to the accused, which have been answered by him.

33. The appellant's counsel has also argued that there is a delay of two days in lodging the first information report, therefore, he submits it could be said that the alleged occurrence and FIR were the result of some conspiracy and were not correct and they were a result of some afterthought.

34. In this case, there is an allegation of sexual assault upon a girl child. In the event of a sexual offence with a woman or a girl child of a family, before lodging a first information report the family thinks twice before taking any action. So the delay in lodging the first information report was very normal.

35. Considering these circumstances, the Hon'ble Supreme Court in the cases of **State of U.P. vs. Manoj Kumar Pandey** reported in **AIR 2009 SC 711** (three judge Bench) and **Santosh Moolya vs. State of Karnataka reported in 2010 (5) SCC 445** held that the normal rule that prosecution has to always explain the delay does not apply to rape cases.

36. Thus, the argument of the appellant-accused regarding two days' delay in lodging the FIR is hereby rejected.

37. Close scrutiny of the evidence makes it clear that on 29.1.2015, prosecutrix was subjected to rape by the accused appellant and the prosecutrix immediately reported the entire incident to her mother.

38. We find no substance in the argument of the defence that the statement of the prosecutrix does not inspire confidence of the Court. Prosecutrix is a small girl; at the time of incident, she was four and half years old and even at the time of recording evidence, she was just about seven years old, but she has answered all the questions in a proper manner. She appears to be a fully trustworthy witness and there is no reason for this Court to disbelieve her statements. Furthermore, there is no contrary evidence available on record to suggest that the accused appellant has been falsely implicated. In this regard, the argument advanced by the accused side is found baseless. No such evidence has been brought on record by the defence. Even in the cross-examination of the prosecutrix, she was not subjected to answer any such question which may be of any help to the defence. In the examination-in-chief, she has reiterated as to the manner in which she was subjected to wrong act by the appellant and no such cross question has been put to her in the cross-examination. Statement of the prosecutrix duly finds support from the statement of the Doctor (PW-4) who had noticed injuries on her private part. Here also, no such question was put to the Doctor about the statement of the prosecutrix or the medical examination of the prosecutrix. Even assuming that the internal examination of the prosecutrix has not been done by the Doctor, it hardly makes any difference once the Doctor herself found injuries on her private part. The other relevant witnesses, i.e. PW-1 (lodger of FIR) and PW-2 (mother of the prosecutrix) have also duly supported the prosecution case.

39. Taking cumulative effect of the evidence, we are of the view that the trial Court was fully justified in convicting the accused appellant.

40. The next question, which arises for consideration of this Court, is as what should be the appropriate sentence to be awarded to the accused appellant.

41. The Court is convinced that the appellant was a young man with no criminal antecedents and he can always be given a chance for reformation.

42. It is true that in this case the matter pertains to Section 376 IPC and

Sections 5(f)&(m) and 6 of the POCSO Act but the accused has no previous criminal history except this case and he has not caused any other injury to the prosecurtrix. The case is that the accused inserted his finger into the genitals of the prosecutrix which according to the amended Section 375(b) IPC (amended by Act 13 of 2013) is now considered in the category of rape. Therefore, the crime committed by the accused-appellant is punishable under Section 376 (2) (d & f) of the I.P.C. for which there is a punishment of rigorous imprisonment for a term not less than 10 years but which may extend the imprisonment for life and a fine is also provided.

43. Since the offence was committed in a school where the accused-appellant was a Class IV employee, therefore, the amended Section of 376 (C) (c) of the IPC (amended in 2013) is also applicable. For which there is a punishment of rigorous imprisonment which shall not be less than five years but which may extend to 10 years and a fine also has been provided.

45. Since the case of the accused - appellant is covered by Section 376 (2) where, the minimum imprisonment of 10 years has been provided, therefore, the Court is of the opinion that considering the conditions that the accused-appellant is the sole bread earner of his family and he is a young man, having no previous criminal antecedents, there is possibility of reform and therefore, it would be appropriate that punishment be reduced and a minimum punishment be awarded to the accused-appellant.

46. The accused-appellant has also been tried under the POCSO Act. It is proved from the above discussions that the accused has committed an offence under Section 5 (f & m) of the POCSO Act and for which under Section 6 of the POCSO Act (prior to the amendment of 2019) there was a punishment for imprisonment not less than 10 years which may extend to life imprisonment also and a fine.

45. Therefore, considering the aforementioned circumstances relating to the accused-appellant, this Court is of the opinion that a minimum punishment with rigorous imprisonment for a term not less than 10 years and a fine of Rs. 5,000/- would meet the ends of justice.

47. Though, the Supreme Court in its recent judgement in **Ravindra v. State of Madhya Pradesh (AIR 2015 SC 1369)** has ruled that accused in a rape case may be awarded lesser sentence than the minimum ten years where adequate and special reasons exist by invoking the proviso to Section 376(2)(g) of the IPC for awarding lessor sentence, we think it would be appropriate to punish the appellant with the minimum punishment.

48. In the case of **Baldev Singh vs. State of Punjab reported in AIR 2013 SC (Supp) 28,** the Supreme Court had reduced the sentence on a similar ground.

49. We are of the opinion that no sentence lesser than that prescribed in the IPC and POCSO Act should be awarded to the accused-appellant. The trial court had punished the accused-appellant under Section 376 IPC and the Section 5 (f & m)/ 6 of the POCSO Act. But because of the provisions of Section 42 of the POCSO Act that the highest punishment be awarded had punished the accused - appellant only under Section 5 (f & m)/6 of the POCSO Act.

50. If we peruse the Section 376 IPC and Sections 5/6 POCSO Act, we find that punishments for the offences committed under the provisions in the year 2015 were similar.

51. In Section 6 of the POCSO Act (amended by the Act No. 25 of 2019 "w.e.f. 16.8.2019") the minimum punishment of rigorous imprisonment "not less than 20 years" was added. Earlier it was 10 years only.

52. Similarly, Section 376 IPC was amended in 2018 and prior to this amendment when the offence was committed in the year 2015 there was amended Section of 376 IPC available which was amended in the year 2013 in which only punishment with rigorous imprisonment for a term not less than 10 years and a fine was provided.

53. On the question of punishment, we, because of the reasons which have been stated in this judgement, propose to award the minimum punishment to the appellant..

54. We are of the opinion that under Section 376 IPC, punishment with rigorous imprisonment for a term not less than 10 years and a fine of Rs. 5,000/- and under Section 6 of the POCSO Act, a punishment with rigorous imprisonment for a term of 10 years and a fine of Rs. 5,000/- would be sufficient to meet the ends of justice. In the case of non-payment of fine, under Section 376 IPC, the appellant would undergo an additional one year of rigorous imprisonment and in the case of non-payment of fine under Section 6 of the POCSO Act, the appellant would further undergo one year of additional rigorous imprisonment.

55. Therefore, on the basis of the aforesaid discussion, we are of the view that conviction under Section 376 IPC and Section 6 of the POCSO Act is liable to be maintained and the appeal is dismissed. However, the punishment awarded by the lower court stands modified.

ORDER

56. The appeal in respect of conviction under Section 376 IPC and Section 6 of the POCSO Act is dismissed and the conviction awarded by the Trial Court is affirmed. However, the Appeal in respect of punishment stands party allowed as under:-

57. Under Section 376 IPC, the accused-appellant shall undergo punishment for a period of 10 years rigorous imprisonment with a fine of Rs. 5,000/-. In case of default of payment of fine, the accused-appellant shall undergo one year additional rigorous imprisonment.

58. Under Section 6 of the POCSO Act, the accused-appellant shall undergo punishment for a period of 10 years rigorous imprisonment with a fine of Rs. 5,000/-. In case of default of payment of fine, the accused-appellant shall undergo one year of additional rigorous imprisonment.

59. The punishment awarded under Section 376 IPC and Section 6 of the POCSO Act shall run concurrently. The period of incarceration of the accused - appellant in the aforesaid case crime number shall be adjusted as per law. The fine imposed upon the accused shall be given to the prosecutrix as compensation.

60. For the hard work which has been put in by the learned Amicus Curiae Ms.

Beena Mishra, we quantify her fee as Rs. 35,000/- which shall be payable to her by the Legal Services Authority forthwith.

(2022)07ILR A1186
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.05.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 984 of 2015
connected with
Government Appeal No. 1774 of 2015

Manoj @ Bhorai ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Sanjay Tiwari, Sri Adya Prasad Tewari, Sri Birendra Singh, Sri M.N. Pathak, Sri Ramesh Kumar Singh, Sri Sheo Shankar Tripathi, Sri Pawan Kumar Vishwakarma, Sri Vijit Saxena

Counsel for the Opp. Party:
Govt. Advocate

Criminal Law- Indian Penal Code, 1872- Section 376- Code of Criminal Procedure, 1973- Section 154- Delayed First Information Report- Section 157- Special Report to Magistrate- There is 68 days delay in lodging the F.I.R, but the lower trial court did not find it unnatural or unusual and found sufficient explanation of the delay-If causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending the copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by its reliable evidence.

Where the prosecution has satisfactorily explained the delay in lodging the first information report and there is nothing to suggest concoction, of a story, then the said delay will not adversely affect the case of the prosecution.

Juvenile Justice (Care and Protection of Children) Act, 2015- Section 94- Determination of age of Prosecutrix - The prosecutrix is the sole witness of kidnapping, abduction and rape. According to radiological examination report, she was found to be 18 years of age, but according to her High School Certificate her date of birth recorded is 03.05.1992, thus, she was aged about 17 years at the time of commission of crime.

As per the provisions of the juvenile Justice Act primacy has to be given to the high school certificate of the prosecutrix and not to the ossification test in order to determine her age, hence prosecutrix held to be minor on date of occurrence.

Quantum of Punishment- Doctrine of Proportionality- It is correct that accused is married and family person even his children might have been of victim's age or similar to the age of victim. He has committed the sexual offence upon the victim twice and this offence was committed to pressurize the victim and her family members to come on the table of compromise. In this regard, another criminal case has also been lodged against the appellant, thus the accused has taken law in his own hand and has also interfered in administration of justice. Therefore, an extreme lenient view cannot be adopted in favour of the accused-appellant but since he is the only bread earner of his family and his family and children are facing lot of problem, therefore it would be expedient in the interest of justice to reduce the sentence to some extent awarded under Section 376 I.P.C.-Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court

considers that no accused person is incapable of being reformed, therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream- 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Supreme Court, as discussed above,has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system- Eight year's rigorous imprisonment and Rs.25,000/- fine under Section 376 I.P.C would meet the ends of justice.

As the criminal jurisprudence in our country is reformative and corrective hence the accused/ applicant should be given an opportunity of reforming himself, however a balance requires to be struck between the nature and gravity of the offence with the quantum of the sentence awarded and undue sympathy should not prevail, hence sentence reduced to 8 years with fine. (Para 22, 24, 40, 42, 43, 44, 45, 46)

Criminal Appeal partly allowed. (E-3)

Judgements/ Case Law relied upon:-

1. Ashok Kumar Vs St. of U.P. 2012 (78) ACC 320

2. Satpal Singh Vs St. of Har. 2011 (1) C.C.S.C 185 SC

3. Mukesh Vs St. for NCT of Delhi & ors., AIR 2017 SC 2161

4. Ashok Kumar Chaudhary Vs St. of Bih., 2008 (61) ACC 972 (SC)

5. Rabindra Mahto Vs St. of Jhar., 2006 (54) ACC 543 (SC)

6. Ravi Kumar Vs St. of Punj., 2005 (2) SCJ 505

7. St. of H.P. Vs Shree Kant Shekari, (2004) 8 SCC 153

8. Munshi Prasad Vs St. of Bih., 2002 (1) JIC 186 (SC).

9. Ravinder Kumar Vs St. of Punj., 2001 (2) JIC 981 (SC).

10. Sheo Ram Vs St. of U.P, (1998) 1 SCC 149

11. St. of Kar. Vs Moin Patel, AIR 1996 SC 3041.

12. St. of U.P. Vs Manoj Kumar Pandey, AIR 2009 SC 711 (Three Judges Bench).

13. Santosh Moolya Vs St. of Kar., 2010 5 SCC 445

14. Manoj Mishra @ Chhotkau Vs The St. of U.P 2001 0 Supreme Court (SC) 609

15. Mohd. Giasuddin Vs St. of AP, [AIR 1977 SC 1926],

16. Deo Narain Mandal Vs St. of UP, [(2004) 7 SCC 257

17. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

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

1. We have heard learned counsel for the appellants, learned A.G.A for the State and perused the material available on record.

2. The present appeals have been filed against the judgement and order dated 24.01.2015, passed by Additional Sessions Judge/Court No. 3, Gorakhpur, by which the accused-appellant was sentenced under Section 376 I.P.C with Rigorous Imprisonment of ten years and fine of Rs.50,000/- out of which Rs. 25,000/-

would be paid to the victim as compensation. In default, the convict will have to undergo simple imprisonment for twelve months. For the offence under Section 363 I.P.C, he was convicted and sentenced with Rigorous Imprisonment of one year and fine of Rs.1000/-. In default, the convict will have to undergo simple imprisonment for two months. For offence under Section 366 I.P.C, he has been convicted for rigorous imprisonment for three years and fine of Rs.5,000/- in case of default six months R.I. was ordered. It was also ordered that the period spent by the convict in custody would be adjusted in his sentence and all the sentences shall run concurrently.

3. Smt. Munni Devi, Smt. Phoola Devi and Smt. Tirtha Devi summoned as accused under Section 319 Cr.P.C, were acquitted. Being aggrieved, the State has preferred the appeal no. 1774 of 2015.

4. In brief, grounds of Appeal No. 1774 of 2015, is that the learned Trial Court has given benefit of doubt or advantage to the acquitted respondents. The case under Section 364 is fully proved against them but the learned Trial Court disbelieved P.W 1 & P.W 2. The order of acquittal is illegal, unjustified and bad in the eye of law. The learned Trial Court has not properly appreciated the prosecution evidence and has decided the case on the basis of conjuncture and surmises. The impugned judgement and order of acquittal is not sustainable and is liable to be set aside.

5. In brief, grounds of Appeal No. 984 of 2015, are that the appeal, the accused appellant has taken a plea that the prosecutrix and appellant were in love with each other and agreed to marry, but parents of the victim did not approve of their marriage, rather decided to marry the victim with another person. Thereafter, she left the house on 14.04.2009. Mother of the victim lodged first information report against the appellant and his family members. The appellant and his family members have previous enmity with the informant/complainant, therefore, being annoyed and prejudiced and on the dictates of informant, the prosecutrix has falsely implicated the appellant. It is a case of consent and no opinion about the rape can be given. As per the medical report the victim was 18 years old at the time of alleged incident. The F.I.R. is delayed by 68 days, which is not explained. There is no injury in the private part of the victim and it can be gathered that she is a consenting party. There are major and serious contradictions in the evidences of prosecution witnesses. Defence proved the enmity, and conviction is based on surmises and conjuncture, therefore, the appeal be allowed and impugned judgment be set aside.

In brief, facts of the case is as follows:-

6. In the present case, First Information Report was got registered by mother of the prosecutrix Smt. Ishrawati, who is informant of the prosecutrix by way of an application addressed to the D.I.G of Police, Gorakhpur, in which she stated that earlier accused-Manoj had kidnapped her daughter. In this respect the case is pending. The accused was pressurizing the informant and her daughter to change their statement and for this he had beaten the prosecutrix and had also threatened to kill her after kidnapping. Information in this respect was given to the police station. On 14.04.2006 at about 16:00 p.m., when her daughter, was going to the new house situated near Vikas Bharati School, from

her old house in Unaula Awwal, she became untraceable. She was searched everywhere but could not be found. The informant had given a missing report regarding the prosecutrix with the police station but no action was taken. It was suspected by the informant that the accused Manoj and his family members named in the application had kidnapped her daughter and have killed her.

7. The duty Constable registered F.I.R on 22.06.2009 and entered in G.D at Serial No. 10. Investigation was handed over to S.I Wasim Anwar Khan. During investigation, the Investigating Officer (I.O) recorded the statements of the witnesses, visited the place from where the prosecutrix was suspected to be kidnapped and prepared site map. On 11.09.2009, the I.O. was informed that the accused, Manoj is bringing the victim towards the railway station Unaula. The police party went towards the railway station. At about 17:00 hours, a man and a girl were seen coming towards the railway station. They were asked to stop on the signal of informer. The person fled away, leaving the prosecutrix of this case, so this person could not be arrested. On inquiry, the girl told her name and also told the police party that the person accompanying her was the accused - Manoj @ Bhorai, who had kidnapped her against her will on 14th April, when she was going from her old house in Unaula Awwal to new house situated near Vikas Bharati School. Accused Manoj had persuaded her and taken her with him, he had kept her with him at different places. Today, he was taking her to record her statement and to meet an advocate, but was intercepted by police. A recovery memo was reduced into writing which was signed by the prosecutrix, I.O. and witnesses present, on the place of recovery.

8. The prosecutrix was medically examined on 12.09.2009. In her internal examination, she was found mentally fit, pubic hair and auxiliary hair were developed. Both breast were developed, a lump was found in her stomach about 12 cm/10cm size which was mobile. Her height was 150 cm weight 48 k.gm teeth 15/15. In her internal examination conducted with her consent, hymen was found old torn, margins irregular, vagina admitted two fingers easily. The mouth of cervix was closed, and the lump was in continuity with the cervix. She could not tell about her last months menstruation date. She was sent for radio-logical examination and ultrasound examination as well urine test. The medical examination report was prepared by the Dr. Mintu Kumari Sharma.

9. The Doctor, who had examined the prosecutrix medically, prepared a supplementary report on 21.09.2009 on the basis of pathological report, the pathological report number 154/14/09/2009 revealed that spermatozoa was not found. According to ultrasound report, she was pregnant for about 19 weeks and two days. According to the report of C.M.O, after her radio-logical examination, her wrist joints, knee joints and all the epiphysis were fused, she was about 18 years of age. According to the Doctor, no definitive opinion about rape could be given. The prosecutrix was produced before Magistrate and her statement under Section164 Cr.P.C was recorded.

10. After completion of investigation, the investigating officer filed charge-sheet under Sections 364 & 376 I.P.C against accused Manoj only as the names of other accused, mentioned in the F.I.R was found to have been falsely implicated.

11. The Magistrate took cognizance and committed the case to the court of Sessions vide order dated 22.01.2010, from where it was transferred to Additional Sessions Judge 03rd, Gorakhpur, where charges under Sections 364 and 376 I.P.C was framed on date 18.05.2010 against accused-Manoj who pleaded not guilty and claimed trial.

12. Prosecution examined on oath, the informant as PW 1 Smt. Ishrawati, who is the mother of the prosecutrix, prosecution moved an Application under Section 319 Cr.P.C. to summon other persons accused i.e. Smt. Munni Devi, Smt. Phoola and Smt. Tirtha, named in the F.I.R. The application was allowed and they were also summoned for trial vide order dated 24.05.2012. These three accused were charged under Section 364 I.P.C vide order dated 26.07.2013. The accused pleaded not guilty and claimed trial.

13. The P.W 1 & PW 2 were again examined and cross examined. Prosecution further examined on oath, PW 3, Dr. V.P. Singh, who deposed of conducting radio-logical examination of the prosecutrix and preparing report, after X-ray of right elbow knee and wrist of the prosecutrix.

14. P.W 4 Dr. T.N. Jha deposed about the ultrasound examination of the prosecutrix and stated that he had conducted the ultrasound examination of the prosecutrix on 15.09.2009. Fetus which was mobile, was found in her uterus on the upper part of the placenta. There was placental fluid in the uterus. The heartbeat of the fetus was 142 per minute, weight 285 gms. The fetus was of about 19 weeks and two days. He proved his report and ultrasound examination report and also proved the ultrasound plates as material exhibits.

15. PW-5, is the Constable clerk who deposed and proved about registering the first information report on the basis of an application and making relevant entry in G.D.

16. PW-6 Dr. Mintu deposed about medical examination of the prosecutrix and also of preparing the examination report, referring the prosecutrix for pathological test and X-ray examination and ultrasound examination as well. She also deposed and proved the supplementary report regarding age and on the basis of pathological report, details of which have been mentioned earlier in this judgment.

17. PW-7 is the Investigating Officer, who deposed about the investigation of the case. He accordingly proved the recovery memo of the prosecutrix, the site plan and the charge-sheet.

18. PW-8 P.S. Tiwari, is the Constable clerk, who was posted in the office of D.I.G Police, where the informant submitted her application for registering first information report. He accordingly deposed and has proved the report, written by him and the entry in the general diary regarding the report.

19. In their statement under Section 313 Cr.P.C the accused have pleaded false implication due to enmity. They have stated that the witnesses of fact have deposed under pressure and also that the investigation was not fair, rather it was a paperwork done by the I.O. in office. No evidence in defence was produced except certified copy of a surety bond in case number 302/08 which is admissible in evidence being certified copy of public document but of no use and rest of the documents are photocopy documents,

which have not been proved. Hence are not admissible in evidence.

20. We have heard learned counsel for the accused-appellant, learned A.G.A. for the State and perused the material available on record.

21. The following documentary evidences were produced proved and relied by the prosecution :

Exhibit '*ka' 1 :* Written Tehrir by the informant Smt. Ishrawati, who is mother of the victim.

Exhibit '*ka' 2 :* Recovery memo of the victim.

Exhibit *'ka' 3 :* Statement of the victim under Section 164 Cr.P.C.

Exhibit *'Ka' 4 :* Admit-Card of the Victim for High School Exam. 2007

Exhibit '*Ka' 5 :* Registration of Victim of Class - IX, in which her date of birth is mentioned as 03.05.1912.

Charge-sheet.

Exhibit *'Ka' 5 :* Copy of chik F.I.R.

Exhibit *'Ka' 6 :* Radio-logical Report by P.W.3 Dr. V. P. Singh, Radiologist.

Exhibit *'Ka' 7 :* Ultrasound report by P.w. 4 Dr. T.N. Jha, Radiologist

Exhibit *'Ka' 8 :* Carbon Copy of G.D, regarding registration of case, P.W. 1.

Exhibit *'Ka' 9.* : Medical Examination Report by P.W 6 - Dr. Mintu Kumari Sharma.

Exhibit *'Ka' 10* : Supplementary medical report.

Exhibit *'Ka' 11* : Map.

Exhibit '*Ka'12* : Copy of G.D regarding recovery of the victim.

Exhibit '*Ka'13* : Entry in G.D. regarding arrest of the accused on 25.09.2009.

Exhibit *'Ka' 14 :* Charge-sheet.

Exhibit '*Ka' 15 :* Chik F.I.R by P.W 8.

Exhibit *'Ka' 16 :* Carbon copy G.D dated 22.06.2009, regarding lodging F.I.R.

Exhibit '*Ka'17 :* Missing report of original G.D.

Material Exhibit 1 : X-ray plate.

Material Exhibit 2 : Ultrasound film by P.W 4 Dr. T.N. Jha.

Material Exhibit 3 : Ultrasound film by P.W 4 Dr. T.N. Jha.

22. There is 68 days delay in lodging the F.I.R, but the lower trial court did not find it unnatural or unusual and found sufficient

explanation of the delay. According to the informant P.W-1, she had informed the missing of the victim to the local police, but the police did not take any action, then she approached the D.I.G with an application upon which order was passed to register the case. Therefore, her F.I.R was lodged after 68 days of the incident. The lower court has held that in case of kidnapping or rape of a girl, the family members hesitate to approach the Police at the first instance because of the stigma prestige and honour of the family involved. Firstly, they try to search the victim and when they fail and no other option is left then, approaching the authority is the last option. In this respect the lower court has referred the ruling in ***Ashok Kumar Vs. State of U.P. 2012 (78) ACC 320 - Satpal Singh Vs. State of Haryana 2011 (1) C.C.S.C 185 Supreme Court***, which support the observations of the lower court and the explanation given by the prosecution.

Following judicial precedents are also relevant in which principle regarding delay in lodging F.I.R has been propounded and have been held that *if causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending the copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by its reliable evidence : (Refer)*

1a. Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge bench).

1. Ashok Kumar Chaudhary Vs. State of Bihar, 2008 (61) ACC 972 (SC).

2. Rabindra Mahto Vs. State of Jharkhand, 2006 (54) ACC 543 (SC).

3. Ravi Kumar Vs. State of Punjab, 2005 (2) SCJ 505.

4. State of H.P. Vs. Shree Kant Shekari, (2004) 8 SCC 153.

5. Munshi Prasad Vs. State of Bihar, 2002 (1) JIC 186 (SC).

6. Ravinder Kumar Vs. State of Punjab, 2001 (2) JIC 981 (SC).

7. Sheo Ram Vs. State of U.P, (1998) 1 SCC 149

8. State of Karnataka Vs. Moin Patel, AIR 1996 SC 3041.

In the following cases the Hon'ble Supreme Court has held that *normal rule that prosecution has to explain delay and lack of prejudice does not apply per se to rape cases*

(1). State of U.P. Vs. Manoj Kumar Pandey, AIR 2009 SC 711 (Three Judges Bench).

(2). Santosh Moolya Vs. State of Karnataka, 2010 5 SCC 445.

23. From the prosecution evidence, why this crime was committed has also became clear that accused Manoj had earlier kidnapped the prosecutrix and the case of kidnapping was pending against him and he was mounting pressure on the prosecutrix and the witnesses to give statement in his favour; and when the prosecutrix and her mother refused then the prosecutrix was kidnapped, abducted and

raped by the accused-appellant to malign the honour of the victim, informant and her family.

24. In this case, the prosecutrix is the sole witness of kidnapping, abduction and rape. According to radiological examination report, she was found to be 18 years of age, but according to her High School Certificate her date of birth recorded is 03.05.1992, thus, she was aged about 17 years at the time of commission of crime. According to C.M.O. Report, she was above 18 years old. It is not proved from any evidence that she was above 18 years of age and was major at the time of commission of crime. According to the Juvenile Justice Act & Rules, the medical report shall be considered in the last if no other evidence is available regarding her date of birth. The lower court has held that the prosecutrix is aged about 17 years at the time of alleged incident. According to the accused-appellant, if the victim was kidnapped then why did she not even attempt to seek help during travelling to public places. In this regard, the lower court has given a plausible explanation that the victim was already kidnapped by accused-appellant earlier, therefore, she could have been in fear that she could not raise alarm and she might have accepted her fate in the hand of accused appellant. The finding reached by the lower court appears to be plausible and correct and as the girl belongs to village/rural background and she was earlier harassed by the accused, therefore, she could not dare to alert public during the course of travelling. It is also noteworthy that when the victim was recovered from the railway station Unaula, the accused appellant was also sitting with him, who fled away from the place and could not be arrested on the spot. From the medical evidence, it is also established that the victim became pregnant, which was the result of rape by the appellant-accused while she was unmarried.

25. The informant - P.W. 1 - Ishrawati, mother of the prosecutrix has clearly deposed that the accused and his family members were mounting pressure to compromise the earlier case of kidnapping of the victim by the accused, which is already pending in the Court and on refusal they had beaten her, against which a criminal case has been lodged.

26. P.W. 2 - Victim, prosecutrix has deposed that on 14.04.2009, at about 04:00 p.m. when she was coming to her new house from her old house then Smt. Phoola and Smt. Tirtha met her and asked her to sit in tempo, as they shall drop her at her house. On route, the accused and his wife Munni Devi joined them in tempo. When the tempo reached near victim's house, they did not drop her rather she was carried at the house of sister of the accused at Kampiarganj, where the accused and her sister locked her in a room and in the night accused forcibly raped her. Accused continuously threaten her that if she will not compromise the case, the victim and her sole brother will be murdered. According to the victim, the accused appellant kidnapped her and kept her in confinement for four months and 15 days. Thereafter, she promised to compromise if she is set free and brought to her house. On the way, when the victim and accused were coming to the house and reached Unaula railway station, she started crying then people caught the accused and approached the police, but before reaching the police, the accused ran away. Thereafter, she was taken by lady/female Police Officer at lady Police Station where rest formalities were

completed. In her deposition, she has also proved her statement under Section 164 Cr.P.C. As per the statement of the prosecutrix, Lilawati sister of the accused appellant kept her in a house for about four and half months, but the police and Investigating Officer have not made Smt. Lilawati accused under Section 368 I.P.C. Even application under Section 319 Cr.P.C was not moved. An application under Section 319 Cr.P.C was moved, against Smt. Tirtha Devi, Smt. Munni Devi and Smt. Phula Devi only, who are arrayed as co-accused. Smt. Munni Devi is the wife of the accused appellant. According to the statement under Section 313 Cr.P.C accused appellant - Manoj @ Bhorai was aged about 38 years on 19.04.2014, and was father of 5 -6 children. He was a family person and if he was a responsible family and social person, he ought to have known about his moral duties and followed the social norms. It is noteworthy that the victim was aged about 17 years.

27. Before the incident of this case, the accused Manoj @ Bhorai was also named accused in Case Crime No. 1071/07, u/s 363, 364, 366, 376 & 506 I.P.C. for kidnapping, abducting and raping this victim with other persons.

28. On the basis of the facts mentioned in appeal, the guilt of the accused is proved. It is noteworthy that the appellant was aged about 38 years and father of 5 to 6 children at the time of commission of crime and that the victim P.W.-2, Sandhya was a minor girl of 17 years. She had not consented ever for marriage and cohabitation with the accused.

29. In ground nos. 7, 9 & 11 of the appeal, which is quoted below, the appellant has confessed ***the guilt:***

"7. Because, the appellant and Sandhya-prosecutrix love to each other and both of them agreed to marriage for their life peacefully, but the parents of Sandhya were not ready to solemnize the marriage of Sandhya and when the parents decided to marry her daughter, then her daughter Sandhya went with some person, they left the house without informing to the informant on 14.04.2009 and the mother of the prosecutrix lodged the F.I.R against the appellant and his family members.

9. Because, the medical examination shows that it is a case of consent and there is no injury on private parts of the body and no opinion about the rape can be given and according to medical report, the victim Sandhya was major. She was 18 years old at the time of incident.

11. Because, from the medial report it is clear that the private parts were well developed and there is no injury on the private parts of body and it can be said that she is consented girl."

The assertion of the accused has extracted above prove his guilt and commission of crime.

It would be proper to discuss the relevant provisions regarding kidnapping, abduction and rape as enumerated in I.P.C.

Section 359. Kidnapping and kidnapping of two kinds, kidnapping from India and kidnapping from lawful guardianship.

In this case the matter relates to kidnapping from the lawful guardianship

about which a separate section 361 I.P.C has been enumerated, which is as under:

Section 361 *in The Indian Penal Code;*

361. Kidnapping from lawful guardianship.--Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Explanation.--The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person."

According to this Section, if a female is under 18 years of age and she is taken out of the lawful guardianship of her guardians without the consent is said to have kidnapped such minor or person from lawful guardianship.

Under Section 363 I.P.C.

Kidnapping from lawful guardianship is punishable offence. According to which, for the offence of kidnapping from lawful guardianship the accused shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

"Section 366 of The Indian Penal Code

This Section deals with the punishment for kidnapping, abducting or inducing woman to compel her marriage, etc.--Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; 1[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid]."

Section 375 relates to rape:-

A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other persons; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other persons; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

Under the circumstances falling under any of the following seven descriptions:

First. - Against her will.

Secondly. - Without her consent.

Thirdly. - With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. - With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or thorough another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. - With or without her consent, when she is under eighteen years of age.

Seventhly. - When she is unable to communicate consent.

Explanation 1.- For the purposes of this section, "vagina" shall also be include labia majora.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only to that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Exception 2. - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

Section 376 relates to Punishment for rape:-

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which1[shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine].

(2) Whoever,--

(a) being a police officer, commits rape--

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(i) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.--For the purposes of this sub-section,--

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);

(d) "women's or children's institution" means an institution, whether

called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

1[(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.]"

30. It is established from the aforesaid discussions that the prosecutrix was aged about 17 years at the time of commission of crime. It is also established that accused wanted to settle and compromise the previous offence as alleged to be committed by him in 2007, for which an F.I.R being in Case Crime No. 1071 of 2007, under Sections 363, 364, 366, 376 & 506 I.P.C was lodged, which was pending and to settle the aforementioned case, the accused-appellant committed this offence again and the life of prosecutrix was made miserable and troublesome.

31. P.W 1 - Mother of the victim, P.W 2 - Victim has proved the manner as to when and from where she was kidnapped and taken away to Gorakhpur. It is established that the victim was an unmarried girl, who had no physical and sexual relation with any other person except accused. When she was recovered from the Railway Station Unaula and was medically examined, she was found to be pregnant for 19 weeks two days foetus. Earlier the grounds of appeal taken by the appellant in paragraphs no. 7, 9 and 11 has been quoted, which also proved the guilt of the accused has not been established that the victim was a consenting party and physical relation was established by the accused with her after obtaining her consent, thus, a minor girl was raped and was impregnated by the accused. From the grounds taken in the appeal, it reveals that accused impliedly admitted his guilt.

32. The accused is so immoral person that he kidnapped, abducted and raped a girl of 17 years of age while having own children of similar age group. Accused has a legally wedded wife and without divorcing her, in the memo of appeal he states that he loves the victim and both love each other and wanted to marry. He made a minor girl pregnant and ruined her future, for which he has no regrets. It is not proved that victim became pregnant from the contact of any other person than the accused. Accused stated that both love each other and being a consenting party, the victim had co-habitated with him.

33. In ground 9 of the appeal, accused has stated that there was no injury on the private part of the victim as she was a consenting party. In evidence victim has not accepted that she was a consenting party. She was under the control of accused, her body was used for the fulfilment of desire and lust of the accused. A minor girl of about 17 years of age was made pregnant by the accused, who was 38 yeas of age and was having a legally

wedded wife and a father of 5 - 6 children. The prosecution has proved the contents of kidnapping, abduction and forceful rape by the accused. Had the victim been the consenting party, no case would have been filed about the earlier incident of 2007.

34. Being aggrieved, against the acquittal, the State of U.P. has preferred Appeal No. 1774 of 2015 against Smt. Tirtha, Smt. Munni Devi and Smt. Phula Devi, who were summoned under Section 319 Cr.P.C and these lady accused persons were charged under Section 364 I.P.C. The lower court has discussed at page no. 11 in the judgment as to why the prosecution case against these lady accused persons is not proved. In this regard, the lower trial court has relied upon the investigation of the I.O, who found them to be falsely implicated and also referred to the statement of victim P.W 2, who assigned only the role of sitting of these accused persons with her in three-wheeler. These facts have also come in her statement that these women forced her not to come out of the three-wheeler when the three-wheeler reached near her new house and also assisted in locking her inside the house of sister of Manoj. The lower trial court came to the conclusion that they had falsely been implicated due to previous enmity as the husband of Smt. Phoola Devi was surety of the accused and husband of Smt. Tirtha Devi was the witness in Crime No. 1/4 under Sections 324, 325, 452 & 506 of I.P.C. The third woman is the wife of Manoj. The lower trial court come to the conclusion that no wife would tolerate/cooperate with her husband in kidnapping the girl for the purpose of her husband marrying the kidnapped girl or for the purpose committing rape upon her. It is also noticed by the lower court that if these three ladies accused persons were with the prosecutrix till she reached the house of sister of the accused - Manoj, she did not cry or raise alarm even in the crowded area/places during the journey. So far as the role and alleged acquisition of lady accused persons is concerned there is no independent evidence except the evidence of the victim. None has come forward to corroborate that they saw the victim and the three lady accused persons on the alleged date and time in three-wheeler. I.O in additional statement of the prosecutrix under Section 161, Cr.P.C, has written that she was taken by the accused Manoj @ Bhorai alone and not by rest three ladies.

35. From the aforesaid discussions, it is proved that there is old enmity amongst the family of informant and the lady accused persons. The findings recorded by the lower trial court in this regard appears to be reasonable and plausible, therefore, the prosecution has completely failed in proving the case of abduction or kidnapping of victim by the three lady accused persons. The victim was recovered on 11.09.2009 and her statement under Section 164 was recorded on 23.09.2009, in the meantime she was in contact of her parents, therefore, it can be concluded that the statement of the victim recorded under Section 164 Cr.P.C is not gospel truth and since all the accused ladies, whose family members were in aid to the accused earlier were named in the First Information Report and statements was recorded under Section 164 Cr.P.C.

36. Therefore, the appeal preferred by the State of U.P. against the female accused persons, has no force and is accordingly dismissed.

37. So far as the sentencing of main accused - Manoj @ Bhorai is concerned, he

has been awarded by the following sentences by the lower trial court :-

"(i) Under Section 376 I.P.C, ten years rigorous imprisonment and Rs.50,000/- fine out of which Rs.25,000/- is to be paid to the victim as compensation and if fine is not paid the appellant will have to under go additional simple imprisonment for 12 months..

(ii) Under Section 363 I.P.C, one year's rigorous imprisonment and fine of Rs.1,000/-, in default simple imprisonment for two months.

(iii) Under Section 366 Cr.P.C : three years rigorous imprisonment and Rs.5,000/- fine and in case of default six months rigorous imprisonment.

(iv) It was also ordered that period spent by the convict in custody has to be adjusted in his sentence and all the sentences run concurrently."

38. Learned counsel for the appellant has argued and requested that accused-appellant is an aged old person having children and wife, he is the sole earning member of his family they are facing problems in earning their livelihood.

39. Learned counsel for the appellant has relied upon the ruling in the Case of ***Manoj Mishra @ Chhotkau Vs. The State of Uttar Pradesh 2001 0 Supreme Court (SC) 609,*** wherein Hon'ble the Apex Court found no gang rape, but the victim was raped by the appellant alone. The accused was found guilty for the offence under Sections 363, 366, 376 I.P.C and Section 4 of POCSO Act. The victim was a minor girl and the accused had undergone sentence for more than eight years, therefore, the Hon'ble Supreme Court ordered to release the accused-appellant for the sentence undergone in jail. In this case the occurrence was occurred on 14.04.2006 when the POCSO Act was not into existence, therefore the accused had not been tried under the POCSO Act. Section 376 I.P.C has been amended w.e.f. 21.04.2018 providing minimum sentence of 10 years. Before this date, minimum sentence was seven years, but which may extend to imprisonment for life and shall also be liable to fine.

40. In this case the trial court delivered the judgement and sentenced the accused on 23.01.2015. Since then he (Manoj @ Bhorai) is in jail. During the trial, he was in jail for four months three days, thus he is in jail for more than seven and half years. It is correct that accused is married and family person even his children might have been of victim's age or similar to the age of victim. He has committed the sexual offence upon the victim twice and this offence was committed to pressurize the victim and her family members to come on the table of compromise. In this regard, another criminal case has also been lodged against the appellant, thus the accused has taken law in his own hand and has also interfered in administration of justice. Therefore, an extreme lenient view cannot be adopted in favour of the accused-appellant but since he is the only bread earner of his family and his family and children are facing lot of problem, therefore it would be expedient in the interest of justice to reduce the sentence to some extent awarded under Section 376 I.P.C.

41. In ***Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926],*** explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

42. The term, 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP, [(2004) 7 SCC 25***7 by observing that sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

43. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166***, Supreme Court referred its earlier judgments rendered in ***Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463]***, and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The Supreme Court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not

retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

44. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed, therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

45. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Supreme Court, as discussed above,has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

46. This Court is of the opinion that eight year's rigorous imprisonment and Rs.25,000/- fine under Section 376 I.P.C would meet the ends of justice. The sentences and fine awarded under Sections 363 and 366 I.P.C may be kept intact. Out of the above commutated fine of Rs. 31,000/-, Rs. 25,000/- might be paid to the victim and rest Rs. 6,000/- might be deposited to the Government Exchequer. In case of non-payment of fine awarded under Section 376 I.P.C, the accused may undergo for additional 12 months, rigorous imprisonment.

47. Accordingly, following orders is passed with regard to conviction and sentence:-

The Criminal Appeal No. 984 of 2015 - *Manoj @ Bhorai Vs. State of U.P.* is partly **allowed** with regard to the sentence awarded under Section 376 I.P.C and is **dismissed** withholding the conviction and sentence awarded under Sections 363 & 366 I.P.C. Accordingly, the conviction and sentence under Sections 363 and 366 I.P.C passed by the court below is affirmed and maintained. So far as the conviction and sentence under Section 376 I.P.C is concerned, on the basis of above discussions, this Court is of the view that the sentence awarded by the learned trial court is modified to the effect that the accused-appellant is awarded eight years R.I. and Rs. 25,000/- fine.

48. Out of the above commuted fine of Rs. 31,000/-, Rs. 25,000/- would be paid to the prosecutrix and rest fine of amount of Rs.6,000/- shall be deposited in Government Exchequer. In case of non-payment of fine under Section 376 I.P.C, the accused-appellant shall undergo additional twelve month's rigorous imprisonment. All the sentences shall run concurrently. Incarceration period of accused shall be adjusted as per existing rules.

The Government Appeal No. 1774 of 2015 - *State of U.P. Vs. Smt. Tirtha & Two Others*, is accordingly **dismissed.**

The Registry to return the Lower Court Record alongwith the copy of this order.

(2022)07ILR A1203
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.07.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 1665 of 1996

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

Counsel for the Appellant:
Sri O.Singh, Sri Lal Mani Tripathi, Sri Pankaj Kumar Tyagi

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 134 - Sole witness testimony- The law is settled that on the testimony of a sole witness conviction can be sustained provided the witness is wholly reliable and his testimony is unimpeachable and of a stellar quality- Though, there is no bar in basing conviction on the testimony of a single eye-witness but, before doing so, the court must carefully scrutinise the evidence to be satisfied that it is free of any blemish or suspicion, is wholly truthful and appears natural and convincing, that is, in short, it is intrinsically reliable, inherently probable and wholly trustworthy.

Settled law that it is the quality and not the quantity of evidence which is relevant provided that the said evidence is wholly reliable, trustworthy and credible.

Criminal Law- Indian Evidence Act, 1872- Sections 3 & 134 - Considering that it is a case of night incident, the prosecution has examined a solitary eye witness, whose testimony is not of a stellar quality; that two gunshots were fired in quick succession, not preceded by altercation, it would have been a split second affair; that the witnesses arrived at the spot from different places after hearing gunshots while they were within the confines of their own home, thereby taking time to arrive; that initial report was of seeing the accused while they were scaling the wall to escape therefore, bearing in mind that the presence of light outside the room has not been satisfactorily proved, there was very little scope for the witnesses to recognize the accused- Keeping in mind that it is a case based on a single eye witness testimony who is not wholly reliable as discussed above, we are of the considered view that the appellant is entitled to the benefit of doubt.

Conviction cannot be secured where the testimony of a solitary witness is wholly unreliable, improbable and unnatural. (Para 16, 21, 25)

Criminal Appeal Allowed. (E-3)

Judgements/ Case Law relied upon:-

1. Anil Phukan Vs St. Of Assam, (1993) 3 SCC 282

2. St. of Raj. Vs Bhola Singh, AIR 1994 SC 542

3. Bhimapa Chandapa Hosamani & ors Vs St. of Kar., (2006) 11 SCC 323

4. Jagdish & ors. Vs St. of Har., (2019) 7 SCC 711

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. We have heard Sri Pankaj Kumar Tyagi for the appellant Rameshwar; and Sri Amit Sinha, learned AGA, for the State.

2. This appeal is against the judgment and order dated 01.08.1996 passed by the First Additional Sessions Judge,

Muzaffarnagar in S.T. No.266 of 1994, arising out of case crime no.33 of 1993, P.S. Ratanpuri, district Muzaffarnagar, whereby the appellant Rameshwar has been convicted and sentenced as follows: imprisonment for life under Section 302/34 IPC; and 10 years R.I. under Section 449/34 IPC. It be noticed that two persons were put to trial, namely, Rameshwar (the appellant) and Vinod. By the judgement and order impugned while convicting and sentencing the appellant as above, the co-accused Vinod has been acquitted by extending the benefit of doubt to him.

INTRODUCTORY FACTS

3. The prosecution case in a nutshell as per the written report (Ex. Ka-1) is that on 12.4.1993 at about 8 pm in the night when the deceased Salek Chand was in his house, watching TV in his room, two gunshots were heard by neighbours, namely, Jitendra (PW-2), Deshraj (not examined) and Dharmo (not examined). When they arrived at the spot, they noticed Rameshwar (the appellant) and another person, having country made pistols in their hand, scaling the eastern wall of the house of the deceased and escaping towards south. Inside that room, Salek Chand (the deceased) was noticed dead with injuries.

4. The written report (Ex. Ka-1) of the incident was given by the deceased's brother (PW-1) at P.S. Ratanpuri. Chik FIR (Ex. Ka-3) and GD entry No.25 (Ex. Ka-4) of the written report was prepared by PW-4 at 21.25 hrs on 12.04.1993 giving rise to case crime no.33 of 1993 at P.S. Ratanpuri, District Muzaffarnagar. The inquest was conducted at the spot and was completed by 24.00 hrs (i.e. midnight of 12/13.04.1993) of which inquest report (Ex. Ka-5) was prepared, which was witnessed by five persons. But neither the informant nor any of the persons who witnessed the accused escaping were witnesses to the inquest report. Autopsy of the cadaver was carried out by Dr. S. Tandon (PW-3) on 13.04.1993 at about 3 pm. As per the autopsy report (Ex. Ka-2), the external examination of the body revealed that rigor mortis was present all over the body. The abdomen was distended. Ante-mortem injuries were as below:-

"1. Gunshot wound of entry with lacerated margin 6.5 cm x 2.5 cm x vertabrae deep on left side of the neck in front. The wound extends from mid line to 3 cm below labula of the ear left. The direction of wound is from right to left and from front to back with evidence of fracture of the third cervical vertabrae and evidence of laceration and rupture of neck vessels.

2. Gunshot wound of exit 4.5 cm x 2 cm x vertebrae deep on the back, left side of neck, adjacent to the mid line. The wound was communicating through and through to the injury no.1.

Note: One large metallic shot removed from injury no.1, sealed and handed over to the constable concerned.

3. Gunshot wound of entry 2 cm x 1.5 cm x abdomen cavity deep on right side front of abdomen. Blackening around the entry on the skin present. The direction of wound was from front to back. It was situated at 9 O'clock position, 2 cm right lateral to umblicus.

4. Gunshot wound of exit 2 cm x 2 cm x abdominal cavity deep on right side of the back, adjacent to mid line."

According to the opinion of the doctor, death was due to shock and haemorrhage as a result of ante mortem firearm injuries and the same could have been caused three-fourth of a day before.

5. During the course of investigation, the investigating officer collected: (i) blood stained mat from the cot inside the room where the deceased was shot, of which seizure memo (Ex. Ka-11) was prepared; and (ii) blood stained earth and plain earth from the spot, of which seizure memo (Ex. Ka-12) was prepared. A custody memo (Ex. Ka-13) in respect of the torch alleged to have been used to witness the accused escaping from the spot was also prepared, as per which, the custody of the torch, which was of Deshraj and in a running condition, was handed over to its owner Deshraj. After the statement of witnesses were recorded under Section 161 CrPC, the investigating officer (I.O.), namely, PW-5, submitted a charge sheet (Ex. Ka-14) against two persons, namely, Rameshwar (the appellant) and Vinod (co-accused). After taking cognizance on the charge-sheet, the case was committed to the court of session. The sessions court by order dated 11.10.1994 framed charge of the offences punishable under Sections 449/34 and 302/34 IPC against both the accused. Both the accused pleaded not guilty, denied the charge and claimed for trial.

PROSECUTION EVIDENCE

6. During the course of trial, the prosecution examined five witnesses. Their testimony, in brief, is as follows:-

7. **PW-1- Bhikkan Das (the informant)**. He stated that the deceased Salek Chand is son of his uncle (Chacha); that the accused Rameshwar and Vinod are known to him; and that relationship between Rameshwar and Salek Chand was not cordial though, he is not aware about the relationship between Vinod and Salek Chand. In respect of the incident, he stated that at the time of the incident he was at his own house. He heard that his cousin (the deceased) was shot by someone. He received information from Dharmo that Salek Chand has been killed. He stated that the written report was in his writing and he had signed it. On this statement of PW-1, the written report was marked (Ex. Ka.-1). PW-1 stated that he had not named Rameshwar (the appellant) in the written report. At this stage, the prosecution declared the witness hostile and sought permission for his cross examination, which was granted.

During cross examination by the prosecution, PW-1 stated that he had studied upto Class-X. He admitted his signature on Ex. Ka-1. He also admitted that in his report, he had mentioned that accused appellant Rameshwar and another person with country made pistols in their hand were witnessed scaling the eastern wall of deceased's house and going towards south. He also admitted that the I.O. had interrogated him. The witness when confronted with his statement recorded under Section 161 CrPC admitted that he had stated before the I.O. that on 12.04.1993 while his cousin Salek Chand (the deceased) was in his house, watching TV, at about 8 pm, 2-3 gunshots were heard coming from the house of Salek Chand upon which neighbours Jitendra (PW-2), Deshraj and Dharmo came running to the spot to witness Rameshwar (the appellant) and another person scaling the eastern wall of the house and escaping towards south; and that, about two years before the

incident, the deceased and Rameshwar had a scuffle, which was settled by intervention of the villagers. PW-1 stated that whatever he had told to the I.O. was on the basis of information received by him. He also stated that the written report was scribed by him in the village and was handed over to the police for registration of a first information report.

During cross examination at the instance of co-accused Vinod, he feigned ignorance that the deceased Salek Chand was challaned for an offence. He also feigned ignorance that Salek Chand was made an accused in a case of firing at the police. He also feigned ignorance in respect of recovery of a country made pistol from Salek Chand and registration of a case under Section 25 of the Arms Act, against him. He, however, admitted that to his knowledge there is no other person by the name of Salek Chand son of Buddhu in the village. He admitted that in the village one Raja Baniya was killed but he denied that in connection with that murder, Salek Chand was arrested by the police. He feigned ignorance that Salek Chand (the deceased) had enticed away a girl from village Kukanpur. He denied the suggestion that the said girl is yet to be recovered. He claimed that he has no knowledge that Salek Chand is a history sheeter.

During cross examination at the instance of Rameshwar (the appellant), PW-1 stated that he had not witnessed the incident and had arrived at the spot after about half an hour at 8.30 pm. He stated that he is not aware whether at the time when he arrived at the spot, there was any electric light in the house of Salek Chand. He stated that he is not aware whether Salek Chand had an electricity connection though he admitted that the night was dark. He stated that at the spot, with him, there were Dharmo and 2-3 other persons. He stated that whatever he had written in the report was on the information received from Dharmo. He stated that the report was scribed while sitting in the house of Salek Chand. He stated that he must have taken 15-20 minutes to write the report; and that he reached the police station by about 10 or 11 pm. He stated that at the time of lodging the report, the Pradhan had accompanied him to the police station along with other persons though he does not remember their names. Immediately thereafter, he stated that he went to the police station alone, whereas others were outside. He stated that soon after registration of the report, his statement was recorded by the I.O. On further probe, **PW-1 stated that Dharmo had not disclosed the name of any person to him and he had also not disclosed the name of any person to the I.O.**

8. **PW-2 - Jitendra. PW-2** stated that he knows Rameshwar (the appellant) and Vinod as they are residents of the same village where he resides. He stated that there was enmity between Rameshwar (the appellant) and Salek Chand. 2-2½ years before the incident, there was a scuffle between them. He stated that there was also a talk in the village that Vinod's aunt Shimla had illicit relations with Salek Chand and because of that, Vinod (co-accused) was inimically disposed towards Salek Chand. He stated that Salek Chand was unmarried. With regard to the incident, PW-2 stated that at about 8 pm, while he was having dinner at his house, he heard gun shot noise coming from the house of Salek Chand. He ran towards the house of Salek Chand. He saw Rameshwar firing a gunshot at Salek Chand. At that time, Salek Chand was in his house. He stated that there was electric light in the house of

Salek Chand. With Rameshwar, he saw Vinod as well. After firing the shot, Rameshwar (the appellant) and Vinod (co-accused) escaped with their country made pistols by scaling the eastern wall of deceased's house. He stated that before the accused could escape, witnesses Deshraj and Dharm Singh had also arrived at the spot. They also witnessed the incident. He stated that Deshraj had a torch with him. He stated that Salek Chand died on the spot. At that time a television and a fan were switched on in his room.

During cross examination at the instance of Rameshwar, PW-2 stated that his house is about 20 paces away from the house of Salek Chand (the deceased); that the way to Salek Chand from his house runs east-west; that on hearing gunshot he did not even take a minute to reach the spot; that he witnessed Rameshwar and Vinod scaling the wall and escaping; at that time, there was electricity light though the night was dark; **that he was the first to arrive at the spot; that the informant had also arrived thereafter, but must have arrived 10-5 minutes later; that before the informant, Deshraj and Dharmo had arrived;** that he had entered the room of Salek Chand where he was shot at; there he noticed that he was shot twice; that the deceased was lying on the cot; that blood had spilled on the cot as well as on deceased's clothes; that blood had not spilled anywhere else except the cot and the clothes; that Salek Chand used to reside alone; that when he entered the room of Salek Chand, he noticed that empty utensils were there suggesting that he had had his dinner; and the TV was switched on. He could not recall as to which programme was running on the TV. He stated that when several people arrived at the spot, someone had switched off the TV. He also stated that he could not notice any metered electricity connection but there appeared use of electricity with the aid of a cable. On further questioning, he stated that the accused had scaled the eastern wall, the height of which would have been 2 ½ to 3 feet high; that **at the time of scaling the wall, accused persons' face was not towards him (PW-2) rather, their waist could be noticed.** PW-2 stated that after witnessing the incident, he went back home. On the same day the I.O. had arrived at the spot by about 10-11 pm. He stated that the I.O. stayed there for about an hour. He met the I.O. that day itself. His statement was also recorded by the I.O. He stated that he had narrated the incident to the I.O. and had also disclosed to the I.O. the place and the spot from where the accused had escaped. He again reiterated that his house is at a distance of 20 paces from the spot. On further questioning, PW-2 stated that he is not aware whether the I.O. had prepared the site plan on that day. He stated that he had disclosed to the I.O. the location of his house. **At this stage, the witness stated that he saw the accused firing the gunshot. He stated that he had disclosed to the I.O. about this fact. Upon this statement of the witness, he was confronted with his previous statement recorded under Section 161 CrPC which was read out to the witness and it was pointed out to the witness that in his previous statement he had not disclosed that he had seen the accused firing gunshot. On being confronted with his previous statement, the witness stated that if that was not written while recording his statement under Section 161 CrPC, he cannot tell the reason for the same**. On further cross examination, PW-2 stated that in connection with the incident of scuffle between the deceased and Rameshwar (the appellant), there is no

litigation pending. He denied the suggestions that he made false statement against Rameshwar on account enmity; that he had not witnessed the incident; that his house is at a distance of 200 paces from the house of Salek Chand; and that in the night of the incident there was no electric light in the house of Salek Chand.

During cross examination at the instance of co-accused Vinod. PW-2 reiterated that at the time when the gunshot was heard, he was having dinner in his house and at that time Salek Chand was in his own house. He was confronted with his previous statement wherein he had stated that he heard a gunshot noise coming from the house of Salek Chand. In response to which, he stated that his statement that Rameshwar (the appellant) fired a shot at Salek Chand is not false. He stated that his statement that while he was having dinner in his house, he heard gunshot noise coming from the house of Salek Chand; upon hearing that noise, he ran towards the house of Salek Chand where he saw Rameshwar firing a shot at Salek Chand, is correct. He stated that the fact is that he was having dinner in his own house when he heard a gunshot noise; when he arrived at the spot from where the noise came, he saw Rameshwar firing at Salek Chand, which was the second shot. He stated that only two gunshot injuries were found on the body of Salek Chand. He stated that Salek Chand was watching television in his room and his house is a one room house in front of which there is a courtyard. He stated that there is only one door in the room of his house and from that door, Rameshwar, after firing gunshot, had effected his escape. He stated that he made an effort to catch Rameshwar while he was escaping but if he had done so, he would have been shot by Rameshwar. He stated that Deshraj and Dharmo Singh had not arrived at the spot before him but they arrived immediately after he arrived at the spot. **He stated that when Deshraj and Dharmo arrived by that time Rameshwar had already scaled the wall.** He stated that he, Deshraj and Dharmo had witnessed Rameshwar scaling the wall. Deshraj had a torch with him.

On further questioning at the instance of co-accused Vinod, PW-2 stated that he saw Rameshwar firing at the neck of the deceased from a close range. At this stage, **on further probe, PW-2 stated that Deshraj and Dharmo had arrived with him at the house of Salek Chand**. PW-2 stated that when the police had arrived, they had called him over to the house of Salek Chand; that was the second time, he visited the house of Salek Chand. At that time, Dharmo, Deshraj and Bhikkan Das (the informant) were there at the spot. He stated that what he had witnessed, he told to the police. He also stated that he had informed the I.O. that there was gossip in the village that there was enmity between Vinod and Salek Chand on account of illicit relations of the aunt (Chachi) of Vinod with Salek Chand. At this stage, **PW-2 admitted that he had not informed Bhikkan (the informant) that Vinod had fired a shot at Salek Chand in his presence. However, PW-2 maintained that Vinod had fired a shot at Salek Chand in his presence which hit Salek Chand on the neck, whereas Rameshwar had fired shot at Salek Chand which hit him on the abdomen**. He stated that Vinod and Rameshwar both had fired shot at Salek Chand while he was there. He denied the suggestion that neither Vinod nor Rameshwar fired shot in his presence and that he had not witnessed Vinod escaping from the spot. He also denied the

suggestion that he is telling lies on account of village party bandi.

9. **PW-3- Dr. S. Tandon (Autopsy Surgeon)**. He stated that on 13.04.1993 he was posted at District Hospital, Muzaffarnagar when the body of the deceased was brought to him for autopsy in a sealed state. He proved the autopsy report and the injuries noticed by him therein. On the basis of his statement, the autopsy report was exhibited as Ex. Ka-2. He stated that injury nos.1 and 3 noticed by him were firearm injuries and were entry wounds. Those injuries were possible to have been caused at 8 pm on 12.04.1993. He also stated that death of the deceased might have occurred three-fourth of a day before the autopsy. He denied the suggestion that he prepared the autopsy report on the basis of suggestions given by the constable concerned.

10 . PW-4- H.C. Bhagwat Singh. He is the constable who prepared the GD entry of the written report. He proved the GD Entry No.25 made at 21.25 hrs on 12.04.1993 in respect of the written report. The copy of the GD entry was exhibited as Ex. Ka-4. He also proved preparation of the chik FIR, which was marked Ex. Ka-3.

During his cross examination, he denied the suggestion that the first information report was written at his instance. He stated that the informant had brought the written report. He stated that he could not remember whether the informant had arrived on foot or by some other mode.

11. **PW-5- Ram Singh Pal (Investigating Officer)**. He proved the various stages of investigation and stated that after registration of the first information report he had visited the spot and had noticed the body of Salek Chand lying on a cot inside the room of his house. He proved conducting of inquest proceeding as also preparation of papers in connection with inquest and autopsy. He stated that on 13.04.1993 he recorded the statement of Jitendra, Deshraj and Dharmo, who were eye witnesses as per the first information report, and inspected the spot in light of electric bulb as well as lantern and prepared a site plan of the spot, which was marked Ex. Ka-10. He proved collection of blood stained Dari (mat) from the cot as well as plain earth and blood stained earth from the spot. The seizure memos thereof were marked Ex. Ka-11 and Ex. Ka-12, respectively. He stated that efforts were made to arrest the accused. The accused Rameshwar was arrested on 14.04.1993 whereas the accused Vinod surrendered on 26.04.1994 in court. He also stated that the witness Deshraj had shown him the torch in the light of which he had witnessed the accused scaling the wall. He stated that the torch was found in a working condition and custody memo in respect thereof was prepared, which was marked Ex. Ka-13. He also proved submission of charge sheet, which was marked Ex. Ka-14. He produced the blood stained earth, plain earth/ the piece of mat collected by him. They were made material exhibits.

During cross examination at the instance of co-accused Vinod, PW-5 stated that he recorded the statement of informant on 12.04.1993 at 21.50 hrs, soon after registration of the case. He recorded the statement of Deshraj at 0.45 hrs on 13.04.1993. He also recorded the statement of witness Dharmo Singh in the night itself at 01.00 hrs. And at 0.30 hrs, on 13.04.1993, he recorded the statement of Jitendra. He stated that the FIR was registered at the instance of PW-1 at 21.25 hrs on 12.04.1993 and, whereafter, the

police team left to go to the spot at about 22.00 hrs. He stated that he arrived at the spot by about 22.10 hrs on 12.04.1993 itself.

During cross examination at the instance of accused Rameshwar, PW-5 stated that at the time of preparing the site plan he had not shown the electricity wires and the direction in which they were placed but had disclosed in the site plan the presence of an electricity bulb, TV and a fan in the room where the incident occurred. He stated that when the police team arrived at the spot, the electricity bulb was switched on but the TV and fan were off. He stated that the witnesses had told him that the TV and the fan was also on at the time of occurrence. He stated that the witnesses informed him that some person may have switched off the TV and fan. He stated that he is not aware about the electricity connection in the premises where the incident occurred. **PW-5 specifically stated that witness Jitendra (PW-2) had not disclosed to him that he had witnessed the accused firing shots at the deceased. He stated that PW-2 had only informed him that he had seen the accused coming out of the room; scaling the eastern wall and escaping with country made pistols in their hand.** He stated that he did not prepare any seizure memo of the TV, fan, stool or the bulb that was in the room but their presence was disclosed in the site plan prepared by him. In respect of the height of the wall which was allegedly scaled by the accused to effect their escape, PW-5 stated that it must be 3 feet high though its height was not mentioned in the index of the site plan prepared by him. **He stated that the distance between point "F" and "E" mentioned in the site plan would be around 35 paces. He stated that point "F" shown in the site plan is the place from where witnesses witnessed the accused scaling the wall while effecting their escape with the help of torch light. On being specifically questioned with regard to the distance between the wall and point "F", PW-5 stated that although that distance is not mentioned in the site plan but it must be around 14-15 paces.** PW-5 stated that when the witnesses saw the accused scaling the wall while they were at point "F", the witnesses could notice the accused from the side (waist) but, immediately thereafter, he clarified by stating that when the accused were coming out of the door, the witnesses could have noticed the face also. He denied the suggestion that he completed the investigation while sitting at the police station.

STATEMENT UNDER SECTION 313 CrPC

12. After the prosecution evidence was closed, the incriminating circumstances appearing in the prosecution evidence were put to the accused. As co-accused Vinod has been acquitted by the trial court, we do not propose to notice the statement of co-accused Vinod recorded under Section 313 CrPC. In so far as the appellant Rameshwar is concerned, in his statement recorded under section 313 CrPC he denied the incriminating circumstances appearing in the prosecution evidence against him and claimed that he has been falsely implicated on account of village party bandi.

TRIAL COURT FINDING

13. The trial court by placing reliance on the statement of PW-2 convicted the accused-appellant Rameshwar. Accused

Vinod was extended the benefit of doubt as he was not named in the first information report and that his name surfaced only in the statement of witnesses recorded during investigation.

SUBMISSIONS OF LEARNED COUNSEL FOR THE APPELLANT

14. Questioning the judgment and order of the trial court, the learned counsel for the appellant submitted that this is a case where the incident is of night; that the deceased was shot dead inside the room of his house; that none of the witnesses were residing with the deceased; that the site plan prepared by the I.O. did not disclose the presence of any external light; that the site plan also does not disclose that the house of PW-2 was adjoining the house of the deceased; that the first information report disclosed that the witnesses had only seen the accused escaping from the spot; that the other two witnesses whose names were mentioned in the first information report have not been examined by the prosecution; that the torch in the light of which the accused were seen escaping was of Deshraj, who has not been examined; that the statement of PW-2, the sole eye witness examined, is not wholly reliable; and that PW-2 not only makes improvement from his previous statement recorded under Section 161 CrPC but also makes improvement during the course of his deposition in court, therefore, it is a fit case where the accused-appellant be extended the benefit of doubt, particularly, when there is no corroboratory evidence in respect of participation of the accused-appellant in the crime. It has been submitted that the motive for the crime is not proved beyond doubt, inasmuch as, the motive for the crime shown in the first information report is in respect of animosity arising from a scuffle between the deceased and the accused-appellant that took place two years before the incident. Whatever animosity that might have been there, arising from that incident, stood erased with passage of time as also that the two had settled their differences on the intervention of villagers. Lastly, it was contended that since it is a case based on a single witness testimony and the informant, namely, PW-1, has also stated that he had not named the accused-appellant in the FIR, the appellant is entitled to the benefit of doubt.

SUBMISSIONS ON BEHALF OF THE STATE

15. **Per contra**, learned AGA submitted that the first information report of the incident was promptly lodged; that there is no suggestion to the prosecution witnesses including the informant that the incident was of some other time than what is alleged in the first information report; that there is no suggestion with regard to the ante-timing of the first information report; that, admittedly, two gunshots were fired therefore the witnesses could have arrived at the spot after hearing the first gunshot and it is highly probable that the witnesses, upon arrival, noticed the accused exiting the the room where the deceased was shot and while they were scaling the wall of the house; that, admittedly, there was a bulb lit in the room and there was also a torch hence there was sufficient light to witness the accused escaping soon after the incident; that since no animosity is suggested between the accused-appellant and the witness PW-2, the trial court was justified in convicting the accused-appellant as he was named in the first information report and also in the statement recorded during the course of investigation

and further, his participation in the crime was proved by the testimony of PW-2. Learned AGA, therefore, prayed that the appeal be dismissed and the conviction and sentence recorded by the court below be affirmed.

ANALYSIS

16. Having noticed the rival submissions and having noticed the entire prosecution evidence, before we proceed to evaluate the prosecution evidence we may remind ourselves that this is a case where the prosecution relies on a sole witness testimony. The law is settled that on the testimony of a sole witness conviction can be sustained provided the witness is wholly reliable and his testimony is unimpeachable and of a stellar quality.

17. In **Anil Phukan vs State Of Assam, (1993) 3 SCC 282**, the Supreme Court held as follows:-

"..... Conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye- witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction"

18. In **State of Rajasthan v. Bhola Singh, AIR 1994 SC 542,** the aforesaid statement of law was reiterated in the following words:

"It is well settled that if the case rest only on the sole evidence of the eye-witness, such testimony should be wholly reliable."

19. In **Bhimapa Chandapa Hosamani and others v. State of Karnataka, (2006) 11 SCC 323**, the apex court reiterated the law in the following words:-

"This Court has repeatedly observed that on the basis of the testimony of a single eye witness a conviction may be recorded, but it has also cautioned that while doing so the Court must be satisfied that the testimony of the solitary eye witness is of such sterling quality that the Court finds it safe to base a conviction solely on the testimony of that witness. In doing so the Court must test the credibility of the witness by reference to the quality of his evidence. The evidence must be free of any blemish or suspicion, must impress the Court as wholly truthful, must appear to be natural and so convincing that the Court has no hesitation in recording a conviction solely on the basis of the testimony of a single witness."

20. In a recent decision in the case of **Jagdish and others v. State of Haryana, (2019) 7 SCC 711**, again, the Supreme Court reiterated the law by observing "conviction on basis of a solitary eyewitness is undoubtedly sustainable if there is reliable evidence cogent and convincing in nature along with surrounding circumstances."

21. Having noticed the observations of the Supreme Court on the issue as to when on a single witness testimony

conviction can be sustained, we are of the view that, though, there is no bar in basing conviction on the testimony of a single eye-witness but, before doing so, the court must carefully scrutinise the evidence to be satisfied that it is free of any blemish or suspicion, is wholly truthful and appears natural and convincing, that is, in short, it is intrinsically reliable, inherently probable and wholly trustworthy.

22. In the instant case, the first information report was lodged by disclosing the name of three persons, namely, Jitendra (PW-2), Deshraj and Dharmo, as witnesses. In his deposition in court, PW-1, the informant, states that the information was lodged as per information received from Dharmo, who has not been examined. During the course of investigation, the torch of Deshraj was seized and its custody was handed over to Deshraj. But, surprisingly, Deshraj has not been examined by the prosecution. The only witness examined by the prosecution is PW-2 (Jitendra Singh). In the testimony of PW-2 what is consistent is that PW-2 was having dinner in his house at the time when he heard noise of a gunshot. After hearing the noise of first gunshot, he rushed to the spot. In his statement before the investigating officer, recorded under Section 161 CrPC, the witness had not disclosed of having witnessed the accused firing gunshots at the deceased. Rather, he disclosed about having seen the accused escaping by scaling the eastern wall of the house. However, during his deposition in Court, he makes considerable improvement by stating that he witnessed firing of gunshots at the deceased. But, PW-2 is not consistent even here. At one portion, he says that after hearing the first gunshot he arrived at the spot and after his arrival, Deshraj and Dharmo arrived. Deshraj had a torch. In this part of his statement, PW-2 stated that after hearing the first gunshot when he arrived, he saw Rameshwar firing a second gunshot at the deceased. Later, in his deposition, PW-2 stated that he witnessed both shots that were fired at the deceased. In the latter part of his statement, PW-2 stated that Vinod fired a shot which hit the deceased on his side, near the neck region; whereas, the shot fired by Rameshwar struck the abdomen of the deceased. At one place, this witness states that Deshraj and Dharmo had arrived after his arrival at the spot whereas at another stage, he states that he, Deshraj and Dharmo simultaneously arrived at the spot. Notably, PW-2 was confronted with his previous statement recorded under Section 161 CrPC where he had not disclosed that he witnessed the accused firing shot at the deceased. The investigating officer who had recorded the statement of PW-2 under Section 161 CrPC specifically stated, during his cross examination, as follows:-

"गवाह जितेन्द्र ने गोली मारने वाली बात तथा मुलजिमानो द्वारा गोली मारते हुवे देखने की बात नही बताई थी। परन्तु यह बताया था कि उसने विनोद व रामेश्वर को कमरे से निकल कर पूर्व की दिवार कूद कर भागते हुये देखा था उनके हाथो मे कट्टे थे।"

The inconsistencies in the statement of PW-2, noticed above, in our view, renders the witness as not a wholly reliable one.

23. In addition to above, the autopsy report of the deceased would suggest that two shots were fired at the deceased from a close distance. The house of the deceased was a single room house and in front of that room there was a courtyard. The site plan prepared by the I.O., which is at the instance of the witnesses who witnessed the

incident including Jitendra, would suggest that one set of witness came from east and the other set came from west. The spot from where those witnesses witnessed is shown by point "F'. In the index of the site plan "E' is the point where the witnesses heard the gunshot. In the testimony of PW-5, the distance between "E' and "F' is 35 paces. Point E is not located inside the house of any one but falls in the lane. From the testimony of PW-2 it is clear that he was having dinner in his house when he heard first gun shot. Whereafter, he rushed to the spot. The house of PW-2 is not shown in the site plan therefore, if point "E' is the spot where the witness heard the shot, it would be the point where he heard the second gun shot and not the first because, as per the evidence, the first was heard while the witness was having dinner in his house. The point "F', as per the testimony of PW-5, is 14-15 paces away from the wall scaled by the accused to escape from the spot. Notably, the height of that wall is 2½ to 3 feet, which means that it would not take much effort to scale it. From the testimony of PW-2, it appears, the place from where he witnessed the accused scaling the wall he could notice only the side profile of the accused, which is evident from his statement extracted below:-

"जब मुलजिमान दीवार कूद कर भाग रहे थे तब इनकी मेरी तरफ कमर थी मुंह नही था।"

24. To get out of this situation, the I.O. in his testimony sought to suggest that when the accused were exiting the room by using the door, their face would have been towards the witnesses thus the witnesses had the opportunity to notice the face of the accused. Assuming that this was the case, then another question that would arise is whether a man standing in darkness and looking towards light, could visualize the face of a person, which is towards darkness, when light is falling on the back of that person. Importantly, presence of light is not shown outside the room. Bulb shown is inside the room, which had one door. Notably, it is not disclosed that the room had a window. Thus, when the accused would have exited that door, light of the bulb, if any, would be falling on their back. Ordinarily, in our view, in such a situation, it would be difficult for a person to clearly see the face of a man, facing darkness, particularly, when light is falling on that man's back. Interestingly, PW-2 states that he knew both Rameshwar and the co-accused Vinod. If he had actually recognized the face of the two accused, both would have been named. But here only one is named. Surprisingly, Deshraj, the one to arrive with torch in his hand, has not been examined. In such a situation, a question would arise whether the prosecution has been successful in proving existence of torch light to recognise the accused. On this aspect, we may observe that there is inconsistency in the statement of PW-2 as to whether Deshraj arrived at the spot simultaneously with PW-2 or later. Therefore, it can not be determined with certainty whether there existed the benefit of torch light at the moment when the accused were exiting the room through its door. In our view, the evidence led by the prosecution fails to establish beyond doubt that the two accused could be recognised while exiting the door, particularly, when the night was dark and no proven source of light was present outside the room more so, when the person whose torch is said to have been used has not been examined. It, therefore, appears to us that this a case where the name of the accused, which came to mind first, on account of past enmity, was mentioned in the FIR out of

strong suspicion. In these circumstances, prompt lodging of a named FIR by itself would be no guarantee for the credibility of the testimony of PW-2, particularly when, according to the testimony of PW-1 (the informant), the FIR was on the basis of information provided by Dharmoo, who has not been examined. In addition to above, PW-1 at the fag end of his deposition stated that the name of the appellant was not disclosed to him.

25. In view of the analysis above, considering that it is a case of night incident, the prosecution has examined a solitary eye witness, whose testimony is not of a stellar quality; that two gunshots were fired in quick succession, not preceded by altercation, it would have been a split second affair; that the witnesses arrived at the spot from different places after hearing gunshots while they were within the confines of their own home, thereby taking time to arrive; that initial report was of seeing the accused while they were scaling the wall to escape therefore, bearing in mind that the presence of light outside the room has not been satisfactorily proved, there was very little scope for the witnesses to recognize the accused. Further, the statement of PW-2 that he witnessed firing of gunshot by the appellant on the abdomen of the deceased is for the first time in court and is a gross improvement from his previous statement. Consequently, keeping in mind that it is a case based on a single eye witness testimony who is not wholly reliable as discussed above, we are of the considered view that the appellant is entitled to the benefit of doubt.

26. For all the reasons above, the accused-appellant Rameshwar is extended the benefit of doubt as has been extended to co-accused Vinod by the trial court. The appeal is **allowed**. The judgment and order of the trial court convicting and sentencing the appellant Rameshwar is set aside. The accused-appellant is acquitted of the charge for which he has been tried and convicted. It appears from the record of this appeal that though, earlier, the appellant was released on bail but, on account of absence of his counsel non bailable warrants were issued against the appellant and, in pursuance whereof, the appellant has been taken into custody. Accordingly, the appellant-Rameshwar shall be released forthwith, subject to compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court.

27. Let a copy of this order be forwarded to the court below along with the record for information and compliance.

(2022)07ILR A1215
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 2542 of 2011
with
Criminal Appeal No. 2173 of 2011
with
Criminal Appeal No. 2541 of 2011

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

Counsel for the Appellant:
Sri L.M. Singh, Sri K.Kumar Tripathi

Counsel for the Respondent:
G.A.

Criminal Law - Indian Evidence Act, 1872- Section 32- The only evidence that remains against the appellant is the dying

declaration- A dying declaration is admissible under Section 32 of the Indian Evidence Act as an exception to the general rule against hearsay evidence. The principle of admissibility of a dying declaration is based on a maxim "Nemo Moriturus Praesumitur Mentire" i.e. a man will not meet his maker with a lie in his mouth. Even an uncorroborated dying declaration can be the basis of conviction, if it is found truthful and unblemished.

Settled law that conviction can be secured solely on the basis of the dying declaration provided the same is found to be truthful, cogent and credible by the court.

Criminal Law - Indian Evidence Act, 1872- Section 32- Assuming that the dying declaration was recorded in complete secrecy to maintain its confidentiality, it is quite strange that a daughter, who has been admitted in the hospital with burn injuries, would not inform her father for five days about the incident, particularly, when there is evidence that her father (PW 1), the informant, and other family members had met her several times in the hospital. This fact itself makes the dying declaration doubtful.

Where the deceased did not inform her parents and relatives for several days about the occurrence, as stated in the dying declaration, then the said non-disclosure would render the dying declaration doubtful.

Criminal Law - Indian Evidence Act, 1872- Section 32- The first information report sets up dowry as a motive for the crime whereas in the dying declaration, there is no mention of dowry but something which finds no mention in the FIR, this creates a doubt on the truthfulness of the dying declaration.

The mentioning of a motive in the dying declaration different from the one alleged in the FIR , would render the dying declaration doubtful.

Criminal Law - Indian Evidence Act, 1872- Section 32- The deceased was not only in great pain but was suffering from breathing trouble as well hence oxygen inhalation was also advised. In such a situation whether she was in a fit state of mind or in a delusional state is difficult to fathom. In such circumstances, acting on the dying declaration, which finds no corroboration from the testimony of other witnesses, would be unsafe, particularly, when it makes certain allegations which are at variance with the prosecution case- it would be unsafe to rely upon dying declaration of such a person, particularly, when it has no corroboration from other evidences.

An uncorroborated dying declaration of its maker whose mental fitness is doubtful cannot be safely relied upon by the courts.

Criminal Law - Indian Evidence Act, 1872- Section 32- The dying declaration appears suspicious and highly doubtful more so, when it is not recorded in a question and answer form and does not appear to be in the language of the deceased. We may hasten to clarify that though it is not a rule that a dying declaration cannot be accepted unless it is in the own language of the declarant or is in a question answer form. But where there is a serious challenge to the fitness of its maker at the time of recording and there are circumstances that render the dying declaration doubtful, non-recording of the declaration in the language of the deceased and in a question answer form is an additional circumstance throwing doubt on its genuineness.

Where the fitness of the maker of the dying declaration is doubtful, the dying declaration is not corroborated from other evidence, then not recording the dying declaration in the language of the deceased and in question answer form, would further render the dying declaration doubtful.

Criminal Law - Indian Evidence Act, 1872- Section 32 - The dying declaration (Ext. Ka-2) was recorded after five days of admission of the deceased in the hospital, which is against the guidelines laid down by the Apex Court in the case of Kushal Rao Vs State of Bombay (supra) wherein it has been held that the same should recorded at the earliest.

Settled law that dying declaration has to be recorded at the earliest available opportunity.

Criminal Law - Indian Evidence Act, 1872- Section 32-Number of persons of the neighbourhood had gathered at the place of incident but the prosecution did not examine any of them. Had they been examined, a correct picture of the case could be had and the doubts shrouding the dying declaration might have been dispelled both in terms of the condition of its maker and the truthfulness of its contents-No doubt, a dying declaration is a valuable piece of evidence but it has to be considered as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing evidence and if it is not found wholly trustworthy or truthful, it should not form the sole basis of conviction without corroboration.

Not examining the neighbours and other independent witnesses where the dying declaration is doubtful and the same remaining uncorroborated by other evidence cannot lead the court to secure the conviction of the accused solely on the basis of such dying declaration.

Criminal Law - Indian Evidence Act, 1872 - Sections 3 & 32- The husband of deceased, was examined as DW-2. He had admitted the deceased in the hospital. He stated that his wife (deceased) had stopped speaking after first day of admission as her condition started deteriorating. Prosecution failed to give any suggestion to discredit his testimony. Therefore, from this angle too, the dying declaration (Ext. Ka-2) appears doubtful because if the condition of the deceased had deteriorated so much by the second day of the incident, how could her dying declaration be recorded on the 6th day- The law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

Settled law that the testimony of the witnesses of defence have to be given the same weight as the witnesses of prosecution and therefore the relevant and legally admissible parts of the testimony of a hostile witness can be taken into consideration by the court. (Para 48, 54, 56, 57, 60, 64, 65, 66, 67, 68, 70, 71)

Criminal Appeals Allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Khushal Rao Vs St. of Bom. AIR 1958 SC 22

2. Paniben Vs St. of Guj. (1992) 2 SCC 474

3. Jagbir Singh Vs St. (NCT of Delhi) (2019) 8 SCC 779

4. Umakant & anr. Vs St. of Chhattis. 2014 7 SCC 405

5. Sampat Babso Kale & anr. Vs St. of Maha. (2019) 4 SCC 739

6. Jayamma & anr. Vs the St. of Kar. (2021) 6 SCC 213

7. Puran Chand Vs St. of Har. (2010) 6 SCC 566

8. Dudh Nath Pandey Vs St. of U.P. AIR 1981 SC 911

9. Ramesh Harijan Vs St. of U.P (2012) 5 SCC 777

10. C. Muniappan Vs St. of T.N. (2010) 9 SCC 567

11. Himansh Vs St. (NCT of Delhi) 2011 (2) SCC 36

(Delivered by Hon'ble Sameer Jain, J.)

1. As these three appeals arise out of common judgment and order dated 04.04.2011 passed by Sessions Judge, Ramabai Nagar in connected Session Trial Nos. 228 of 2008 and 232 of 2008, they have been heard together and are being decided by a common judgment and order.

2. Criminal Appeal Nos. 2542 of 2011, 2173 of 2011 and 2541 of 2011 are against the judgment and order dated 04.04.2011 passed by Sessions Judge, Ramabai Nagar in Sessions Trial Nos. 228 of 2008 and 232 of 2008, by which, the appellants have been convicted under Section 302 read with Section 34 IPC and awarded imprisonment for life with a fine of Rs. 10,000/- each and default sentence of six months additional imprisonment.

3. We have heard Sri Kamlesh Kumar Tripathi, learned counsel for the appellants in all the three appeals; Sri J.K. Upadhyay, learned AGA for the State and have perused the record.

4. The prosecution story, in brief, is that on 20.10.2007 Lalla (PW-1) lodged an FIR against the appellants and four others by alleging that on 08.06.2006 his daughter Reeta (deceased) was married to Ram Mishra. In the marriage, PW-1 gave lot of dowry but her in-laws harassed her for a motorcycle. Informant's daughter on return to her paternal home, informed that her in-laws used to harass and assault her for motorcycle and if their demand is not met, they will kill her. As a result, PW-1 spent additional Rs. 20,000/- at the time of Bidai of her daughter. On 01.10.2007, his daughter was badly beaten by her in-laws and her husband Ram Mishra brought her to her native village. Thereafter, on 11.10.2007, the husband of Reeta (deceased) along with his brothers Shyam Mishra (appellant of Criminal Appeal No. 2542 of 2011) and Vinay came to the village to fetch informant's daughter (Reeta) and Reeta (the deceased) went with them. On 12.07.2007, Siddh Nath (PW-3), elder son-in-law of the informant (PW-1), arrived at the matrimonial home of Reeta (the deceased), where, he witnessed that on the instigation of Pramod (Nandoi of deceased), Ram Mishra (husband of the deceased), Smt. Sarojani Devi (mother-in-law of the deceased/appellant in Criminal Appeal No. 2541 of 2011), sister-in-laws of the deceased, namely, Smt. Rashmi (appellant in Criminal Appeal No. 2173 of 2011) and Rubi, brothers-in-law of the deceased, namely, Shyam Mishra (appellant in Criminal Appeal No. 2542 of 2011) and Vinay, were assaulting Reeta (the deceased) and Shyam Mishra (appellant in Criminal Appeal No. 2542 of 2011) poured kerosene oil on Reeta and ablazed her. By the time the fire could be doused, Reeta got burnt extensively. Later, on threats extended by the police, the husband of the deceased along with Siddh Nath (PW-3) took Reeta to Halet hospital and got her admitted there; where, on 18.10.2007, at about 9.30 PM, Reeta expired.

5. During investigation, Investigating Officer recorded the statement of witnesses and collected evidence in respect of the treatment provided to the deceased in the Halet hospital. The Investigating Officer also copied the dying declaration (Ext. Ka-2) of the deceased recorded by Madan Singh Garbiyal, ACM 5th Kanpur City (PW-4) and submitted charge-sheet against the appellants, namely, Shyam Mishra (Devar of the deceased), Rashmi (Nanand of the deceased) and Sarojni (mother-in-

law of the deceased), under Sections 498A, 304B IPC and ¾ D.P. Act. No charge-sheet was filed against rest of the accused including deceased's husband Ram Mishra, apparently, because there was no accusation against them by the deceased in her dying declaration (Ext. Ka-2). In between, upon information regarding death of deceased, inquest report (Ext. ka-4) was prepared and autopsy of the body of the deceased was conducted on 19.10.2007 at about 7.10 PM. In the autopsy report (Ext. Ka-12), PW-6 (the Autopsy Surgeon), noticed following ante-mortem injuries:-

"Burn superficial to deep, present all over the body except soles of both feet. Pus pockets present all over the body."

According to the doctor, deceased died due to shock and septicaemia due to ante mortem burn injury.

6. After taking cognizance on the charge-sheet, the case was committed to the court of Session and, on 21.01.2009, trial court framed the charges against the appellants under Sections 498A, 304B IPC and ¾ D.P. Act. Later, on 23.09.2010, an alternate charge under Section 302 IPC read with Section 34 IPC was also framed against the appellants.

7. During trial, prosecution examined 13 witnesses. Out of 13 witnesses, Lalla, the informant (PW-1), Neeraj Mishra (PW-2) and Siddh Nath (PW-3) are witnesses of fact; PW-4 recorded the dying declaration; and rest are formal witnesses. After prosecution evidence was closed, trial court recorded the statement of appellants under Section 313 Cr.P.C. All the appellants denied the allegations levelled against them and stated that deceased sustained burn injuries accidentally while cooking food. Two defence witnesses, namely Daya Shanker Tiwari (DW-1) and Ram Mishra (DW-2), the husband of the deceased, were also examined. The trial court found appellants guilty and convicted and sentenced them under Section 302/34 IPC.

Submissions advanced on behalf of the appellants

8. Learned counsel for the appellants submitted that during trial all the prosecution witnesses of fact turned hostile and they did not support the version of the FIR. The only evidence against the appellants is the dying declaration (Ext. Ka-2), dated 17.10.2007, recorded by ACM 5th Kanpur City (PW-4). Learned counsel for the appellants submitted that as the sole evidence against the appellants remained the dying declaration, it was necessary for the trial court to look for its corroboration and since the trial court convicted the appellants without looking for its corroboration, its judgment is liable to be set aside. He also submitted that the deceased had sustained 95% burns, therefore, it was highly improbable that she would be in a position to give a declaration, that too, after five days. Hence, it will not be safe to act upon such dying declaration, particularly, in absence of corroboration. He further submitted that the deceased was admitted in the hospital on 12.10.2007, whereas her dying declaration was recorded on 17.10.2007 i.e. after five days. The prosecution failed to provide any explanation in this regard. In such circumstances the possibility of the dying declaration being tutored cannot be ruled out. Learned counsel for the appellants also submitted that from the testimony of prosecution witnesses it is apparent that deceased was not in a fit condition to give

dying declaration. Moreover, there is no disclosure in the dying declaration as to what was the motive for the appellants to eliminate the deceased. In absence of disclosure of motive the dying declaration appears completely untrustworthy yet, the trial court, without considering all these aspects, treated the dying declaration as gospel truth. It is submitted that the trial court did not properly consider the testimony of defence witnesses and thereby erred in law as well as facts and as such as judgment is liable to be set aside.

Submissions advanced on behalf of the State

9. Per contra, learned AGA submitted that the trial court rightly convicted the appellants; that the law is well settled that even uncorroborated dying declaration can on its own form the basis of conviction if it is found truthful and blemish free; and that in the present case dying declaration was recorded by Executive Magistrate who was examined before the trial court and proved the same. Moreover, the doctor provided a certificate of fitness of the deceased. Therefore, dying declaration (Ext. Ka-2) can safely be relied upon to record conviction even without corroboration. Learned AGA also submitted that even if deceased sustained 95% burn injuries she could give the dying declaration therefore, merely on the quantum of burns, dying declaration cannot be discarded. Learned AGA submitted that lodging of the FIR is duly proved and since it alleges that the appellants as well as other accused persons were harassing the deceased for want of dowry, therefore, even if, during trial, the informant and other prosecution witnesses did not support the version of the FIR, it can be taken into consideration as a corroboratory material. The learned AGA submitted that the appeals filed by the appellants are, therefore, liable to be dismissed.

10. We have given our anxious consideration to the rival contentions and have perused the record.

11. Before analysing the arguments of both sides, it would be apposite to notice the prosecution evidence, in brief.

PROSECUTION EVIDENCE.

12. Lalla, the informant, has been examined as PW-1. He is the father of the deceased. PW-1 stated that the marriage of his daughter Reeta (deceased) was performed with Ram Mishra about two and half years before. He stated that none of the appellants or their family members demanded a motorcycle in dowry and they never harassed his daughter (the deceased). PW-1 also stated that his daughter complained to him regarding her harassment or dowry demand. PW-1 stated that on 1.10.2007 neither the appellants nor anybody else assaulted the deceased and that on 11.10.2007 only Shyam Mishra (appellant in Criminal Appeal No. 2542 of 2011) had come for her Bidai. PW-1 stated that he is not aware whether his elder son-in-law, namely, Siddh Nath (PW-3), had gone to the matrimonial home of his daughter on the day following her Bidai. PW-1 also stated that PW-3 did not inform him (PW-1) that the appellants assaulted the deceased at the instigation of her Nandoi, namely, Pramod. PW-1 stated that PW-3 also did not inform that appellant Shyam Mishra (appellant of Criminal Appeal No. 2542 of 2011) poured kerosene oil and set her ablaze. PW-1 stated that his daughter (the deceased) was admitted in Hallet Hospital by his son-in-law Ram and

was provided medical treatment and she died there on 18.2.2007 at about 9.30 PM. PW-1 stated that appellant Shyam Mishra (the appellant of Criminal Appeal No. 2542 of 2011) had informed him about his daughter's death whereafter he arrived at Hallet Hospital. PW-1 stated that his daughter neither informed him nor any member of his family that the appellants or any other member of her husband's family demanded a motorcycle in dowry or had harassed her in that regard or that Shyam Mishra (the appellant in Criminal Appeal No.2542 of 2011) poured kerosene oil on her and set her ablaze.

PW-1 further stated that the written report (Ext. Ka-1) was written by Neeraj Mishra (PW-2) which was not read over to him though he had put his signature on it. PW-1 stated that after inquest and autopsy his daughter was cremated by her husband-Ram. At this stage, prosecution declared PW-1 hostile and requested for his cross-examination, which was accepted.

13. During cross-examination, PW-1 was confronted with his statement recorded under Section 161 Cr.P.C. but PW-1 stated that he never gave any such statement to the Investigating Officer. PW-1 also stated that he did not dictate the written report to Neeraj Mishra (PW-2) and that PW-2 did write the report at the instance of the villagers. PW-1 also stated that before taking his signature, written report was not read over to him. PW-1 denied the suggestion that due to compromise, he is giving false statement. He also stated that he is not aware whether a dying declaration of his daughter (deceased) was recorded in the Hospital or not.

14. The defence also cross-examined PW-1. In his cross-examination at the instance of defence, PW-1 stated that written report (Ext.Ka-1) was not written before him and that he put his signature on a plain paper. He also stated that when he had put his signature on a plain paper his daughter was alive. PW-1 stated that when he put his signature on a plain paper he was told that this paper would be used in the Hospital. PW-1 stated that Chhunnu is his son and not brother. He added neither he was in a position to give motorcycle nor his son-in-law Ram (husband of the deceased) was in a position to fill petrol. He stated that he had never witnessed his son-in-law Ram driving a motorcycle. He also stated that the accused persons had informed him that his daughter Reeta (deceased) had sustained burn injuries while cooking food. He also stated that on the date of the incident he had arrived in the Hospital and his daughter had informed him that she sustained burn injuries while cooking food. PW-1 stated that after first day of her admission in Hospital, his daughter was not in a position to speak and could communicate through gestures only. He stated that the written report (Ext. Ka-1) is false and that his daughter Reeta (deceased) accidentally sustained burn injuries while cooking food.

15. **Neeraj Mishra PW-2.** He is the scribe of the FIR. He stated that on 20.10.2007 at about 8-10 PM when he was at his shop his relative Lalla (PW-1) and member of his family came. PW-2 wrote the report on the dictation of Chhunnu (not examined), the son of Lalla (PW-1). He stated that Lalla (PW-1) was also present but not near by and that the report was not read over to him (PW-1) and that the signature of Lalla (PW-1) was already there on the paper. PW-2, however, recognized his own signature on the written report (Ext. Ka-1) and affirmed that the report was written by him.

16. In his cross-examination, PW-2 stated that in respect of the written report

(Ext. Ka-1) he had no dialogue with Lalla (PW-1). He reiterated that the report was written at the instance of Chhunnu and villagers. He reiterated that Lalla (PW-1) had not put his signature on the report in his presence.

17. PW-2 added that Chhunnu is brother and not uncle of Reeta. He stated that on 13.10.2007 i.e. next day of the incident, he visited the hospital to see Rita and noticed that people were talking to Reeta (deceased) but he did not talk with her. He added that when he visited the hospital after the second day, Reeta (deceased) was not in a condition to speak.

18. **Siddh Nath PW-3**. He is elder son-in-law of the informant (PW-1) and brother-in-law (jija) of the deceased. PW-3 stated that he use to often visit the matrimonial home of the deceased. Her marriage was performed with Ram Mishra about three and a half years ago. Accused Shyam Mishra is younger brother of Ram Mishra; that Shyam Mishra neither demanded a motor cycle nor harassed the deceased in that connection. PW-3 stated that on 1.10.2007, he neither went to Chaubepur to fetch medicine nor he visited the matrimonial home of the deceased. He further stated that he did not witness the appellant- Shyam (appellant No. 2 in Crl. Appeal No. 2542 of 2011) pouring kerosene on the deceased and setting her ablaze. PW-3 stated that in the evening he received information that Rita (deceased) has sustained burn injuries and has been admitted in Hallet Hospital. He stated that he had no conversation with the deceased in the hospital; and that Shyam Mishra (appellant in Criminal Appeal No. 2542 of 2011) and his family members did not ablaze her on account of non-fulfilment of motorcycle demand. At this stage, prosecution declared PW-3 hostile and sought permission to cross-examine him, which was granted.

19. In his cross examination, PW-3 was confronted with his earlier statement recorded under Section 161 Cr.P.C., however, PW-3 denied having given any such statement to the investigating Officer.

20. Thereafter defence cross-examined PW-3. In this cross-examination, PW-3 stated that both sides were very poor. Neither informant side was in a position to give motorcycle nor the accused side was in a position to fill petrol. PW-3 also stated that when he initially went to the hospital, the deceased informed him that she had sustained injuries while cooking food. Later, whenever he visited the hospital, he found Rita (deceased) not in a fit condition to speak. He then clarified that she could speak in soft tones and sometimes she could not even speak but finally on the day she died, she had stopped speaking.

21. **Madan Singh Garbiyal-Additional City Magistrate, Kanpur City has been examined as PW-4.** He stated that on 17.10.2007, he was posted as ACMM, Kanpur. He recorded the dying declaration of Rita Mishra (deceased) in L.R. Hospital. PW-4 proved the dying declaration as Ext. Ka-2. He stated that at the time of recording the dying declaration, Dr. S.B. Mishra (PW-5) was present and had certified that the deceased was in a fit condition to make her declaration. He stated that the dying declaration started at 6:55 pm and was completed at 7:35 pm. PW-4 stated that after completing the recording again certificate of the doctor was taken. He stated that during her

declaration, deceased was in a fit condition and that the statement made by her was read over to her.

22. In his cross-examination, PW-4 stated that the doctor provided a second certificate of fitness before thumb impression of the declaration was taken. He stated that as the doctor had issued the certificate he believes that the deceased was fit. He stated that the body of the deceased was burnt and bandaged. He could not recollect whether the face of the deceased was burnt or not. PW-4, however, stated that there was no bandage on the face of the deceased. PW-4 stated that he wrote the declaration by putting questions to the deceased and not at one go. He stated that his statement was not recorded by the Investigating Officer. PW-4, however, denied the suggestion that a false statement was recorded while sitting in the office. He also denied the suggestion that deceased was not in a fit condition to give the statement.

On 30.1.2010, PW-4 was recalled for re-examination. In his re-examination PW-4 stated that the deceased died on 18.10.2007 at about 9:30 pm and he prepared the inquest report. He proved the inquest report as Ext. Ka-4. In his cross-examination, PW-4 stated that only once he received information for recording the dying declaration and on first information he went to record the dying declaration (Ext. Ka-2). He also stated that in the dying declaration he took the impression of the left toe of the deceased as both her hands were burnt.

23. **Dr. S. B. Mishra PW-5.** He is the emergency Medical Officer Officer posted at Lala Lajpat Rai Hospital, Kanpur. He stated that on 12.10.2007 he was posted at the hospital. At 1:05 pm, he examined the injured (Reeta) who was brought by her husband. On examination it was noticed:-

"General examination:- general condition-under observation; pulse rate-not recordable; breathing rate 28 per minute; blood pressure-not recordable. Heart condition was alright. Stomach was distended.

The patient was conscious but irritable. On inquiry, it was informed that about 1 and 1/2 hours before she had sustained burn injuries. The patient was 95% burnt and was complaining of pain and burning sensation.

Local examination:- a superficial to deep burns present all over the face, head, body on both front and back excluding both feet, both soles and part of lower chest. Line of redness present. Skin had peeled off at some places. Blisters were also present at some places. Hair on the head were singed."

PW-5 stated that injured was admitted in the hospital as a case of Thermal Burn injuries and was placed under the treatment of Dr. R.K. Singh (PW-11). According to PW-5 all the injuries were fresh and caused due to burns and they could have been sustained due to dry as well as moist heat. PW-5 proved the injury report of the deceased as Ext. Ka-10. He further stated that on 12.10.2007 information was sent to the Magistrate for recording of the dying declaration of Rita Mishra (deceased) and, thereafter, on 13.10.2007 a reminder was sent. PW-5 stated that after recording of dying declaration, he made an endorsement that on 17.10.2007 dying declaration of the injured was recorded by Mr. Madan Singh

Garbiyal A.C.M. (5th). PW-5 also proved the information letter as Ext. Ka-11.

PW-5 further stated that on 17.10.2007 at 6:55 PM he issued a certificate that Smt. Reeta Mishra (deceased) was fully conscious and fit to give dying declaration. PW-5 stated that after recording of the dying declaration the impression of the left toe of the deceased was taken and, thereafter he again certified the fitness of Smt. Rita Mishra w/o Ram Mishra to the effect that during the recording of dying declaration she was fit and conscious.

24. In his cross-examination, PW-5 stated that when a dying declaration is recorded only the Doctor and the Magistrate are present. He denied the suggestions that the Magistrate had been coming but the dying declaration was not recorded; and that the dying declaration was not recorded in the hospital. He also denied the suggestion that he issued wrong certificate and that the deceased was not in a fit condition to give her declaration. PW-5 further stated that septicaemia can commence within 36 hours or 2 days of receiving injury. He stated that ordinarily a person takes 3 to 4 days to die after commencement of septicaemia. PW-5 stated that there is no difference between thermal burns and kerosene burns. He stated that on 12.10.2007 he sent the information for recording of dying declaration as the condition of the deceased was very serious and from 12.10.2007, till recording of the statement, condition of the patient was low. PW-5 stated that he did not provide treatment to the deceased as Dr. R.K. Singh (PW-13) was treating her. PW-5 admitted that the doctor who provides the treatment can tell about the general condition of the patient but any qualified doctor can also tell about the general condition of the patient. He denied the suggestion that only the doctor who provides the treatment to the patient can give a correct picture about the condition of the patient.

25. **Dr. Autar Singh PW-6**. This witness proved the post mortem report as Ext. Ka-12. During post mortem of the body of the deceased, PW-6 noticed:-

"Ante mortem injuries- burn superficial to deep, present all over body except soles of both feet. Hair were also burnt. Puss pockets present all over the body. According to the doctor deceased died due to shock and septicaemia caused by burn injuries."

26. During cross-examination PW-6 stated that there was bandage all over including the face except eyes and lips. He stated that septicaemia had spread all over the body. After commencement of septicaemia there can be no definite estimate as to when the person will die because it depends upon the resistance power of the patient and the treatment but, ordinarily, a person may die within a week. PW-6 stated in a case of deep burn, no blister may form.

27. **PW-7 Sundar Lal, Circle Officer**. He is the first Investigating Officer of the case. He proved the site plan. He stated that he recorded the statement of witnesses and after the permission of Chief Judicial Magistrate, perused the dying declaration of the deceased. He proved the application seeking permission as Ext. Ka-14. He stated that he noted down the dying declaration of the deceased in the case dairy. According to this witness, on the basis of dying declaration, the implication

of co-accused Ram (husband), Vinay (brother in law), Rubi (Sister in law) and Pramod (Behnoi) was found false.

28. During cross-examination PW-7 stated that he did not record the statement of Doctor S.B. Mishra (PW-5). He further stated that he did not make any inquiry in respect of the treatment provided to the deceased. He also stated that he did not record the statement of Magistrate who recorded the dying declaration of the deceased. PW-7 further stated that in the dying declaration, the name of Chhunnu, uncle of the deceased, had surfaced but he neither recorded his statement nor inquired about him. PW-7 also stated that he did not record the statement of the deceased.

29. **Prem Prakash PW-8.** He is the third Investigating Officer of the case. After recording the statement of few witnesses and perusal of earlier Parchas, he submitted charge sheet against the appellants- Shyam Mishra (appellant in Crl. Appeal No. 2542 of 2011). The charge sheet was marked Ext. Ka 15. He continued the investigation against Rashmi (appellant in Criminal Appeal No. 2173 of 2011) and Sarojani Devi (appellant in Criminal Appeal No. 2541 of 2011) and submitted charge sheet against them, which was proved and marked Ext. Ka-16.

30. During cross-examination, PW-8 stated that he made inquiry from independent witnesses, namely, Meera Mishra, Daya Shanker Tiwari, etc. who stated that husband-Ram Mishra, brother-in-law-Vinay Mishra, Behnoi-Pramod Mishra and sister-in-law-Kumari Ruby were not present at the spot. PW-8 also stated that Meera Mishra (not examined) had stated that fire was extinguished by mother-in-law Sarojani (appellant in Crl. Appeal No. 2541 of 2011); sister-in-law Rashmi (appellant in Crl. Appeal No. 2173 of 2011) and brother-in-law Shyam (appellant in Crl. Appeal No. 2542 of 2011). He stated that witness Meera Mishra did not inform him as to who burn the deceased.

31. **Subhash Chandra Shakya PW-9**. He is the second Investigating Officer of the present case. This witness did not record statement of any witness except the statement of the informant (PW-1).

32. **Constable-Ashok Kumar Dwivedi PW-10**. He proved the Chik report of the case as Ext. ka-17 and G.D. of the registration of the case as Ext. Ka-18. PW-10 in his examination-in-chief, dated 03.11.2010, stated that the deceased died on 18.10.2007 at about 9:30 pm in the hospital and this information was given through phone, which was noted in G.D. He proved the said G.D. entry as Ext. Ka 22.

33. **Dr. R.K. Singh PW-11**. He is the doctor who provided medical treatment to the deceased Reeta Mishra. He stated that the deceased was brought to the hospital by her husband. He provided medical treatment to her from 12.10.2007 to 18.10.2007. During the course of treatment, she died on 18.10.2007 at 9:00 pm. PW-11 proved her bed head ticket (B.H.T.)as Ext. Ka-19. He stated that during treatment, the patient was conscious. He stated that he made an endorsement on the B.H.T. for recording the dying declaration and information in this regard was sent to doctor S.B. Mishra, Emergency Medical Officer (PW-5). There is an endorsement on the B.H.T. made by doctor S.B. Mishra (PW-5) in respect of sending information for recording the dying declaration. PW-11

stated that the Magistrate, Sri Madan Singh Garbiyal ACM 5th (PW-4), made an endorsement on the B.H.T. regarding recording of dying declaration and has put his signature. PW-11 stated that it is the responsibility of Emergency Medical Officer to provide a certificate of fitness of the patient whose dying declaration is to be recoded. He stated that on 17.10.2007, the day when the dying declaration of the deceased was recorded, Sri S.B. Mishra (PW-5) was the Emergency Medical Officer. PW-11 stated that as per entry in the of B.H.T, the dying declaration was recorded on 17.10.2007. PW-11 stated that the date of recording of dying declaration was not written before him and he cannot say who wrote it. PW-11 stated that he cannot state as to who made the endorsement "D/D noted by me" in B.H.T. (Ext. Ka-19). He stated that the endorsement on the B.H.T (Ext. Ka-19) "call for recording D/D sent to Magistrate", dated 17.10.2007, was neither written before him nor he can tell the name of the person who wrote it.

Note:- On perusal of the first page of Ext. Ka-19 (B.H.T), we found that on the margin (left side) it is noted "cell phone recording D/D sent to Magistrate". At the bottom of which there appears a signature, which appears to be sign of (PW-5) Dr. S.B. Mishra.

34. PW-11 denied the suggestion that deceased-Rita Mishra had died on 17.10.2007 and that the dying declaration of the deceased-Rita Mishra was noted after her death. PW-11 stated that on the first page of Ext. Ka 19 (B.H.T) there is an initial of a Junior Doctor below the written endorsement "D/D to be recorded" but he does not know whose initial it is. PW-11 further stated that he did not himself make any noting on the B.H.T with regard to the dying declaration. He stated that during the course of treatment he did not get any information about the dying declaration. PW-11 stated that Doctor S. B. Mishra (PW-5) who provided the fitness certificate was not in the team of junior doctors assisting him. PW-5 also did not advise PW-11 during the course of treatment. PW-11 stated that 95% of the body of the deceased was burnt and only 5% remained and that the patient was continuously on a glucose drip. PW-11 stated that since the beginning patient was low and day by day her condition deteriorated and due to septicaemia, the condition of the patient became worse. During cross-examination PW-11 stated that it is his responsibility to look after the patient admitted under him and he would be the best judge of patient's condition but in his absence, in case of need, the junior doctor can always attend the patient.

35. **Dr. Nirakar Dev PW-12**. He stated that during 12.10.2007 to 18.10.2007, he was in Burn Ward of L.L.R. Hospital as Junior Resident and on 12.10.2007 at about 1:05 pm, Rita Mishra (deceased) was admitted in the hospital in that ward with bed No. 5. He stated that the deceased was admitted under the treatment of Dr. Rajkumar Singh (PW-11); that on 18.10.2007, at 9:30 pm, Reeta Mishra was declared dead by him. After her death, he sent information to the police station. He proved the information letter as Ext. Ka-20. He stated that on the last page of BHT (Ext. Ka-19) due to mistake the date of death of Reeta Mishra (deceased) is mentioned as 17.10.2007. He stated that on the 1st page of B.H.T. Dr. Pankaj Gupta (not examined) has noted the summary of the patient and has entered the date and time of her death as 18.10.2007 at 9.30 PM. He proved

writing of Dr. Pankaj Gupta and the same was marked Ext. Ka-21.

36. In his cross-examination, PW-12 stated that in Ext. Ka-19 (B.H.T.) and Ext. Ka-21, his (PW-12's) name is not mentioned as one of the doctors in the team of doctors under R.K. Singh (PW-11) because he was posted in the burn ward. He stated that in Ext. Ka-19 (B.H.T.) and Ext. Ka-21 there are entries in the handwriting of five persons. He again stated that on page 22 of B.H.T. (Ext. Ka-19) due to mistake date of death has been mentioned as 17.10.2007 by Dr. Pankaj Gupta, which he noticed it today for the first time. He also stated that the condition of patient can only be disclosed by the doctor who provides treatment. He stated that on page 2 of the B.H.T. (Ext. Ka-19) the clinical history of the patient was written on the information furnished by the husband of the patient, namely, Ram Mishra. He denied the suggestion that Rita Mishra died on 17.10.2007. He also denied the suggestion that due to pressure exerted by the administration, on the B.H.T., the date of death was falsely entered as 18.10.2007.

37. **Constable Virendra Kumar PW-13.** He stated that on 18.10.2007, at about 22:50 hours, he received an information from the hospital regarding the death of the deceased, which was given by Om Prakash the ward boy of L.L.R. Hospital by way of a memo which disclosed that Reeta Mishra was admitted in the hospital on 12.10.2007 at 1.50PM and during treatment she died on 18.10.2007 at 9.30 AM. He noted the memo of death of the deceased in the G.D. vide Report No. 65 at 22.50 hours, which was marked Ext. Ka-23. He denied the suggestion that the information of death of the deceased was noted either in the G.D. dated 16.10.2007 or dated 17.10.2007.

38. After recording the evidence of prosecution witnesses, trial court recorded the statement of appellants under section 313 Cr.P.C. All the appellants denied the allegations levelled against them. They, however, admitted the factum of marriage and stated that the deceased died due to burn injuries sustained while cooking food. They also challenged the dying declaration by claiming that she was not in a condition to speak.

39. After recording the statement of accused, two defence witnesses were examined, namely, Dayashankar Tiwari (DW-1) and Ram Mishra, the husband of the deceased (DW-2).

Defence witnesses

40. **Dayashankar Tiwari DW-1**. He is a neighbour of Ram Mishra, the husband of the deceased (DW-2). He stated that the deceased sustained burn injuries accidentally while she was cooking food. He also stated that the deceased was never harassed for a motorcycle. He stated that Reeta Mishra (deceased) could speak only on the first day of her accident but thereafter she did not speak. In his cross-examination, PW-1 stated that after the incident he arrived at the spot. At that time none of the family member was present; when the deceased was taken to the hospital she was conscious and could speak. He denied the suggestion that being a neighbour he was giving false statement in favour of the appellants.

41. **Ram Mishra (husband of the deceased) has been examined as DW-2.**

He stated that the deceased was his wife; she died due to burn injures sustained while cooking food; that at the time of the incident, his wife was alone in the house and when he received information at his shop, he arrived and took his wife to Hallet Hospital where she died after 7-8 days. DW-2 stated that his wife (the deceased) had informed him that she got burnt while cooking food. DW-2 stated that he could converse with his wife Reeta Mishra only on the first day, thereafter, her condition deteriorated and she was not able to speak. DW-2 stated that before her parents his wife (deceased) informed him about receipt of burn injuries while cooking. He stated that there was no demand for a motorcycle; and that he is a poor person who cannot even afford petrol. DW-2 stated that Rashmi (appellant in Crl. Appeal No. 2173 of 2011) is his sister; she had given birth to her daughter just 5-6 days before the incident. He further stated that Shyam Mishra (appellant in Crl. Appeal No. 2542 of 2011) is his younger brother; he is a driver and used to take vehicles on long routes. He was away from home for last 10-15 days. After receiving information Shyam Mishra arrived, 4-5 days after the death of his wife. DW-2 also stated that due to 'Navratri' his mother, at the time of the incident, had gone to a temple. During cross-examination, DW-2 stated that in his house, food is cooked on gas. He received information at about 9:30 am. This information was given by his neighbour Daya Shanker Tiwari (DW-1). He stated that when he arrived at home, Shyam Mishra (appellant in Criminal Appeal No. 2542 of 2011) was not present but his mother had just arrived from the temple. When he reached, by that time, neighbours had already extinguished the fire by using blankets etc. At that time he found his wife (deceased) in the kitchen and not in the room. DW-2 stated that when he arrived at the spot, he saw his neighbours Om Prakash Mishra, Daya Shanker Tiwari (DW-1) Ram Karan and Savita there. He denied the suggestion that with an intention to save his mother, brother and sister, he is giving false statement.

42. After recording the prosecution evidence, statement of appellants, under Section 313 Cr.P.C., and defence witnesses, trial court found appellants guilty, convicted them under Section 302 IPC read with Section 34 IPC and sentenced them to imprisonment for life. However, the appellants were acquitted under Sections 498A, 304B IPC and ¾ D.P. Act.

Analysis

43. In the present case, the informant (PW-1) father of the deceased and Siddh Nath (PW-3), who were set up as prosecution witnesses to prove demand of dowry and harassment of the deceased in connection therewith did not support the prosecution case therefore, prosecution declared them hostile.

44. Lalla (PW-1) categorically stated that his daughter (the deceased) was never harassed by the appellants and there was no demand of a motorcycle as dowry. He also stated that his daughter never informed him that due to want of dowry she was assaulted by the appellants or that Shyam Mishra (appellant in Criminal Appeal No. 2542 of 2011) poured kerosene oil on her and set her on fire. PW-1 stated that the written report was written by Neeraj Mishra (PW-2) on blank signed papers and the report was not read over to him. When prosecution cross examined him, PW-1 stated that the written report (Ext. Ka-1)

was not dictated by him and that Neeraj Mishra (PW-2) wrote at the instance of villagers. This witness (PW-1) has disowned the FIR of the present case. PW-1 also stated that he has no information as to whether the statement of deceased was recorded by anyone in the hospital.

45. Neeraj Mishra (PW-2) is the scribe of the FIR. He stated that the written report was written by him on the dictation of Chhunnu (not examined), the son of PW-1. He stated that he did not read over the report to PW-1 and that the signature of PW-1 was present on the plain paper even before he had written the report. Therefore, PW-2 supported PW-1 to the extent that the written report (Ext. Ka-1) is not authored by PW-1.

46. Siddh Nath (PW-3) is brother-in-law (Jija) of the deceased. According to the FIR, he was the eye witness of the incident but in his statement PW-3 stated that he was not present at the spot and he came to know about the incident later.

47. Thus, the only evidence that remains against the appellant is the dying declaration (Ext.Ka-2) recorded by Madan Singh Garbiyal (PW-4) ACM Kanpur City.

48. A dying declaration is admissible under Section 32 of the Indian Evidence Act as an exception to the general rule against hearsay evidence. The principle of admissibility of a dying declaration is based on a maxim "Nemo Moriturus Praesumitur Mentire" i.e. a man will not meet his maker with a lie in his mouth. Even an uncorroborated dying declaration can be the basis of conviction, if it is found truthful and unblemished.

49 . In **Khushal Rao Vs. State of Bombay AIR 1958 SC 22** a three judge Bench of the Supreme Court, after discussing the law in detail, observed as follows:-

"16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made ; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions -and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human, memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was

making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it-; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

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

50. Again in the case of **Paniben Vs. State of Gujarat (1992) 2 SCC 474** the Supreme Court had the occasion to summarise the law in respect of dying declaration, in paragraph 18 of its judgment, as follows:-

"(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja Vs. State of M.P. (1976) 3 SCC 104).

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. State of U.P. Vs. Ram Sagar Yadav (1985) 1 SCC 552 Ramawati Devi Vs. State of Bihar (1983) 1 SCC 211.

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. K. Ramachandra Reddy Vs. Public Prosecutor (1976) 3 SCC 618

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. Rasheed Beg Vs. State of M.P. (1974) 4 SCC 264

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. Kake Singh Vs. State of M.P. 1981 Supp SCC 25

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. Ram Manorath v. State of U.P. (1981) 2 SCC 654

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. State of Maharashtra Vs. Krishnamurti Laxmipati Naidu 1980 Supp SCC 455

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. Surajdeo Oza Vs. State of Bihar 1980 Supp SCC 769

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram Vs. State of M.P. 1988 Supp SCC 152

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. Vs. Madan Mohan (1989) 3 SCC 390."

51. The above-noted principles have been recently reiterated by the Apex Court in the case of **Jagbir Singh Vs. State (NCT of Delhi) (2019) 8 SCC 779.**

52. The trial court found the dying declaration (Ext. Ka-2) wholly reliable as it was recorded and proved by the Executive Magistrate (PW-4) after the fitness of the deceased was duly certified by Dr. S.B. Mishra (PW-5).

53. Therefore, in the present case we will have to examine whether the dying declaration is trustworthy and blemish free and whether it would be safe to convict the appellants solely on the basis of that dying declaration (Ext. Ka-2).

54. As per record, dying declaration of the deceased was recorded by Madan Singh Garbiyal ACMM 5th Kanpur City (PW-4) on 17.10.2007 and before and after recording the dying declaration (Ext. Ka-2), Dr. S.B. Mishra (PW-5), the Emergency Medical Officer of the hospital certified the fitness of the deceased. It be noted that the dying declaration of the deceased was recorded after five days of her admission in the hospital. The FIR was lodged on 20.10.2007 i.e. after three days of the dying declaration. It is strange to notice that there is no whisper about the dying declaration in the FIR and there is also no statement in the FIR about the deceased making any such disclosure to either PW-1 or to anybody else about her predicament. Rather, PW-1, the informant (father of the deceased), in his statement stated that he has no knowledge regarding any statement of the deceased recorded in the hospital. It is hard to believe that PW-1, father of the deceased and informant of the case, would not be aware about the dying declaration (Ext. Ka-2) dated 17.10.2007. Assuming that the dying declaration was recorded in complete secrecy to maintain its confidentiality, it is quite strange that a daughter, who has been admitted in the hospital with burn injuries, would not inform her father for five days about the incident, particularly, when there is evidence that her father (PW 1), the informant, and other family members had met her several times in the hospital. This fact itself makes the dying declaration doubtful.

55. The Apex Court in case of **Umakant and another Vs. State of Chhattisgarh 2014 7 SCC 405** discarded the dying declaration on the ground that the deceased had many occasions to meet either her parents or the staff of the hospital but, in spite of that, she did not inform either of them that the accused persons had burnt her whereas, she made allegations against them in her dying declaration for the first time after eleven days.

56. In the present case, the deceased was admitted in the hospital on 12.10.2007 whereas her dying declaration was recorded on 17.10.2007 i.e. after five days and, surprisingly, before 17.10.2007, she did not inform either PW-1, her father, or the doctor or any other member of her family or the staff of the hospital that appellants had assaulted her and set her ablaze. Another circumstance which rules out passing of information by the deceased to her father is that the first information report sets up dowry as a motive for the crime whereas in the dying declaration, there is no mention of dowry but something which finds no mention in the FIR, which is, that Shyam Mishra (Dewar of the deceased), when he had come to fetch her to take her to her Sasural, on way, had tried to act fresh with the deceased by asking the deceased to sleep with him for one night. Notably, this request was made in the presence of the uncle of the deceased, namely, Chhunu, who has not been examined. This creates a doubt on the truthfulness of the dying declaration.

57. Further, there appears a serious doubt regarding the deceased being in a condition fit enough to make a declaration. It be noted that the Bed Head Ticket (Ext.Ka-19) of the deceased shows that since 12.10.2007 she was advised oxygen inhalation and a number of pain killers, anti-biotics and other medicines like Tremadole, Mol injection and Dicloran were administered. As the deceased suffered 95% burns, she must have been in great pain considering the number of pain relieving medicines advised to her. It is not unknown that most of these pain relieving medicines have sedative effect and in that kind of a situation, the possibility of delusional effects on the patient cannot be ruled out.

58. In the case of **Sampat Babso Kale and another Vs. State of Maharashtra (2019) 4 SCC 739** the Supreme Court in para 16 observed:-

*"16. In the present case, as we have already held above, there was some doubt as to whether the victim was in a fit state of mind to make the statement. No doubt, the doctor had stated that she was in a fit state of mind but he himself had, in his evidence, admitted that in the case of a victim with 98% burns, the shock may lead to delusion. F**urthermore, in our view, the combined effect of the trauma with the administration of painkillers could lead to a case of possible delusion, and therefore, there is a need to look for corroborative evidence in the present case."** *(emphasis supplied)*

59. Recently, a three judges Bench of Apex Court in the case of **Jayamma & another Vs. the State of Karnataka (2021) 6 SCC 213** relied on the decision rendered in the case of Sampat Babso Kale (supra) and one of the grounds taken by it not to rely on the uncorroborated dying declaration of the deceased was that during treatment number of pain relieving drugs were being administered to the deceased and, therefore, the possibility of her being in a state of delusion and hallucination could not be ruled out.

60. In the instant case, a perusal of the Bed Head Ticket of the deceased (Ext. Ka-19) would reveal that the deceased was not only on oxygen support but was also being provided Deriphyllin and Dexona injection. The former is given in case of chronic obstructive pulmonary disorder to provide easy breathing and the latter is to provide relief from inflammation and autoimmune condition. All these facts would suggest

that the deceased was not only in great pain but was suffering from breathing trouble as well hence oxygen inhalation was also advised. In such a situation whether she was in a fit state of mind or in a delusional state is difficult to fathom. In such circumstances, acting on the dying declaration, which finds no corroboration from the testimony of other witnesses, would be unsafe, particularly, when it makes certain allegations which are at variance with the prosecution case. Although, we are conscious of the fact that the extent of burn is not a determining factor for ascertaining the mental fitness of the declarant specifically where before and after the dying declaration doctor has provided a certificate of fitness, but in a case where as per the doctor the condition of the patient was very low since the beginning and she was advised oxygen inhalation and a number of medicines to alleviate pain and pulmonary disorder to ensure easy breathing, it would be unsafe to rely upon dying declaration of such a person, particularly, when it has no corroboration from other evidences.

61. The Apex Court in the case of **Puran Chand Vs. State of Haryana (2010) 6 SCC 566** advised the courts to remain alive to all attending circumstances when the dying declaration comes into being before making the same the basis of conviction. The relevant observations are contained in paragraphs 15 and 16 of the judgment extracted below:-

"15. The Courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross- examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.

16. Number of times, a young girl or a wife who makes the dying declaration could be under the impression that she would lead a peaceful, congenial, happy and blissful married life only with her husband and, therefore, has tendency to implicate the inconvenient parents-in-law or other relatives. Number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the Court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. Xxxxxx"

62. In the case of Puran Chand (supra), the Apex Court cautioned that many times young wife makes the dying declaration under the impression that she would lead a peaceful, happy and blissful life only with her husband and, therefore, has tendency to implicate parents-in-law or other relatives.

63. In the present case, the appellants, namely, Shyam Mishra, Smt. Sarojani Devi and Smt. Rashami, are brother-in-law (Dewar), mother-in-law (Saas) and married sister-in-law (Nanand), respectively of the deceased, therefore, possibility of false implication of appellants by the deceased in a state of delusion cannot be ruled out.

64. While we were perusing records of the case, we noticed one interesting entry on the first page of the Bed Head Ticket (Ext. Ka-19). There, on the left margin, there is an endorsement dated 17.10.2007 that "cell phone recording D/D sent to Magistrate" and below that there appears signature of Dr. S.B. Mishra, the Emergency Medical Officer of the hospital (PW-5). This noting suggests that the dying declaration of the deceased was recorded on cell phone and was sent to the Magistrate on 17.10.2007. If it was so, why the video/audio record was not produced. This casts a serious doubt on the truthfulness of the declaration put on record because of suppression of the primary evidence, which may be audio/video recording. Notably, Dr. R. K. Singh (PW-11), under whose treatment deceased was admitted in the hospital, in his testimony read the above endorsement as "call for recording". But that would not make sense as immediately below that it is noted "DD sent to Magistrate", which would not make sense if the dying declaration had not been recorded already. Moreover, PW-11 is not the person who made that endorsement. To our understanding it is not written "call for recording. D/D sent to magistrate" but what is written is "cell phone recording. D/D sent to magistrate", therefore, we read it as "cell phone recording D/D sent to Magistrate". Thus, from this angle too, the dying declaration, dated 17.10.2007, recorded by ACMM (PW-4) appears suspicious and highly doubtful more so, when it is not recorded in a question and answer form and does not appear to be in the language of the deceased. We may hasten to clarify that though it is not a rule that a dying declaration cannot be accepted unless it is in the own language of the declarant or is in a question answer form. But where there is a serious challenge to the fitness of its maker at the time of recording and there are circumstances that render the dying declaration doubtful, non-recording of the declaration in the language of the deceased and in a question answer form is an additional circumstance throwing doubt on its genuineness.

65. In addition to above, in the instant case, the deceased was admitted in the hospital on 12.10.2007, in spite of that, her dying declaration (Ext. Ka-2) was recorded on 17.10.2007 i.e. after five days. As, her general condition since the beginning was very low as she had sustained 95% burns and was on oxygen support then why her statement was recorded after five days. Although there is evidence of Dr. S.B. Mishra (PW-5), the Emergency Medical Officer of the hospital, that he sent an information to the Magistrate for recording the dying declaration on 13.10.2007 but the Executive Magistrate (PW-4) stated that he received the request/information only once and on first call he arrived at the hospital to record the dying declaration. In any view of the matter, fact is that the dying declaration (Ext. Ka-2) was recorded after five days of admission of the deceased in the hospital, which is against the guidelines laid down by the Apex Court in the case of Kushal Rao Vs. State of Bombay (supra) wherein it has been held that the same should recorded at the earliest.

66. Further, according to the Investigating Officer, number of persons of the neighbourhood had gathered at the place of incident but the prosecution did not examine any of them. Had they been examined, a correct picture of the case could be had and the doubts shrouding the dying declaration might have been dispelled both in terms of the condition of its maker and the truthfulness of its

contents. But, unfortunately, the prosecution has led no evidence to dispel these doubts whereas the witnesses of fact already examined have not supported the prosecution case. At this stage, we may profit from certain observations of the Supreme Court in the case of Sampat Babso Kale (supra) where, in para 20, it was observed:-

"20. Another factor which needs to be taken into consideration is that none of the witnesses from the neighbourhood have been examined. Even as per the prosecution case it was the neighbours who first raised an alarm. There is no explanation why none of them have been examined. It is also the prosecution case that the accused husband along with another neighbour went to the hospital to arrange for an ambulance. This person has not been examined. The non-examination of these important witnesses leads to non-corroboration of the dying declaration. ***The best witnesses would have been the neighbours who reached the spot immediately after the occurrence. They would have been the best persons to state as to whether the victim told them anything about the occurrence or not."***

(emphasis supplied)

67. No doubt, a dying declaration is a valuable piece of evidence but it has to be considered as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing evidence and if it is not found wholly trustworthy or truthful, it should not form the sole basis of conviction without corroboration.

68. In the instant case, apart from there being a serious doubt regarding the fitness of the deceased at the time of making her declaration, there is doubt with regard to the veracity of the declaration as well, inasmuch as, its video/audio recording was suppressed and it does not appear in question-answer form or in the language of its maker. The truthfulness of the declaration is also under cloud inasmuch as in the dying declaration the deceased stated that when her brother-in-law Shyam Mishra (appellant of Criminal Appeal No. 2542 of 2011) had come to her paternal home for Bidai then, on way, he assaulted her and threatened her by telling her that she would be sexually used by him and her husband alternatively. Interestingly, this threat was extended by the appellant Shyam Mishra in front of her uncle Chhannu. But, surprisingly, prosecution did not examine Chhannu. Even during investigation, the Investigating Officer did not record his statement. As per the statement of PW-2, Neeraj Mishra, the scribe of the FIR, Chhannu is the brother of the deceased and not her uncle. If such threats were extended by appellant Shyam before Chhannu, who was either brother of the deceased or uncle of the deceased, then Chhannu would have informed the informant. But the FIR is completely silent in this regard. Therefore, the dying declaration does not even appear truthful. Thus, in our considered view, it would be extremely unsafe to record conviction solely on its basis without there being any corroborative evidence.

69. The Apex Court in the case of **Dudh Nath Pandey Vs. State of U.P. AIR 1981 SC 911** has deprecated the practice of courts to instinctively disbelieve defence witnesses and has laid stress that their testimony has to be afforded equal treatment. The relevant observations in the judgment that regard are as follows:-

19. xxx"Defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses."xxx

70. In the instant case, Ram Mishra, the husband of deceased, was examined as DW-2. He had admitted the deceased in the hospital. He stated that his wife (deceased) had stopped speaking after first day of admission as her condition started deteriorating. Prosecution failed to give any suggestion to discredit his testimony. Therefore, from this angle too, the dying declaration (Ext. Ka-2) appears doubtful because if the condition of the deceased had deteriorated so much by the second day of the incident, how could her dying declaration be recorded on the 6th day.

71. Similarly, although PW-1 (the informant) and PW-3 (Jija of the deceased) were declared hostile, but their testimony could have been considered to test the veracity of the dying declaration. It be noted that the law in respect of value of the testimony of hostile witnesses has been settled by a catena of decisions of Supreme Court. Their testimony can be utilized either by the prosecution or by the defence and the Court may accept their testimony if it considers it truthful.

72. In the case of **Ramesh Harijan Vs. State of Uttar Pradesh (2012) 5 SCC 777,** the Supreme Court observed:-

"24. In State of U.P. Vs. Ramesh Prasad Misra and another (1996) 10 SCC 360, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde Vs. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & another Vs. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & others Vs.. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla Vs. Daroga Singh and others, AIR 2008 SC 320; and Subbu Singh Vs. State (2009) 6 SCC 462.

Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."

[See also case of **C. Muniappan Vs. State of T.N. (2010) 9 SCC 567** (SCC P. 596, para 83) and Himansh Vs. State (NCT of Delhi) 2011 (2) SCC 36]

73. In the instant case, PW-1, the informant, although declared hostile, had stated that when he arrived at the hospital on receipt of information, his daughter (deceased) did not inform him that the appellants ablaze her. PW-1 also stated during cross-examination that after first day of her admission in hospital she was unable to speak and could only gesticulate. This statement also casts doubt on the veracity of the dying declaration (Ext. Ka-2) of the deceased.

74. In view of the discussion made above, we are of the considered view that the dying declaration (Ext. Ka-2) allegedly recorded by PW-5, dated 17.10.2007, is not trustworthy and it would be unsafe to record

conviction solely on its basis, particularly, in absence of corroborative evidence. In our view, the trial court failed to properly evaluate the evidence and test whether the dying declaration was wholly reliable and truthful so as to form the sole basis of conviction. Consequently, the appeals are allowed. The appellants are acquitted of all the charges for which they have been tried. They are reported to be in jail. They are set at liberty forthwith if not wanted in any other case subject to compliance of provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court concerned.

75. Let a copy of this order/judgment and the original record of the lower court be transmitted to the trial court concerned forthwith for necessary information and compliance. The office is further directed to enter the judgment in compliance register maintained for the purpose of the Court.

(2022)07ILR A1237
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.07.2022

BEFORE

THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Revision No. 2407 of 2022

Oyas @ Avesh ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Prakash Chandra Srivastava, Sri Vishnu Prakash

Counsel for the Opposite Party:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Section 227 - Discharge - S. 326A IPC, Voluntarily causing grievous hurt by use of acid - Revisionist accused u/s 326-A, 504, 506 IPC - His discharge application rejected - Argument of Revisionist that prima facie charges u/s 326A IPC is not made out as there is no grievous injury on the body of the victim - Held - from the reading of the Section 326-A IPC, it reveals that nine "OR" has been used which shows that for the charge under Section 326A IPC can be framed without grievous hurt to the victim - grievous hurt to acid burn victim, is not mandatory in each case - Nine "OR" has been used to show that in case of permanent or partial damage, deformity, burns, maims, disfigures, disables any part of the body of the person, or by administering acid to that person, charge under Section 326A IPC should be framed in such situation. (Para 6)

Dismissed. (E-5)

(Delivered by Hon'ble Om Prakash Tripathi, J.)

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

2. This criminal revision has been preferred by the revisionist against the order dated 18.04.2022 passed by Additional District and Sessions Judge, Court No.8, District Allahabad in Sessions Trial No.2297 of 2021 (State vs. Oyas @ Avesh), arising out of Case Crime No.225 of 2014, under Sections 326-A, 504, 506 IPC, rejecting the discharge application of the revisionist under Section 227 Cr.P.C.

3. The main submission of the learned counsel for the revisionist is that prima facie charges under Section 326A IPC is not made out against the revisionist. There is no grievous injury on the body of the victim. From the perusal of prosecution papers, offence under Section 326A IPC is

not disclosed. Injured ladies Smt. Gulshan Bano and Km. Reshma Bano were medically examined on 19.05.2014 at SRN Hospital, Allahabad by Dr. Nisar Ahmad at about 09:10 am and 09:20 pm, who were brought by their mother namely, Khusnuma. There is no permanent or partial damage or deformity to or burns or maims or disfigures or disables, any part or parts of the body, so charge under Section 326A or 326B is not made out. Applicant is in judicial custody since 19.03.2019.

4. Learned AGA objected the prayer and submitted that from the perusal of order, it reveals that initially revisionist absconded. Thereafter, proceedings was initiated against the revisionist under Section 83 Cr.P.C., then, he surrendered before the court below on 19.03.2019. On 16.12.2021, case was committed to Court of Sessions and is pending at the stage of framing of the charge. It is also submitted that there is prima facie material to frame charge under Section 326A IPC against the revisionist. One co-accused Jamaluddin @ Raju has been convicted under Sections 326A and 506 IPC and on 17.09.2021 rigorous imprisonment for 10 years has been awarded to the co-accused.

5. Section 326A IPC lays down that "*whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, shall be punished with imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment.*"

6. Learned counsel for the revisionist emphasizes only on the point that as there is no grievous hurt on the body of the victims so charge under Section 326A IPC is not made out. But from the reading of the Section 326-A IPC, it reveals that nine "OR" has been used which shows that for the charge under Section 326A IPC can be framed without grievous hurt to the victim. But grievous hurt to acid burn victim, is not mandatory in each case. Nine "OR" has been used to show that in case of permanent or partial damage, deformity, burns, maims, disfigures, disables any part of the body of the person, or by administering acid to that person, charge under Section 326A IPC should be framed in such situation. Thus, the submission of the learned counsel for the revisionist has no force.

7. The injury report of the victim Gulshan Bano shows that there are following injuries on the body of victim dated 19.05.2014 :

1. Reddish black injury over lt. cheek 2x2cm, 2cm medial to lt. ear.

2. Reddish black injury in the area of lateral surface of lt. forearm in the area of 10cmx6cm.

3. Burning sensation over lt. side of chest (in bra region)

8. Above injuries are caused by acid burn. Duration fresh informed police.

9. Smt. Reshma Bano 18 years female has received following injuries :

1. Reddish black burn injury over face and neck. Burn sensation present.

2. Reddish black burn injuries and on the medial side of lt. upper arm in the area of 8cm.

10. Above injuries caused by acid burn. Duration fresh informed police. From the medical report, it appears that injured had sustained burn acid injury.

11. The provisions relating to charge are intended to provide that the charge shall give the accused full notice of offence charged against him. The purpose of a charge is to tell the accused person as precisely and concisely as possible of the matter with which he is charged and must convey to him with sufficient clearness and certainty, what the prosecution intended to prove against him. At the time of framing of charge, the court is not required to screen evidence or to apply the standard whether the prosecution will be able to prove the case against the accused at the trial. The Court shall consider only the material placed before it by the Investigating Agency. Court has to see only prima facie case against the accused. Charge can be framed even on the basis of strong suspicion founded on material before the Court.

12. On the basis of above discussion, this Court is of the view that trial court has passed a legal order, there is not manifest error or material irregularity in the impugned order. There is prima facie evidence material against the revisionist to frame charge against the revisionist under Section 326A IPC also and in such circumstances applicant is not liable to be discharged.

13. Thus, this criminal revision has no force and is **dismissed, accordingly.**

14. Learned Trial Court is directed to frame charge against the revisionist and make endeavor to conclude the trial expeditiously, if there is no legal impediment.

(2022)07ILR A1239
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

First Appeal Defective No. 1188 of 1993

Harish Chandra & Ors. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:
Sri Shyam Singh Sengar

Counsel for the Respondents:
S,C., Sri Chandrashekhar

U.P. Avas Evam Vikash Parishad - Defective Appeal of the year 1993-matter was dismissed for not making good the deficit of court fees-necessary party not made until 2022-enhancement claimed at a rate of Rs. 100/-Rs. 120/- per square yard be paid to the Appellant-not entitled for interest from 1995 till restoration in the year 2022.

Appeal disposed of. (E-9)

List of Cases cited:

1. Ram Chandra Vs U.O.I (2020) 15SCC

2. Nimna Dudhana Project Vs St. of Mah. & ors., AIR 2020 SC 717

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

1. Heard Sri Shyam Singh Sengar, learned counsel for the appellant, Sri Chandrashekhar, learned counsel for the respondents and learned Standing Counsel for the State.

2. On very short point this appeal can be disposed of. We are thankful to Sri Chandrashekhar for pointing out three aspects:

(i) that the matter was dismissed for not making good the deficit of court fees;

(ii) this is a defective appeal of the year 1993;

(iii) while filing the appeal there was no delay. The appeal came to be dismissed on 22.11.1995 and a restoration application came to be filed immediately i.e in 1995, unfortunately the appellant and his advocate did not take any steps to make good the deficit court fees and all other defects which was there. This Court again in the year 2000 dismissed the same for the second time which went in the disposal list.

3. Learned counsel for the appellant has placed reliance on the judgement of Division Bench of this High Court in F.A. No. 56 of 2005, in F.A.No. 1062 of 1995 and judgement of Single Judge in F.A. No. 395 of 2018. Similarly, learned counsel for the respondent has placed reliance on the judgement of Single Judge in F.A No. 993 of 2021 and Division Bench of this High Court in F.A.No. 184 of 2019.

4. In the year 2018 Division Bench of this High Court more particularly in F.A. No. 56 of 2005 on 21.07.2015 passed some orders despite that appellant did not wake up from his slumber. The other matters were also allowed on 16.11.2016 relying on the decision of the Division Bench in F.A No. 56 of 2005 and F.A. No. 1062 of 1995 came to be allowed. It also did not make up the appellant herein, thereafter, one of us sitting as Single Judge decided the list where on 30.05.2018 and Hukum Singh & Others and also U.P. Avas Evam Vikash Parishad took the matters to the Apex Court.

5. On 04.01.2021, the learned Single Judge of this Court in F.A.D. No. 87 of 2021 allowed connected appeals which is pointed out by the learned counsel for the respondents which has attained finality on 25.04.2022.

6. As far as this appeal is concerned three issues emerged:-

(1) From the year 1993 till date U.P. Avas Evam Vikash Parishad was not made party. On the direction of this Court in the year 2022 they were made party. It is submitted by the learned counsel for the U.P. Avas Evam Vikash Parishad that the appeal cannot be allowed as even in the appeal the appellant has claimed enhancement at a rate of Rs. 100/-. It is further submitted that the deficit court fees are paid on this valuation and therefore the enhancement requires to be restricted to Rs. 100/- square yard;

(2) Should the U.P. Avas Evam Vikash Parishad be saddled with interest. The appeal was dismissed for default way back in the year 1995, it was again dismissed for default even in the year 2020 and 2021, court fees were not paid. The other matters came to be decided in the year 2016 and 2018 respectively, that also did not wake the slumber of the appellant herein. Though the delay is condoned by this Court because of the decision of the Apex Court that parity should be maintained but the decision in Ram Chandra Vs. U.O.I (2020) 15SCC would apply, but the respondents cannot be saddled with costs/interest for the said period. The said view is reiterated by the Apex Court in case of Nimna Dudhana Project Vs. State of Maharashtra & Ors., AIR 2020 SC 717. The appellant has been lacks in prosecuting the case and therefore and in the light of these judgements the interest for the said period cannot be granted, however, on the enhanced amount from the date of enhancement is made till the award appellant would be entitled on the enhanced amount and from the date the delay is restored it will carry interest. It is stated by the Sri Chandrashkehar, learned counsel for the respondents that the matter is concluded by the Apex Court and hence though formally objects as Rs. 100/- per square yard is claimed.

7. We hold in light of the facts that Rs. 120/- per square yard be paid to the appellant, however, for the period from 1995 till the restoration is filed in the year 2022, they shall not be entitled for the interest as held by the Apex Court and as submitted by Sri Chandrashekhar, learned counsel for the respondents.

8. The defective appeal is disposed of.

9. The appellant to make good the deficit court fees and if they do not make good the requisite court fees, the learned trial Judge of the court below where the money is to be deposited would deduct the said amount of Rs. 20/- per square yard. The deficit court fees would be recovered by the amount deposited by the respondents. The respondents to deposit the difference amount within 12 weeks from today with the accrued interest from the date of the award till the award and from the date of filing of restoration i.e 27.04.2022 till the amount is deposited.

10. We are thankful to Sri Chandrashekhar who has assisted us on the very first date of hearing though his name was not shown in the cause list.

11. The counsel for the State adopted the submission of Sri Chandrashekhar.

(2022)07ILR A1241
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2018

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Second Appeal No. 1190 of 2017

Ompal Singh ...Appellant
Versus
Santram Gupta ...Respondent

Counsel for the Appellant:
Sri Preetpal Singh Rathore

Counsel for the Respondent:
Sri R.L. Varma, Sri Chandra Bhushan Verma

Criminal Law - Criminal Procedure Code, 1973 - Section 100 - Suit for specific Performance-Appellant/defendant entered agreement for sale of his share of undivided

land-half money was paid as earnest money-remaining to be paid upon execution of sale deed-Appellant failed to execute the sale deed-agreement to sell-a registered document-authentic and genuine-plea that defendant/ Appellant not well educated-not aware of contents-disbelieved by both the courts below-as Appellant was Gram Pradhan-no perversity in the findings recorded by the Court below-Second Appeal admissible only on substantial question of law and not on fact.

Appeal dismissed. (E-9)

List of Cases cited:

1. Hero Vinoth (Minor) Vs Sheshammal, Appeal (Civil) No.4715 of 2000

2. E.Mahboob Saheb Vs N.Sabbarayan Chowdhary, A.I.R. 1982, SC 679

3. St. of Karn. Vs Appa Balu Ingale, A.I.R. 1993, SC 1126

4. Gurdev Kaur Vs Kaki (2007) 1 SCC 546

5. S.B.I. & ors. Vs S.N. Goyal; (2008) 8 SCC 92

6. Santosh Hazari Vs Purushottam Tiwari, 2001(3) SCC 179

7. Rimmalapudi Subba Rao Vs Noony Veeraju, AIR 1951 Madras 969

8. Sir Chunilal 10 Mehta & Sons Ltd. Vs The Century Spinning and Manufacturing Company Ltd. AIR 1962 SC 1314

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. The instant second appeal is directed against the judgment dated 04.11.2015 passed by learned Additional District Judge, Court No.8, Shahjahanpur in Civil Appeal No.61/2011, whereby the learned Additional District Judge has dismissed the appeal filed by the defendant-appellant and has affirmed the judgment and order dated 14.2.2011 passed by Additional Civil Judge, Shahjahanpur decreeing the suit of plaintiff-respondent.

2. Heard Shri Preet Pal Singh Rathore, learned counsel for the appellant and Shri R.L. Varma on behalf of the caveator-respondent on the point of admission and perused the available record.

3. The brief facts giving rise to the dispute between the parties are that the appellant namely Ompal Singh who is the defendant in Original Suit No.379/2004 is the co-owner of Gata No.241 measuring 1.084 hectares, along with three other co-sharers. He entered into an agreement for sale of 4 bighas from his share of undivided land. The agreement for sale was executed on 25.7.2003 for a period of one year which was going to expire on 24.7.2004. The price of the land was fixed at Rs.80,000/- out of which Rs.40,000/- was paid as earnest money to the defendant-appellant by the plaintiff-respondent and it was settled between them that the remaining Rs.40,000/- shall be paid to the defendant-appellant within a period of one year, who in turn shall execute the sale deed. However, when the appellant failed to execute the sale deed within the stipulated period despite service of notice on him, the purchaser i.e. plaintiff-respondent filed a suit for specific performance of contract against him (Original Suit No.379/2004), copy whereof is annexed as (Annexure No.5).

4. According to the plaint averments, the plaintiff-respondent was always ready and willing to perform his part of the contract, but the (defendant- appellant) always tried to postpone the matter on one pretext or the other. In the aforesaid circumstances, plaintiff was compelled to

issue notice to the defendant by R.P.A.D. informing him to be present in the office of Sub Registrar, Sadar Shahjahanur for execution of the sale deed. According to the plaintiff-respondent, on 24.7.2004, the defendant came to Kutchery at 1 P.M. but, when the plaintiff asked him to take the remaining amount and to execute the sale deed, he silently escaped from there. Thereafter, the plaintiff gave an application at the office of the Sub Registrar to register his attendance. The plaintiff again requested the defendant to execute the sale deed on which the defendant gave him the assurance that he will execute the sale deed on 26.7.2004. On 26.7.2004, the plaintiff-respondent reached at the office of the Sub Registrar at 10 A.M. and waited there for whole day, but the defendant-appellant did not appear, therefore, the plaintiff again moved an application before the Sub Registrar to register his presence. According to the plaintiff, after 26.7.2004, he asked the defendant several times to execute the sale deed, but he never gave any satisfactory reply and always tried to postpone the matter and ultimately on 12.8.2004, he refused to execute the sale deed. As a result, the plaintiff-respondent was constrained to file a suit for specific performance of contract.

5. The defendant-appellant filed his written statement stating therein that the defendant had taken a loan of Rs.30,000/- from the plaintiff with interest at the rate of 15 percent per annum and as a safety measure, an agreement for sale was executed between them on 25.7.2003 for a period of one year. It was further stated by the defendant that he is not well educated, he only knows to make his signature. His signatures were obtained on the agreement deed by the plaintiff in collusion with the employees of the Registrar's Office without its contents being read over and explained to him. The defendant-appellant had already returned Rs.20,000/- to the respondent on 07.8.2004, out of the total amount of Rs.30,000/- taken as loan from him and the remaining Rs.10,000/- was also returned by him on 30.8.2004 in a Panchayat, where it was settled that plaintiff-respondent shall cancel the agreement for sale. But the plaintiff-respondent with malafide intention, filed the suit for specific performance of contract.

6. The learned trial court, on the basis of pleadings framed four issues out of which the relevant issue nos.1 and 4 are as follows:

(1) Whether the plaintiff is entitled to get the sale deed executed in his favour on the basis of agreement to sell dated 25.7.2003, after payment of remaining amount of Rs.40,000?

(2) Whether the balance of convenience is in favour of plaintiff?

7. Both the parties adduced oral and documentary evidence in support of their respective claims.

8. The learned trial court after hearing both the parties and on the basis of evidence led by them decreed the suit by the judgment dated 14.2.2011.

9. The appellant-defendant filed Civil Appeal No.61/2011 which was dismissed by the impugned judgment and order dated 04.11.2015.

10. Now the defendant-appellant is before this Court in the second appeal.

11. Learned counsel for the appellant has contended that both the courts below have failed to consider that the land in question is a combined land of four co-sharers including the appellant and their respective shares have not been determined by way of partition. The submissions of learned counsel is that unless and until a partition by metes and bounds takes place between the parties, no co-sharer has a right to sell even his own share in the joint property, therefore, the agreement to sell was not enforceable. It is further contended that although the plaintiff had stated that on 24.7.2004 and 26.7.2004, the defendant-appellant met him at the Registrar Office, but he did no execute the sale deed, but there is no evidence to substantiate the aforesaid facts. The plaintiff has tried to create his case. In fact, on both days the plaintiff had gone to the Registrar Office all alone without any witness of proposed sale deed and he has not even purchased any stamp paper on those dates. It is further contended that the learned lower appellate court has completely ignored the evidence led by the appellant and has dismissed the appeal in a mechanical manner by the impugned judgment, which is liable to be set-aside. It is lastly contended that on 24.7.2004, the agreement to sell had frustrated in favour of the appellant and it could not have been enforced due to lapse of time stipulated in the agreement, but both the courts below without keeping in view this fact, decided the suit and appeal in favour of the plaintiff-respondent by the impugned judgments which are liable to be set-aside.

12. Per contra, learned counsel for the caveator-respondent has contested the appeal by arguing that all the points raised by the learned counsel for the appellant relate to pure questions of fact. There is no substantial question of law involved in this appeal. There are concurrent findings of facts by both the courts below against the appellant and as per the settled legal position, the concurrent findings of facts should not be disturbed in the second appeal, if those are not perverse.

13. Considered the rival submissions advanced by learned counsel for the parties.

14. The scope of second appeal under Section 100 C.P.C. is very limited and as per settled legal position, the High Court will not interfere with concurrent findings of fact recorded by the courts below unless those findings are perverse or against the law. While exercising jurisdiction under Section 100 C.P.C., the re-appreciation of evidence is not permissible.

15. The Apex Court in the case of **Hero Vinoth (Minor) Vs. Sheshammal,** Appeal (Civil) No.4715 of 2000 decided on 08.5.2006 has laid down the law as under:

"It is to be kept in mind that the right of appeal is neither natural nor an inherent right attached to the litigation. Being a substantive statutory right, it is to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add or to enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts will not be disturbed by the High Court in exercise of powers under this section. Further, a substantial question of law has to be distinguished from a substantial questions of fact."

16. In **E.Mahboob Saheb Vs. N.Sabbarayan Chowdhary, A.I.R. 1982,**

SC 679, the Supreme Court reiterated the law that if there are concurrent findings of fact reached by the lower court's the High Court cannot reappreciate the evidence and substitute its own conclusion in place of those entered by the lower court's.

17. In the case of **State of Karnataka Vs. Appa Balu Ingale, A.I.R. 1993, SC 1126,** it was held that concurrent findings arrived at by the two courts below are not to be interfered with by the High Court in absence of any special circumstances or unless they are perverse.

18. In **Gurdev Kaur Vs. Kaki (2007) 1 SCC 546,** Supreme Court considered the scope and ambit of Section 100 C.P.C. by referring various judgments and legislative background and dismissed the second appeal with costs after observing that the scope of Section 100 C.P.C. has not been correctly appreciated and applied by the High Court. The Apex Court observed that in view of the clear legislative mandate, the High Court could not have interfered with pure findings of facts arrived by the court's below.

19. Now reverting to the case in hand, on a careful perusal of both the judgments passed by the courts below it cannot be said that the concurrent findings of facts are perverse.

20. Copy of the written statement available on record shows that the defendant-appellant nowhere in his written statement has taken the plea that the undivided share in the joint property could not have been sold by him. It is also well settled that the arguments beyond pleadings cannot be sustained.

21. Both the learned Courts below have discussed all the facts and circumstances of the case in detail and after carefully scrutinizing the evidence available on record have recorded a concurrent finding that the plaintiff was always ready and willing to perform his part of the contract, but the defendant failed to execute the sale deed. Both the courts below were of the concurrent view that there is no bar, restricting a person to sell his share of undivided land. The agreement to sell being a registered document was found by the courts below as authentic and genuine document and the plea of the defendant-appellant that he being not well educated was not aware of its contents, was disbelieved by both the courts below on the ground that it cannot be expected from a Gram Pradhan that he will put his signature on a document without knowing its contents.

22. There does not appear any perversity or illegality in the findings recorded by the courts below requiring any interference by this Court in the second appeal.

23. Further, as per Section 100 C.P.C, a second appeal is admissible only on substantial questions of law.

24. Sub section (3) of Section 100 C.P.C. provides that in an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

25. A perusal of the memo of appeal in the present case shows that following two questions have been proposed by the learned counsel for the appellant as substantial questions of law:

"(a) Whether, the plaintiff/respondent was ready and willing

to execute sale deed in his favour from the defendant/appellant and his suit was liable to be dismissed in accordance with provisions laid down u/s 16 (c) of the Specific Relief Act.

(b) Whether, the learned Courts below did manifest error of law in not framing necessary issues with regard to (i) Readiness and willingness of plaintiff, (ii) Comparative hardship of parties, (iii) Effects of non-filing of replication, (iv) Frustration of agreement, (v) the effect of co-sharer's share in the land in question, (vi) refund of money by the appellant to the plaintiff/respondent and (vii) Money laundering job of plaintiff without any valid license etc. and has decided the case against the appellant in quite illegal manner."

26. In my view, the first substantial question as proposed by the learned counsel for the appellant is not a substantial question of law. On the contrary, it is purely a substantial question of fact. Whether the plaintiff was ready and willing to perform his part of contract is a pure question of fact because it is to be gathered from the facts and circumstances of the case and from the evidence available on record. So far as the second question is concerned, though a legal issue is involved in it i.e. effect of non framing of issues with regard to effect of non filing of replication, comparative hardship of parties etc. in the opinion of this Court, it is not an arguable question of law because the learned trial court has already framed issue no.4 with regard to comparative hardship/balance of convenience and has discussed all other points while deciding issue no.1.

27. In the facts and circumstances of the case as discussed above and in wake of the well settled legal position, this Court is of the considered view that none of the aforesaid questions framed by learned counsel for the appellant, can be termed as "substantial questions of law".

28. The term "substantial question of law" has been interpreted by Hon'ble Supreme Court in a catena of judgments.

29. In **State Bank of India and others Vs. S.N. Goyal; (2008) 8 SCC 92** the Hon'ble Supreme Court has held as under:-

"Second appeals would lie in cases which involve substantial questions of law. The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of section 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing in the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law."

30. In **Santosh Hazari Vs. Purushottam Tiwari, 2001(3) SCC 179** the Supreme Court considered what the

phrase "substantial question of law" means as under:-

"The phrase is not defined in the Code. The word "substantial", as qualifying question of law, means-of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with-technical, of no substances or consequence, or academic merely."

31. A Full Bench of Madras High Court in **Rimmalapudi Subba Rao Vs. Noony Veeraju, AIR 1951 Madras 969** considered this term and observed:

"when a question of law is fairly arguable, where there is room for difference of opinion or where the Court thought it necessary to deal with that question at some length and discuss an alternative view, then the question would be a substantial question of law. On the other hand, if the question was practically covered by decision of highest Court or if general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of case, it could not be a substantial question of law."

32. The above observations were affirmed and concurred by a Constitution Bench of Hon'ble Supreme Court in **Sir Chunilal Mehta and Sons Ltd. Vs. The Century Spinning and Manufacturing Company Ltd. AIR 1962 SC 1314**. Referring to above authorities, the Court in Santosh Hazari (supra) said:

"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

33. In view of the above cited legal position and in absence of any arguable substantial question of law, this appeal cannot be admitted.

34. Accordingly, the appeal is dismissed at the admission stage itself.

(2022)07ILR A1247
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.06.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Matters U/A 227 No. 17365 of 2021

Amit Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sushil Kumar Singh

Counsel for the Respondents:
G.A., Sri Anurag Singh, Sri Kunwar Ravi Prakash

Civil Law – Indian Penal Code, 1860 – Sections 323, 504 & 506 - Stay of suit - Divorce suit as well as Complaint Case u/s-323, 504, 506 I.P.C. filed by wife - Petitioner/husband prayed for stay of divorce suit proceeding, u/s-13 of H.M. Act, awaiting the result of the Complaint Case filed by the Opposite Party /wife - husband prayed that he may not be forced to file his Written Statement in the divorce suit otherwise his defence would be disclosed and his right to silence guaranteed in Article 20 (3) will stand violated causing his gross miscarriage of justice - Family court rejected the husband prayer - Held - civil court will not find any embarrassment, if both the criminal proceeding and the civil suit are tried simultaneously as the scope of enquiry and the standard of proof in both the proceedings are not identical (Para 22)

Dismissed. (E-5)

List of Cases cited:

1. Anant Vs Sheetal Misc. Petition No. 345/2020, MP HC, Jabalpur Bench at Indore

2. f M.S. Sheriff Vs St. of Madras (1954) A.I.R. 397 dated 18.3.1954

3. Ashok Kumar Pal Vs Smt. Sawan Pal (2008) SCC Online Calcutta 462

4. K. Sitaram Patro ors. Vs K. Saraladevi Patro (2016) SCC Online Orissa 209

5. M.S. Sheriff Vs St. of Madras AIR 1954 SC 397

6. P. Swaroopa Rani Vs M. Hari Narayana (AIR 2008 SC 1884

7. Syed Askari Hadi Ali Augustine Imam a ors. Vs State (Delhi Admn.) & ors. AIR 2009 SC 3232

8. N. Gurucharnam Vs The St. of Andhra Pradesh (2013 CriLJ 1061)

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

1. By means of the present petition, the petitioner is praying for quashing and stay of divorce suit proceeding, U/s-13 of H.M. Act, Regular Suit No. 337 of 2017, pending before Principal Judge-4, Family Court, Lucknow (Smt. Yogita Singh versus Amit Singh).

2. Brief fact of the case is that marriage of petitioner was solemnized with Opposite Party No. 2 on 24-05-2014 as per Hindu rites and rituals. The petitioner was in London, England in respect of the service with regards to the job and also took her (Opposite Party No. 2) with him to London Cityland. On 5.7.2015, the Opposite Party No. 2 instituted frivolous complaint of domestic violence against the petitioner in London in order to create false grounds of divorce. When the petitioner was in police custody, opposite party no.2 immediately ran away with valuable items, cash and jewellery of the petitioner from London to her parental home at Kanpur. On coming back to India, Opposite Party No. 2 lodged the F.I.R. on 22-07-2015 as Crime No. 28 of 2015, U/s- 498-A, 323, 406, 504, 506 I.P.C. and 3/4 D.P. Act against the petitioner and other family members. All the accused persons in the said Crime No. 28 of 2015 were granted bail and the petitioner was granted interim bail on 07-11-2015, then, the Opposite Party No. 2 filed a false Criminal Complaint No. 4216 of 2015, U/s- 323, 504, 506 I.P.C. creating a false ground of assault to her at the Court

premises at Kanpur, which was challenged by the petitioner and other family members before this Court at Allahabad and this Court at Allahabad quashed the proceedings against all family members of the petitioner. But the proceeding against the petitioner is continuing before the court of magistrate at the stage of Section 244 CrPC. Thereafter the Opposite Party No. 2 filed a case/complaint U/s-12 of Domestic Violence Act on 01-03-16 at Kanpur, copy of which is yet to be provided to the petitioner. Thereafter the Opposite Party No. 2 also filed a Criminal Complaint U/s-138 of N.I. Act on 26-04-2016 for dishonour of cheque which was obtained by the father of the Opposite Party No.2 from the father of the petitioner in his absence by exercising undue influence and coercion. The proceeding has been stayed by this Court vide order dated 04-09-2018.

3. The present case/suit filed by Opposite Party no.2 before the Family Court at Lucknow U/s 13 of H.M. Act on 17-03-2017, the petitioner filed preliminary objection under Order 7 Rule 11 of C.P.C. challenging Lucknow as the jurisdiction of the present divorce suit filed by the Opposite Party No. 2 herself in which she claimed to be a resident of Kanpur and all those cases are running in Kanpur, which was rejected by this Court vide order dated 13-12-2018. In the present case of divorce proceeding, the petitioner filed an application for stay the proceeding and awaiting the result of Complaint Case No. 4216 of 2015 filed by the Opposite Party No. 2 and the said case is at the stage of recording evidence U/s- 244 Cr. P. C., but she did not appear there, and is avoiding the process of Court. Thereafter, the petitioner moved an application before the Family Court Lucknow stating therein that till all the prosecution evidences of Opposite Party No. 2 in her Complaint Case No. 4216 of 2015, U/s-323, 504, 506 I.P.C. is not completed, the petitioner may not be forced to file his Written Statement in the present divorce suit matter, otherwise his defence would be disclosed and the petitioner's right to silence guaranteed by the Constitution of India in Article 20 (3) and a fair trial guaranteed under Article-21 will both stand violated causing his gross miscarriage of justice. But the family court, Lucknow rejected the prayer of the petitioner vide order dated 01-02-2021.

4. The petitioner relies upon the judgment dated 11-09-2014, passed in Writ Petition No. 13211 of 2013 and the judgment dated 08-02-2021 in the matter of Anant versus Sheetal in Misc. Petition No. 345/2020, passed by High Court of Madhya Pradesh, Jabalpur Bench at Indore and also relies on the judgment of the Supreme Court in the case of M.S. Sheriff vs. State of Madras (1954) A.I.R. page no. 397 dated 18.3.1954. Thus, the petitioner submits that the impugned order dated 01-02-2021 is bad in law and deserves to be stayed and further divorce proceedings u/s 13 of the Hindu Marriage Act pending before the Family Court, Lucknow may also be stayed.

5. The counsel for opposite party no.2, on the basis of counter affidavit filed by him, submits that this Court by means of orders dated 04.08.2017 and 14.11.2019, passed in writ petition numbers 17655 (M/S) of 2017 and 31176 (M/S) of 2019 respectively has been pleased to direct for expeditious disposal of the applications filed by the applicant for expeditious disposal of the divorce suit No. 337 of 2017. It is further submitted that the petitioner has tried to obtain order for staying the proceedings for Regular Suit till termination of the criminal proceedings,

though, there are two orders of this Court, wherein after considering the request of the answering respondent, directions have been issued for deciding the application filed by the answering respondent for expeditious disposal of the divorce suit.

6. The counsel for the opposite party no.2 further submits that the present writ petition has been filed on 13.08.2021 challenging the order dated 01.02.2021 passed by the Additional Principal Judge-4, Family Court, Lucknow, whereby the application of the petitioner seeking opportunity to file written statement after completion of criminal proceedings was rejected. On 24.02.2020, the last opportunity for filing written statement was granted to the petitioner but he has not chosen to file written statement till date. By means of the order dated 12.04.2021, the Family Court, Lucknow closed the opportunity for filing of written statement by the petitioner and the direction was issued for proceeding under Order VIII Rule 10 Code of Civil Procedure.

7. The counsel for opposite party no.2 submits that after passing of the order dated 12.04.2021, the present writ petition has been filed after a considerable delay, when the proceeding has reached at the stage of arguments only with the ulterior motive of delaying the proceedings and further harassing the opposite party no. 2. It is further submitted that the aforesaid case laws relied upon by the petitioner are not applicable in the present case. Only lingering on practice has been adopted by the petitioner. Thus, the petition is liable to be rejected.

8. The counsel for the respondents has relied on the judgements in the case of ***Ashok Kumar Pal vs. Smt. Sawan Pal (2008) SCC Online Calcutta 462, K. Sitaram Patro and others vs. K. Saraladevi Patro (2016) SCC Online Orissa 209 and M.S. Sheriff vs. State of Madras AIR 1954 SC 397.***

9. Heard Mr. Sushil Kumar Singh, learned counsel for petitioner, learned AGA for the State as well as Mr. Anurag Singh, counsel for opposite party no.2 and perused the material available on record.

10. On perusal of the record, it transpires that the criminal proceedings as well as civil proceeding for divorce on ground of cruelty and polygamy was raised by the respondents against the petitioner. It is also admitted fact that the civil suit for divorce petition is still pending at the stage of Order VIII Rule 10 of CPC. The main ground of this petition raised by the petitioner is that the civil proceeding against the petitioner may be stayed, otherwise the petitioner's right to silence guaranteed under Article 20(3) and fair trial and lawful arrest of a person guaranteed under Article 20 of the Constitution of India would stand violated causing his gross injustice. Submission of the counsel for the petitioner is to stay the civil proceeding at this stage without disclosing his defence.

11. Both civil and criminal proceedings can be initiated by the victim/respondents simultaneously with distinct impetus and objective. The Supreme Court in ***P. Swaroopa Rani vs. M. Hari Narayana (AIR 2008 SC 1884)*** held that: "...It is, however, well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case."

12. Earlier in ***M. S. Sheriff vs. The State of Madras and Others (AIR 1954 SC 379)***, a constitution bench of the Supreme Court while discussing the precedence of both criminal and civil matter as to which proceeding should be stayed observed as under:

"...As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment."

"...Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might made some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under section 476. But in this case, we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

13. The Supreme Court in ***Syed Askari Hadi Ali Augustine Imam and Ors. vs. State (Delhi Admn.) and Ors. (AIR 2009 SC 3232)*** discussed the same issue and reiterated as under:

"...Indisputably, in a given case, a civil proceeding as also a criminal proceeding may proceed simultaneously. Cognizance in a criminal proceeding can be taken by the criminal court upon arriving at the satisfaction that there exists a prima facie case.

The question as to whether in the facts and circumstances of the case one or the other proceedings would be stayed would depend upon several factors including the nature and the stage of the case."

10. It is, however, now well settled that ordinarily a criminal proceeding will have primacy over the civil proceeding. Precedence to a criminal proceeding is given having regard to the fact that disposal of a civil proceeding ordinarily takes a long time and in the interest of justice the former should be disposed of as expeditiously as possible."

14. The High Court of *Andhra Pradesh discussed the same point in* **N. Gurucharnam vs. The State of Andhra Pradesh (2013 CriLJ 1061)** held as under:

"...When there are both civil and criminal liabilities in respect of an issue

against a person, he is liable to be prosecuted both on the criminal side and on the civil side."

15. Section 498A of the Penal Code, 1860 deals with cruelty by husband or relatives of husband. The said provision provides that whoever, being the husband or the relatives of the husband of a woman subjects such woman to cruelty, shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. What amounts to cruelty for the purpose of the said provision has also been clarified in the explanation added to the said section which provides that:

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

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

16. Thus, cruelty has a limited meaning as defined in the said provision.

17. But under the Hindu Marriage Act cruelty has not been defined. As such, any act or conduct which though may not amount to cruelty within the meaning of the definition of cruelty as given in section 498A of the Penal Code, 1860, may constitute cruelty as envisaged under section 13(1)(ia) of the Hindu Marriage Act.

18. Since the cruelty has not been defined in the Hindu Marriage Act, it is difficult to define precisely as to what exactly cruelty means under section 13(1)(ia) of the Hindu Marriage Act. Cruelty under section 13(1)(ia) of the Hindu Marriage Act may extend to behaviour which may cause pain and injury to the mind as well as to render the continuance in matrimonial home an ordeal where it becomes impossible for them to live together with mental agony, torture or distress. The question as to whether an act complained of was cruel or not is to be determined from whole of the facts and matrimonial relations between the spouses regard being given to their culture, temperament, status in life and state of health of the parties interaction between them in their daily life. Cruelty for the purpose of matrimonial relationship means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury or to have caused reasonable apprehension of bodily sufferings or of being injured. Cruelty may be physical, mental or legal. In matrimonial laws it may be of infinite variety. It may be by words, gestures or by mere silence, violence or non-violence. To constitute cruelty, the conduct complained of, should be so grave and weighty as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be more serious than ordinary wear and tear of the married life. The cumulative conduct, taking into consideration the circumstances and background of the parties has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in matrimonial laws or not. Thus, cruelty postulates a treatment of the petitioner, with such cruelty as to reasonable apprehension in the petitioner's

mind that it will be harmful or injurious for the petitioner to live with the other spouse. Cruelty may be physical or mental. Mental cruelty may consist of verbal abuse and insult by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

19. Thus, it appears that the "cruelty' under the Hindu Marriage Act has a different meaning altogether, than that of the concept of "cruelty' as envisaged in the Penal Code, 1860. It necessarily follows that even the act complained of, in the criminal proceeding may not constitute cruelty within the meaning of section 498A of the Penal Code, 1860, but, still such act may constitute a ground of divorce on the ground of cruelty where such acts are so grave and weighty as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other.

20. Since the concept of cruelty under the Penal Code, 1860 is not exactly identical with the concept of cruelty as envisaged under section 13(1)(ia) of the Hindu Marriage Act, this Court cannot hold that there will be any embarrassment on the part of the Civil Court in continuing with the trial of the suit during the pendency of the criminal proceeding.

21. In divorce petition, several opportunities were given to the petitioner to file written statement, but he failed to do so and as such the opportunity for filing his defence through written statement has been closed. Thus, the divorce petition is still pending at the stage of maturity and this Court had already directed the learned civil court to decide the suit expeditiously.

22. In my view, in these circumstances, the civil court will not find any embarrassment, if both the criminal proceeding and the civil suit are tried simultaneously as the scope of enquiry and the standard of proof in both the proceedings are not identical. Stay of any one of such suit/proceeding will surely have a wrong impact not only on the society but also on the parties in their matrimonial life. Under such circumstances, this Court does not find any justification to interfere with the order of learned civil court and thus, the petition being devoid of merit is, accordingly, **dismissed**.

23. Interim order, if any, stands vacated.

(2022)07ILR A1253
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.06.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matters U/A 227 No. 24435 of 2018
(Old Misc. Single No. 24435 of 2018)

Smt. Fatima ...Petitioner
Versus
Smt. Shahana & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bahar Ali, Sri R.D. Shahi

Counsel for the Respondents:
C.S.C., Sri A.Z. Siddiqui, Sri Mohak Srivastava, Sri Rajiv Raman Srivastava, Sri Shakeel Ahmad Jamal, Sri Uma Shankar Sahai

Civil Law - Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 28 - Enforcement of landlord's obligation regarding repairs, etc - Section 28 - tenant requested the

landlady, to get the demised shop repaired, but landlady refused - tenant made an application to the Prescribed Authority praying that she may be permitted to get the shop repaired - landlady filed objection saying that the demised shop is in a dilapidated condition - Prescribed Authority rejected the tenant's application seeking permission to carry out repairs - He noted that the premises are dilapidated and cannot be repaired - permitting repair of the shop would be taking a risk - Held - High Court issued a commission to ascertain whether the shop in dispute is dilapidated beyond redemption - Commission report showed that the demised shop is a public nuisance and a serious hazard to human life and property in its vicinity & it is already under a statutory demolition notice issued by the Nagar Palika - directing for repair would imperil tenants own life - petition dismissed with costs in the sum of Rs.25,000/- payable by the tenant to the landlady (Para 13, 14)

Dismissed. (E-5)

List of Cases cited:

Satya Prakash & ors. Vs District Judge, Sultanpur & ors. , 2018 (1) AWC 877 (LB)

(Delivered by Hon'ble J.J. Munir, J.)

1. This petition under Article 227 of the Constitution has been preferred by the tenant, challenging an order dated 10.08.2018 passed by the Prescribed Authority under The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No.13 of 1972) (for short, 'the Act'), whereby her application under Section 28 of the Act has been rejected.

2. The petitioner, Smt. Fatima is a tenant in a shop situate in Churi Wali Gali, Mohalla Tansenganj, Pargana Khairabad, Tehsil and District Sitapur. Smt. Fatima shall hereinafter be called 'the tenant'. The original tenant in the shop was the tenant's husband and after his death, she has inherited the tenancy, where she claims to have a shop selling bangles. The landlady of the shop is Smt. Shahana Siddiqui, to whom the tenant pays rent at the rate of Rs.550/- per month. The current tenancy is there since the time of the former landlord, Kamal Ahmad Siddiqui. It is claimed on behalf of the tenant that the shop to the east of the demised shop collapsed during the rainy season of 2016, on account of which the eastern wall of the demised shop and a part of the lintel in the roof need repairs. The tenant has requested the landlady, respondent no.1 several times to get the demised shop repaired, but she did not oblige. Instead, the landlady flatly refused the request for repairs and threatened to get the shop vacated. Thereupon, the tenant sued for a permanent injunction before the Civil Judge (Jr. Div.), Sitapur seeking an injunction in terms that she may not be dispossessed from the demised shop otherwise than in due course of law. The said suit was numbered on the file of the Civil Judge (Jr. Div.), Sitapur as O.S. No.615 of 2016, which is still pending.

3. It is the tenant's further case that the landlady has refused to accept rent since the month of January, 2020, whereupon it was remitted by money order on 22.09.2016. The money order was also refused. The tenant is depositing the rent in Court under Section 30 of the Act vide Misc. Case No. 147 of 2016. The said case is also pending. The tenant caused a notice to be served upon the landlady through her Counsel on 06.12.2017 to get the eastern wall of the demised shop repaired, which the landlady duly received. But, the landlady did not get any repairs carried out,

nor did she answer the notice. Accordingly, the tenant made an application to the Prescribed Authority under Section 28 of the Act, with a prayer that the eastern wall of the demised shop, details of which were given at the foot of the application, together with the western part of the lintel in the roof and the other damages to the shop, may be permitted to be repaired and the expenses defrayed out of rent payable for the period of two years.

4. Objections to the said applications were filed on behalf of the landlady, saying that the demised shop is in a dilapidated condition and the entire building, of which it is a part, is dilapidated. A substantial part of the building has fallen down over the period of a year and a half. The tenant or her daughters are not doing any business and the demised shop is virtually a rubble. It is mentioned that on 06.01.2015, the adjoining shop's projection collapsed, leading to injury sustained by many. At that time, the eastern wall of the demised shop also collapsed. The projection of the demised shop collapsed during the rainy season. The tenant and her daughters are insistent upon getting the demised shop, which is dilapidated, reconstructed forcibly. The building, where the shop is, located is about 100-150 years old and a danger to human life. There are then some not very relevant pleadings to the proceedings in hand, that say that the tenant has purchased a premises on a road called Krishna Babu Wali Sarak, that includes a house and three shops. The tenant and her daughters carry on their business there. This property had been purchased in the names of the tenant's daughters through a registered sale deed dated 07.06.2016 from one Jagdish Prasad son of Munshi Lal.

5. It has also figured on record that the landlady has been served a notice by the Executive Officer of the Nagar Palika Parishad, Sitapur, under Section 263(1) of the U.P. Municipalities Act, 1916, asking her to demolish the demised shop, which is dilapidated and a danger to human life and property. A copy of the said notice dated 26.02.2016 is on record as Annexure No.3 to the writ petition. A commission was also issued by the Prescribed Authority before he decided the application under Section 28 of the Act by the order impugned. That report, though not very informative, broadly shows the demised property to be a dilapidated structure. The Prescribed Authority, vide the order impugned dated 10.08.2018, has rejected the tenant's application under Section 28 seeking permission to carry out repairs.

6. Aggrieved, this petition has been filed.

7. The Prescribed Authority has remarked that the tenant has not filed any estimate along with the application when according to Section 28 of the Act an estimate of the expenditure for the repairs is essential. The papers filed by the landlady include the notice that she had received from the Nagar Palika, asking her to demolish the shop as it was dilapidated and a danger to human life and property. The Prescribed Authority has particularly noticed that the competent Authority in the Nagar Palika, after due inspection, has passed orders, requiring the landlady to demolish the shop. It has been opined that the notice for demolition, that the landlady has received from the Nagar Palika, cannot be ignored. It has been observed that ignoring the report and permitting a repair of the shop would be taking a risk that does not appear to be worth its while. The premises are dilapidated and cannot be repaired, on account of which it has been

directed to be demolished. It has also been noticed by the Prescribed Authority that there is threat to human life and property, if the shop is not demolished and permitted to be repaired. It is on these findings that the Prescribed Authority has rejected the application.

8. Heard Mr. R.D. Shahi, learned Counsel for the tenant-petitioner along with Mr. Bahar Ali and Mr. U.S. Sahai and Mr. Shakeel Ahmad Jamal, learned Counsel appearing on behalf of the private respondents.

9. The learned Counsel for the tenant has impressed upon the Court that resistance by the landlady to the tenant's proposal and efforts to get the demised shop repaired is an effort to evict the tenant. The action of the landlady in thwarting the tenant's efforts to get the demised shop repaired at the latter's expense is a design and stratagem to get rid of the tenancy. Learned Counsel submits that even if the shop is demolished, the tenancy would not come to an end as the relationship of landlord and tenant would continue in respect of the underlying land. To the above end, learned Counsel for the tenant has relied upon a decision of this Court in **Satya Prakash and others v. District Judge, Sultanpur and others, 2018 (1) AWC 877 (LB). In Satya Prakash** *(supra)*, it has been held:

"15. If the landlord tenant relationship existed between the petitioners and the opposite party No. 3 and it continued even after the destruction of the roofed structure as also if the tenancy did not become automatically void on such destruction, then, proceedings under Section 20 of the Act, 1972 would be maintainable before the SCC Court.

16. The moot point is, did the tenancy continue even after destruction of roofed structure. The first and foremost question, therefore, is whether the 'building' which was the subject matter of tenancy existed on the date of notice of eviction as also initiation of proceedings under Section 20 of the Act, 1972 or not. Section 3(i) of the Act, 1972 defines building as under:-

"3(i) "Building", means a residential or non-residential roofed structure and includes-

(i) any land (including any garden), garages and out-houses, appurtenant to such building;

(ii) any furniture supplied by the landlord for use in such building;

(ii) any fittings and fixtures affixed to such building for the more beneficial enjoyment thereof;"

17. Building as defined aforesaid comprises of a roofed structure and obviously land underneath or land which it bounds with its walls. The inclusive part of the definition relates to land appurtenant and not underneath. It has been so held by the Supreme Court in a decision of State of U. P. and Ors. v. VIIth Additional District Judge and Others, 1992 (4) SCC 429. The relevant extract of this judgment, which pertain to the Act, 1972, is quoted herein below:-

"7. In any case, the definition of 'building' under the Act clearly shows that the building thereunder means roofed structure including the land underneath the said structure. Inclusive part of the definition only relates to the land

appurtenant to such building and not to the land underneath the roofed structure."

18. Generally speaking also the term 'building' includes the ground on which it stands as has been held by the Supreme Court in the case of D.G. Gose and Co. v. State of Kerala reported in MANU/SC/0330/1980 : (1980) 2 SCC 410, wherein the term 'lands and buildings' was under consideration in the context of Entry 49 of List II Schedule- VII of the Constitution. Paragraphs 21, 22 and 23 of which read as under:-

"21. The word "building" has been defined in the Oxford English Dictionary as follows:

That which is built; a structure, edifice: now a structure of the nature of a house built where it is to stand.

Entry 49 therefore includes the site of the building as its component part. That, if we may say so, inheres in the concept or the ordinary meaning of the expression "building".

22. A somewhat similar point arose for consideration in Corporation of the City of Victoria v. Bishop of Vancouver Island with reference to the meaning of the word "building" occurring in Section 197(1) of the Statutes of British Columbia, 1914. It was held that the word must receive its natural and ordinary meaning as "including the fabric of which it is composed, the ground upon which its walls stand and the ground embraced within those walls". That appears to us to be the correct meaning of "building".

23. The Act contains its own definition of what is meant by "building", and Clause (e) of Section 2 is to the following effect:

(e) "building" means a house, outhouse, garage, or any other structure or part thereof, whether of masonry, bricks, wood, metal or other material, but does not include any portable shelter or any shed constructed principally of mud, bamboos, leaves, grass or thatch or a latrine which is not attached to the main structure.

There are two explanations to the clause, but they are not relevant for the controversy before us. The definition therefore makes it quite clear that as a house, outhouse, garage or any other structure cannot be erected without the ground on which it is to stand, the expression "building" includes, the fabric of which it is composed, the ground upon which its walls stand and the ground within those walls. It is equally clear that the ground referred to above would not have a separate existence, apart from the building, and would not be "lands" jointly stated with "buildings" as the subject-matter of the tax in entry 49 of List II. In other words, the "ground" referred to above would not be the subject-matter of a separate tax, apart from the tax on the building standing on it."

19. The case of Corporation of the City of Victoria v. Bishop of Vancouver Island referred in the aforesaid judgment is reported in AIR 1921 PC 240. The same view has been taken by the Kerala High Court in a judgment reported in MANU/KE/0021/1995 : AIR 1995 Kerala 99; V. Kalpakam Amma v. Muthurama Iyer and another case reported in MANU/KE/0012/1991 : AIR 1991 Kerala 55; George J. Ovungal v. Peter.

20. In view of the above discussion, it is not in dispute that 'building' as defined in Section 3(i) of the Act, 1972 not only includes the structure constructed over the land but also the land over which it is constructed. It also includes the land appurtenant to the structure."

10. The learned Counsel appearing for the respondents emphasized that the question here is not about seeking eviction of the tenant, but abating a danger to human life and property, which the dilapidated building has become. The demolition notice issued by the Nagar Palika after due inspection, according to the learned Counsel for the respondents, is warrant enough to believe that the demised shop is no longer fit for human habitation or use.

11. At the hearing of this petition before this Court, there was much contention between parties, if indeed the demised shop was so dilapidated that it was beyond repair. The said question is a pure question of fact and the Prescribed Authority having taken a plausible view of the matter on facts and evidence to hold that the demised shop is so dilapidated that it is beyond repair and a danger to human life, this Court need not examine the question further. Considering, however, the fact that it is the cynosure of all contentions between parties, whether the demised shop is indeed so dilapidated that it cannot be repaired, this Court though it fit to issue a commission to the learned Civil Judge (Sr. Div.), Sitapur vide order dated 02.12.2021, requiring him to ascertain whether the shop in dispute is dilapidated beyond redemption. It was also directed that the learned Civil Judge would have the assistance of a competent Civil Engineer from the local establishment of the PWD at Sitapur and the entire proceedings of the commission would be photographed and videographed.

12. The learned Civil Judge executed our commission on 08.12.2021, maintaining an order-sheet of the proceedings from 04.12.2021 to 08.12.2021 very punctiliously. The commission too was executed by the learned Civil Judge (Sr. Div.), Sitapur, Mr. Pramod Singh Yadav with great industry, care and ability. He inspected the demised shop from within and without as also from the roof top, which appears from his report to have been a considerably perilous venture. He had with him an Executive Engineer from the Public Works Department, Sitapur, besides a photographer, who captured both stills and videos of the demised shop and the building of which it is a part. The photographs are annexed as Annexures 10 to 20 to the learned Civil Judge's commission report. There is a separate C.D. also submitted, which gives a more 'live' and 'realistic' picture of the condition that the demised shop and the building housing it is in. The relevant part of the commission report submitted by the learned Civil Judge must be quoted in some of its relevant detail. It reads:

"वादग्रस्त दुकान की छत के निरीक्षण के उपरांत मेरे द्वारा दुकान के अंदर की दीवार अक्षरांकित BC, CD तथा DG का निरीक्षण करने का प्रयास किया गया। निरीक्षण के दौरान यह पाया गया कि दुकान के अंदर की दीवार अक्षरांकित BC, CD तथा DG सामने से नहीं दिख रही थी बल्कि उसके किनारे किनारे लकड़ी व लोहे की रैक में दुकान का समान रखा था। समान हटवा कर देखने पर दीवार का कुछ अंश (कुछ ईंटें) दिखाई दिया जो बिना प्लास्टर का था। **वीडियो सी०डी० संलग्नक सं० 22 में 15:00 मिनट से 15:12 मिनट तक दुकान के अंदर से दीवार के अंश को दिखाया गया है।** वादग्रस्त दुकान के ऊपर रोड की तरफ़ नीले रंग की प्लास्टिक की पन्नी लगी थी जिसे हटवाकर दुकान की दीवार अक्षरांकित AB के ऊपर की दीवार (जिसके बारे में श्रीमती फ़ातिमा के विद्वान अधिवक्ता द्वारा बताया गया कि उक्त

दीवार की मरम्मत के लिए ही उनके द्वारा न्यायालय में मुकदमा किया गया है) देखी गयी जो दुकान के बाहर से भी दिख रही थी तथा देखने से अत्यंत जर्जर अवस्था में थी तथा उसके आधार पर यही निष्कर्ष निकल रहा है कि दीवार अक्षरांकित BC, CD तथा DG भी जर्जर अवस्था में है। नक्शा कमीशन में दर्शित भुजा AB के ऊपर की दीवार को **फोटोग्राफ़ संलग्नक 13, 14, 15, 16 तथा 17** में अक्षर PQRS से तथा टीन शेड को अक्षर T से दर्शित किया गया है। अधिशासी अभियंता पी०डब्लू०डी० सीतापुर द्वारा भी मेरे निर्देश पर दुकान के अंदर से दीवार अक्षरांकित BC का निरीक्षण किया गया। अधिशासी अभियंता पी०डब्लू०डी० सीतापुर द्वारा भी अपनी जांचा आख्या प्रेषित की गयी है जो **संलग्नक सं09** के रूप में संलग्न है। कमीशन कार्यवाही के दौरान तैयार स्पॉट मेमो, नक्शा कमीशन, अधिशासी अभियंता पी०डब्लू०डी० सीतापुर की जांच आख्या मय पत्र, फोटोग्राफ़ (कुल 12) तथा वीडियो रिकॉर्डिंग की सी०डी० और दि० 04/12/2021 को कमीशन के समय तैयार **स्पॉट मेमो, जिसकी मूल प्रति माननीय न्यायालय को प्रेषित की जा चुकी है, माननीय उच्च न्यायालय के आदेश दि० 02/12/2021 मय ई-मेल पत्र की प्रति, कम्प्यूटर विभाग जनपद न्यायालय सीतापुर से प्राप्त माननीय उच्च न्यायालय के आदेश दि० 07/12/2021 की प्रमाणित प्रति तथा अधिशासी अभियंता पी०डब्लू०डी० सीतापुर का पत्र दि० 08/12/2021 की प्रति कमीशन आख्या का भाग हैं।**

समग्र रूप से वादग्रस्त दुकान का निरीक्षण करने पर अधोहस्ताक्षरी द्वारा यह पाया गया कि वादग्रस्त दुकान बिना पक्की छत के है और अत्यंत जर्जर अवस्था में है जिसपर टीन शेड पड़ा है तथा उसके ऊपर ईंट का मलबा पड़ा है और जंगली पेड़ की डाल और बेल पड़ी है। वादग्रस्त दकान की छत को टीन शेड से सहारा दिया गया है। नक्शा कमीशन में दर्शित वादग्रस्त दुकान की दीवार अक्षरांकित BC, CD तथा DG सामने से नहीं दिख रही थी। उसको लोहे और लकड़ी की रैक से घेरा गया है। वादग्रस्त दुकान की दीवार अक्षरांकित AB के ऊपर की दीवार दिख रही थी जो अत्यंत जर्जर अवस्था में है तथा उसके आधार पर यही निष्कर्ष निकल रहा है कि दीवार अक्षरांकित BC, CD तथा DG भी जर्जर अवस्था में है तथा पूरी दुकान को टीन एवं लोहे तथा लकड़ी के फ्रेम का सपोर्ट देकर चलाया जा रहा है। **अधिशासी अभियंता पीडब्लूडी० सीतापुर की जांच आख्या मय पत्र संलग्रक सं० 9 के अनुसार "जिस बिल्डिंग में यह दुकान है वह पूर्णतः जीर्णशीर्ण अवस्था में है एवं पूरी बिल्डिंग एवं दुकान के ऊपर कोई पक्की छत नहीं है। दुकान टीन के फ्रेम में चलाई जा रही है। अतः यह बिल्डिंग पूरी तरह ध्वस्त करने योग्य है अन्यथा की स्थिति में दुर्घटना एवं जानमाल का खतरा भी पहुंच सकता है।"** अधोहस्ताक्षरी वादग्रस्त दुकान के जर्जर अवस्था में होने के बाबत अधिशासी अभियंता की उक्त आख्या से पूर्णतया सहमत है तथा कमीशन कार्यवाही के दौरान किए गए निरीक्षण के आधार पर **अधोहस्ताक्षरी का यह निष्कर्ष है कि वादग्रस्त दुकान जर्जर अवस्था में है तथा अग्रेतर यह इतनी जर्जर अवस्था में है कि यह मानव जीवन तथा जानमाल के लिए खतरनाक है।"**

13. The above report does not spare a grain of doubt that the demised shop is a public nuisance and a serious hazard to human life and property in its vicinity. It is already under a statutory demolition notice issued by the Nagar Palika. It has been spared demolition because of the interim order passed by this Court. After looking into the report of the commission and the photographs, this Court is, indeed, surprised that the tenant seeks to prevent, by asking for repairs of the said shop, demolition of a building that may imperil her own life or those of her family members. This Court finds the stand of the tenant very unreasonable and very unfair. There is absolutely nothing to suggest that the landlady's stand in the present proceedings is one to secure the tenant's eviction. The state and condition of the demised shop is abominable and a towering threat to one and all in the vicinity. The Nagar Palika ought to take immediate steps to carry out its statutory duty in the larger public interest and raise down the demised shop, including the entire dilapidated structure of which it is a part. Of course, demolition has to be carried out, if it has to be done by the Nagar Palika, strictly in accordance with law and after hearing affected parties, but at the same time, not stretching the processes to an extent that the mischief, that is sought to be remedied, comes true.

14. In view of what has been said hereinabove, this Court does not find any merit in this petition. It is **dismissed with**

costs in the sum of **Rs.25,000/-** payable by the tenant to the first respondent-landlady. The interim order dated 28.08.2018 is hereby vacated.

15 . Let a copy of this order be communicated to the Judge, Small Cause Court, Sitapur and the Executive Officer, Nagar Palika Parishad, Sitapur by the Senior Registrar.

(2022)07ILR A1260
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.07.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 2702 of 2008
with
Criminal Appeal No. 2786 of 2008

Smt. Reena Srivastava ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Indu Prakash Singh

Counsel for the Respondent:
Sri Chandra Shekhar Pandey, Government Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Section 302/34, The Code of Criminal procedure, 1973 - Section 313 - Appeal against conviction - Murder - Indian Evidence Act, 1872 - Section 25,26,27 - difference between ''interested' and ''related' - "Related" is not equivalent to "interested" witnesses - a related witness cannot be said to be an ''interested' witness merely by virtue of being a relative of the victim - testimony of the related witness cannot be discarded only for the reason that they are relatives of the deceased . (Para - 25,26,27)

Incident occurred inside bed-room where husband and wife went to sleep - husband found murdered - Accused had illicit relations with another accused (wife of the deceased) - complainant, deceased and their younger brother all went to sleep in their rooms after having meals - rest of the family members went to sleep on the roof along with their mother - evidence corroborated by the recovery of the knife used in the crime and the vest (Baniyan) of the accused - witnesses of facts - family members of deceased - denied the fact of any kind of bickering or dispute between two brothers -- Some unknown person killed in the night - motive was proved - motive was that both convict/appellants had illicit relations with each other - All the links of chain of circumstances proved - trial Court held -- convict/appellant killed deceased by knife in furtherance of common intention - sentenced them with sentences – aggrieved - hence Two appeals preferred.

(Para - 2,3,8,11,13,28)

HELD:- Prosecution has proved its case beyond reasonable doubt. The murder of the deceased was committed by the convict/appellant in connivance with another convict/appellant in furtherance of a common intention. Trial Court rightly held the accused persons guilty and sentenced them with imprisonment for life and fine. Conviction order upheld. **(Para - 28)**

Criminal appeals dismissed. (E-7)

List of Cases cited:-

1. Kishore Bhadke Vs St. of Mah. , (2017) 3 SCC 760

2. Mehboob Ali & anr. Vs St. of Raj. , (2016) 14 SCC 640

3. St. (NCT of Delhi) Vs Navjot Sandhu @ Afsan , Guru , (2005) 11 SCC 600

4. Pulukuri Kottaya & ors. Vs Emperor , AIR 1947 PC 67

5. Raju Manjhi Vs St. of Bihar , (2019) 12 SCC 784

6. Kartik Malhar Vs St. of Bihar , (1996) 1 SCC 614

7. Mohd. Rojali Vs St. of Assam , (2019) 19 SCC 567

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. These two appeals have been filed by the convicts/appellants Smt. Reena Srivastava and Ajai Prasad @ Ajai Kumar @ Dhirendra Kumar Srivastava (herein-after referred to Ajai Prasad, against the impugned judgment and order dated 18.11.2008 passed by Additional Sessions Judge, Court No. 4, Sultanpur in Sessions Trial No. 315 of 2005 arising out of Case Crime No. 391 of 2005 under Section 302/34 of the Indian Penal Code, 1860 (in short "I.P.C."), Police Station Musafirkhana, District Sultanpur, whereby convict/appellant Reena Srivastava has been held guilty for the offence punishable under Section 302/34 IPC and sentenced to imprisonment for life coupled with a fine of Rs.20,000/- and in default of payment of fine a further sentence for a period of one year and convict/appellant Ajai Prasad has been held guilty under Section 302 IPC and sentenced to life imprisonment coupled with a fine of Rs. 30,000/- and in default of payment of fine, further sentence for a period of one year and six months.

2. Necessary facts for disposal of these appeals in short are as under:-

A First Information Report (in short F.I.R.) was registered at Case Crime No. 391 of 2005, under Section 302 I.P.C. at Police Station Musafirkhana, District Sultanpur on the basis of a written report presented by the complainant Pankaj Kumar. In the written report it has been narrated that the complainant and his brother Satish and Vipin after having their meals in the night, went to sleep in their rooms and rest of the family members went to sleep on the roof along with their mother. In the night the wife of his brother Vipin at about 1 O'clock went to sleep on the roof near his (complainant) mother. In the morning of 19.06.2005 at about 6 AM, his mother shouted loudly and told that Vipin was lying dead on his bed. He ran towards the room of his brother Vipin and found him lying dead on his bed. There were injuries on his body. Some unknown person had killed him in the night.

3. The F.I.R. was registered on 19.06.2005 at 8.20 AM. Investigation started, Panchayatnama of the body of the deceased was conducted. Body was sent for post-mortem examination and post-mortem examination was conducted on the cadaver of the deceased. During investigation, the Investigating Officer finding incriminating material against the convicts/appellants arrested them on 27.06.2005, whereafter they allegedly confessed the crime. On the same day i.e. 27.06.2005 the convict/appellant Ajai Prasad got recovered the knife, which was used for murdering the deceased and also the Vest (Baniyan), which he wore at the time of killing the deceased and on which blood spilled. The recovery of weapon of offence was made at the pointing out of the convict/appellant Ajai Prasad in the presence of the witnesses and the recovery memo of the same was prepared, which is Exhibit Ka-26. At the time of recovery of weapon the convict/appellant Ajai Prasad confessed the crime and told that this is the knife which he used to kill the deceased Vipin and he killed him by stabbing the knife in his neck and the Vest, which he wore at the time of committing murder got stained with blood

of the deceased, therefore, he hid the knife and Vest at the place of recovery.

4. After completing the investigation, the Investigating Officer found the involvement of both the convicts/appellants in the crime and submitted charge-sheet against them under Section 302/34 IPC. On the charge-sheet so submitted, learned Magistrate concerned took the cognizance and committed the case to the Court of Sessions for trial. The Court of Sessions framed the charges under Section 302 read with Section 34 IPC against the convict/appellant Reena Srivastava and under Section 302 IPC against the convict/appellant Ajai Prasad. Both the convicts/appellants denied the charges and claimed to be tried.

5. In order to prove its case the prosecution examined 10 witnesses, which are as under:-

(i) **P.W. 1**- Pankaj Kumar Srivastava, the complainant and the brother of the deceased;

(ii) **P.W. 2**- Prabhavati Srivastava, the mother of the deceased;

(iii) **P.W. 3**- Dr. Mahendra Maurya, Physician who conducted the post-mortem of the body of the deceased-Vipin Kumar Srivastava;

(iv) **P.W. 4**- Head Moharrir, Alok Kumar Singh, who registered the FIR and entered the same in the concerned General Diary (G.D.);

(v) **P.W. 5**- Daljeet Singh, Senior Sub-inspector, who accompanied the Officer-in-Charge Nirankar Singh at the time of recovery of weapon of offence and the Vest at the pointing out of the convict/appellant Ajai Prasad;

(vi) **P.W. 6**- Yaduraj Singh, an independent witness;

(vii) **P.W. 7**- Mamta Srivastava, sister of the deceased;

(viii) **P.W. 8**- Shailendra Kumar Srivastava, younger brother of the deceased;

(ix) **P.W. 9**- Chandra Prakash Tiwari, Officer-in-Charge of Police Station Musafirkhana and second I.O.of the case;

(x) **P.W. 10**-Nirankar Singh, Officer-in-Charge of Police Station, who initially conducted the investigation.

Apart from above witnesses, relevant documents have also been proved by the prosecution, which are as under:-

(i) Exhibit Ka-1- Written report;

(ii) Exhibit Ka-2- Inquest report;

(iii) Exhibit Ka-3- Post-mortem-examination report;

(iv) Exhibit Ka-4- Chik F.I.R.;

(v) Exhibit Ka-5- Nakal Rapat No. 14, 8.20 hours dated 19.06.2005;

(vi) Exhibit Ka-6- Recovery Memo of knife used in murder and the Vest stained with blood;

(vii) Exhibit Ka-7- Site-plan of the place of recovery of knife;

(viii) Exhibit Ka-8- Charge-sheet;

(ix) Exhibit Ka-9- Site-plan of the place of occurrence;

(x) Exhibit Ka-10- Specimen seal;

(xi) Exhibit Ka-11- Police Form No. 13;

(xii) Exhibit Ka-12- Police Form No. 379;

(xiii) Exhibit Ka-13- Letter to Reserve Inspector (R.I.) for getting post-mortem done;

(xiv) Exhibit Ka-14- Letter to Chief Medical Officer, Sultanpur for conducting the post-mortem;

(xv) Exhibit Ka-15- Recovery Memo of taking into custody the blood stained clothes from the place of occurrence;

(xvi) Paper No. 70 Ka, F.S.L. Report, Mahanagar, Lucknow.

6. After completion of evidence of prosecution, statements of convicts/appellants under Section 313 of the Code of Criminal Procedure, 1973, (in short Cr.P.C.) were recorded. The convict/appellant Reena Srivastava denied almost all the facts and shown ignorance about some facts. She has also stated that arrest was made wrongly and the recovery is also false. She has further stated that she has been implicated due to enmity and the witnesses have also deposed due to enmity. She has further stated that between her brother-in-law Pankaj Kumar Srivastava and the deceased Vipin Kumar Srivastava, there was a dispute regarding the supervision and post in School and also about Rs.5 Lacs, which their father got after retirement. For this reason, Vipin Kumar Srivastava was killed and she was implicated falsely in the crime. The convict/appellant Ajai Prasad in his statement recorded under Section 313 Cr.P.C. also denied the crime and other facts and stated that he was wrongly arrested and he was implicated in the crime due to enmity. The witnesses have also deposed due to enmity. He has further stated that he came the house of complainant on asking of his cousin brother Ramesh, along with his daughter Alka and son Narendra and he was implicated falsely in the crime.

7. In defence the convicts/appellant examined D.W. 1- Narendra Kumar Srivastava, the brother of the convict Reena Srivastava and D.W. 2- Smt. Rani Devi, aunt of convict Reena Srivastava and sister-in-law of Prabhawati Devi (mother of the deceased).

8. After completion of evidence, learned trial Court heard the arguments of both the sides. After analyzing the evidence available on record, the trial Court relied upon on the evidence of witnesses of facts examined and found medical evidence consistent with the oral evidence and came to the conclusion that it is proved by circumstantial evidence that the convict/appellant Ajai Prasad killed the deceased Vipin Kumar Srivastava by knife along with convict/appellant Reena Srivastava in furtherance of common intention. Learned trial Court held the convict/appellant Ajai Prasad guilty under Section 302 IPC and convict/appellant Reena Srivastava under Section 302/34 IPC and punished them with sentence noted herein-above. Being aggrieved of this conviction and sentence these two appeals have been preferred.

9. Heard Shri Indu Prakash Singh, learned counsel for the convict/appellant Smt. Reena Srivastava in Criminal Appeal No. 2702 of 2008, Shri Pramod Kumar Singh, learned counsel for the convict/appellant Ajai Prasad @ Ajai Kumar @ Dhirendra Kumar Srivastava in Criminal Appeal No. 2786 of 2008 and Shri Chandra Shekhar Pandey, learned Additional Government Advocate for the State respondent.

10. Learned counsel for the convicts/appellants submitted that convicts/appellants were not named in the F.I.R. The F.I.R. was registered against unknown persons and subsequently convicts/appellants were implicated falsely. All the witnesses of facts are relatives of the deceased. There is no eye witness of the crime. Learned trial Court has held the convicts/appellants guilty and sentenced them on the basis of suspicion alone. Learned trial Court has paid no attention to the evidence of defence witnesses. The whole story of the prosecution is an afterthought. In fact, the complainant was

annoyed with the deceased as their father ousted the complainant from the management of the School and handed over to the deceased, so the complainant was angry and he killed the deceased and implicated the convicts-appellants falsely in the crime in a planned manner, hence the impugned judgment and order should be set aside.

11. To the contrary, learned Additional Government Advocate appearing on behalf of the State respondent submitted that prosecution has proved its case beyond all reasonable doubts and the circumstances related to the crime have been proved. The recovery of knife used to kill the deceased was recovered at the pointing out of the convict/appellant Ajai Prasad and he confessed the crime at the time of recovery. The blood stained Vest which he wore at the time of murder of the deceased was also recovered at the pointing out of the convict/appellant Ajai Prasad. The motive has also been proved as there was illicit relation between the convicts/ appellants Reena Srivastava and Ajai Prasad and for that reason, the deceased was killed. All the links of chain of circumstances have been proved by the prosecution and the prosecution has proved its case beyond all reasonable doubts. The circumstances so proved manifestly evince that the deceased was killed by the convicts/appellants in furtherance of common intention of both and convict/appellant Ajai Prasad killed the deceased with knife. There is no error in the impugned judgment and order, therefore, these appeals should be dismissed.

12. Considered the rival submissions and perused the original record as well as the records of the appeals.

13. The evidence available on record as well as the perusal of impugned judgment shows that there is no dispute regarding date and place of occurrence. The time and date of lodging the FIR has also not been disputed. The F.I.R. of the case was lodged against the unknown persons alleging that the complainant, deceased and their younger brother Satish all went to sleep in their rooms after having meals and rest of the family members went to sleep on the roof along with their mother. In the night at about 1 O'clock the wife of Vipin i.e. Reena Srivastava went to sleep on the roof where mother of the complainant was sleeping with other family members. In the morning of 19.06.2005 at about 6 AM when the mother of the complainant shouted loudly that Vipin was lying dead on his bed, then the complainant rushed to the room of the deceased Vipin and found him lying dead on his bed. He also found injuries on his body and guessed that some unknown person had killed him in the night. During the course of investigation, the name of the convicts/appellants Reena Srivastava and Ajai Prasad surfaced. It came to light, that Reena Srivastava, the wife of the deceased and Ajai Prasad, who happens to be the uncle of Reena Srivastava had killed the deceased-Vipin. The motive was that Ajai Prasad and Reena Srivastava had illicit relations with each other. P.W. 1-the complainant in this regard in his examination-in-chief has stated that Ajay Prasad happens to be the uncle of Reena Srivastava and Reena Srivastava is the wife of his brother Vipin. Narendra Srivastava is brother-in-law of the deceased Vipin. Ajai Prasad and Reena Srivastava had illicit relations. This fact came to knowledge just some days ahead of the incident when Reena Srivastava conversed with Ajai Prasad on telephone and that conversation was heard by the mother of

this witness. He has further stated that incident occurred in the night of 18/19-06.2005. About one week ahead of the incident Narendra Srivastava, Alka (brother and sister of Reena Srivastava) and convict/appellant Ajai Prasad came to his house. On the night of incident, his mother Prabhavati Devi closed the main door of the house. In the night, after having meals his wife Shyama Devi slept on the roof where his mother went to sleep along with his child Ashish. He slept in his own room. His brother Vipin and his wife Reena Srivastava slept in their room. His younger brother Satish was also slept in his own room situated in the south of his (P.W. 1's) room. Narendra Kumar, Alka and the convict/appellant Ajai Prasad slept in the mid portion of the school situated in the west of the house. His mother requested all these three persons to sleep inside the house but they did not agree and slept in the school. They all took meals at about 10-11 PM in the night. In the morning when his mother woke up, then she saw that Reena Srivastava had already taken bath and Vipin did not come out of his room. Reena Srivastava was preparing breakfast in the Kitchen for convict/appellant Ajai Prasad, and her brother and sister as they had to go back to their home in Chitrakoot. His mother found that main door of the house was open, so she asked Reena Srivastava and others to check the goods in their rooms but Reena Srivastava did not go in her room. No articles/goods were found missing from the house. His mother went in the room of his brother Vipin and found him lying dead on his bed. She shouted and told to everybody about the situation. When Reena was asked about the death of Vipin, then she showed her ignorance about the incident and said that she went to sleep on the roof at about 1 O'clock in the night. This witness has proved written report as Exhibit Ka-1 in his hand-writing and signature. This witness has further stated that the bed on which his brother Vipin was slept on the day of incident, the pillow, bed-sheet, mattress and towel on that bed were found blood stained. The loincloth of the convict/appellant Ajai Prasad, which he wore on that day was also blood stained. Dead body of his brother Vipin was covered by that loincloth. The saree which Reena Srivastava wore in the night of the incident was also blood stained and that was lying near the water tap, where she took bath. All these clothes were taken into custody by the Investigating Officer. He has further stated that dead body of his brother was sealed in a white cloth after conducting 'Panchayatnama', and the same was sent for post-mortem-examination. He was made one 'Panch' of Panchayatnama. This witness recognized his signature on 'Panchayatnama', which is Exhibit Ka-2 on the record. Lengthy cross-examination has been made by the defence counsel but no adverse fact or major contradiction could be brought in the cross-examination of this witness.

14. P.W. 2- Smt. Prabhavati Srivastava (mother of the deceased) has stated that when Reena Srivastava used to live as daughter-in-law in her house, the convict/appellant Ajai Prasad used to talk her regularly on telephone. Reena Srivastava also used to talk him on telephone secretly. This fact was not relished by Vipin (deceased). They all used to placate Reena Srivastava that, that was not good as she was married.The convict/appellant Reena Srivastava invited convict/appellant Ajai Prasad to her home by making telephone call. The convict/appellant Ajai Prasad came along with Narendra and Alka, who were brother and sister of the convict/appellant Reena

Srivastava. Her son Vipin used to ask Reena not to call Ajai Prasad, if there is a need make a call to her own parental home. Reena Srivastava invited Ajai Prasad as Marriage Anniversary of Vipin and Reena was to be celebrated on the date 16th. In the night of the incident, she slept on the roof along with her children Vivek, Shailendra, Reeta and her husband Vishambhar Dayal Srivastava. On that night her husband was not feeling well. Her son Vipin and Reena and another son Pankaj and his wife Shyama Devi and third son Satish were slept in their rooms on the ground floor. On the day of incident, main door of the house and the door towards the school were closed by her at the time when she went to sleep. The convict/appellant Ajai Prasad slept in the compound of school on that day, while on the previous days, he slept on the roof of the house. In the mid-night, she heard the noise of falling of water from the water-tap, then she asked Reena about the same, then her daughter-in-law Reena answered that her cousin was asking for water and she is giving the same. After some time, her daughter-in-law Reena came on the roof to sleep. When she asked about her coming on the roof, she told that there was hot on the ground floor, so she had come there. This witness has further stated that on the roof Reena was restless and it was appearing that she was puzzled, restless and nervous. At about quarter to 5 or 5.30 AM her daughter-in-law Reena told her that main gate of the house was open and she felt scared. Then, she (witness) asked her (Reena) how the gate was opened, then she showed ignorance about the same. Knowing it, she came down and found that main gate was open and she asked Reena about Vipin, then she told that he was sleeping. She has further stated that on the night of incident she herself closed the main door of the house and that door could not be opened without opening from inside or without breaking. She checked the goods/articles of the house and also her own box and asked the family members to check the goods/articles but Reena did not go to check her room in-spite of her asking. Reena brought her toothpaste, toothbrush and clothes from her room and took bath and dipped clothes which she wore in the night in a bucket. By that time she (witness) was not aware about the incident. Reena went into the Kitchen and started preparing breakfast for going to her maternal home. She asked Reena to awake Vipin but she did not go to wake Vipin up. In the morning at about 6 or 6.30 AM a mason (Mistri) namely Mumtaj came there as some construction work in the school was to be done. Mason asked to call Vipin, then she called Vipin from the door but no response was received. Then she went inside the room and found that Vipin was lying dead on the bed and blood was also there on the bed. She raised cry, then other family members reached there and saw blood soaked dead body of Vipin. Thereafter his son went to inform at the Police Station. Reena was puzzled after this incident. This witness has also been cross-examined in detail by the defence counsel but no major contradiction could be brought in the cross-examination.

15. P.W. 7-Mamta Srivastava is the sister of the deceased. She has also supported the case of the prosecution. She has stated in her examination in chief that she came to her parental home as her father was not feeling well. The incident occurred on 18.06.2005. On 13.06.2005 Narendra (brother in law of Vipin) and their uncle Ajai Prasad came there. In the morning of 18.06.2005, they had to go to their home but Reena asked Vipin to ask these persons

to stay more. In the night at about 10 O'clock all the persons took meals and went to sleep. Vipin and his wife Reena went to sleep in their room. Elder brother Pankaj Kumar Srivastava and his wife Shyama Devi went to sleep in their room and brother Satish went to sleep in his own room. She, her husband Ajay Srivastava, sister Reeta, mother Prabha Devi, father Vishambhar, brother Vivek and Sonu went to sleep on the roof. Narendra Srivastava, Alka and Ajai Prasad, who came there from the parental home of Reena went to sleep in the School. All these three persons used to sleep on the roof along with them since the day they had come but on that day they went to sleep in the school on the pretext of inconvenience on the roof and on asking by Reena they slept in the school. Her mother asked them to sleep in the ground in front of the house but Reena Srivastava said that it is not good to sleep in the open and they all slept in the School. On the day of incident, her younger sister-in-law also came to sleep on the roof due to hot weather. When the noise of opening of water tap was heard by her she got awake. She also heard some noise of whispering at that time. After sometime, Reena Srivastava came on the roof and lay-down near her mother. At about 6.30 AM she heard the cry of her mother then she along with others went downward and saw that her brother Vipin was lying dead on his bed. There was injury on his neck and blood was there on the bed. She and her brother Sonu picked Vipin up and brought outside the house and saw that he was dead. She has further stated that Reena Srivastava had taken bath before they came down from the roof and started to work in the Kitchen. Mason namely Mumtaj came and he asked to call Vipin, then her mother asked Reena to wake Vipin up, but Reena ignored that, then her mother sent her younger sister Reeta to wake Vipin up and she called Vipin but received no answer. Then she asked her mother to go to Vipin's room, her mother went to the room of Vipin and cried. Then they all rushed downward. She has further stated that Ajai Prasad used to sit with Reena alone in her room for 2-3 hours in the absence of Vipin. This conduct of Reena Srivastava was not liked by them. Her father did not like it and asked Reena to talk with Ajai Prasad sitting outside the room. On it Reena felt annoyed. Vipin also objected to this conduct of Reena Srivastava.

16. P.W. 8 is Shailendra Kumar @ Sonu, the younger brother of the deceased. This witness has stated that on 18.06.2005 his elder brother Vipin was getting some construction work done in the school situated adjacent to his home. In the evening at about 7 O'clock his brother after taking bath became ready to go on motorcycle. On asking he told that he was going outside. On it he (P.W. 8) asked his brother that he also wish to accompany him. On it, his brother Vipin said he was going on being asked by Reena Srivastava for entertainment of Ajai Prasad as he wished for some outing. His brother Vipin agreed to take him along. Therefore, he along with his brother and Ajai Prasad went on motorcycle to Aliganj. They all ate ice-cream. From that place, Ajay Prasad started driving motorcycle and drove the same to a shop of cannabis (Bhaang). There Ajai Prasad along-with his brother Vipin went inside the shop and he remained outside near the motorcycle. About 20-25 minutes after, they both came out. Vipin asked Ajai Prasad that you have made me to eat 3-4 tablets of cannabis, now your niece (Reena) will be angry with him (Vipin) but Ajai Prasad said that Reena Srivastava would say nothing. This witness has further stated

that he heard all this but said nothing. In the night they all took meals and went to sleep on the roof near his parents. Reena and Vipin went to sleep in their room. Ajai Prasad and Narendra went to sleep in the campus of School adjacent to the house. In the morning at about 6 or 6.30 AM, he woke up, hearing the cry of her mother and rushed downward and found that his brother Vipin was murdered on his bed. He has further stated that in the morning the main door of house was found open. His sister-in-law Reena Srivastava took out her toothbrush, toothpaste and clothes etc from her room and took bath and changed the clothes but she did not tell anything about the murder of his brother Vipin to anyone and started to work in the Kitchen. In the morning when labourers came and asked to call Vipin then his mother asked Reena Srivastava to call Vipin but she ignored, then his mother herself went to wake Vipin up, then found that Vipin was killed by some one and she cried. This witness has further stated that before this incident Reena and Ajai Prasad used to sit alone in the room for a long time and this conduct of Reena and Ajai Prasad was not liked by the family members. His father also objected to it. He has further stated that for these reasons he and his family members have full belief that his brother was killed by Ajai Prasad along with his sister-in-law Reena Srivastava

17. All the witnesses of facts have been cross-examined at length but no major contradiction could be brought in the evidence of these witnesses. These all witnesses of facts have proved that Ajai Prasad and Reena Srivastava used to talk on telephone for a long time and whenever Ajai Prasad used to visit their house, Reena Srivastava and Ajai Prasad used to sit in the room alone for a long time and that was not liked by the family members or even by the deceased Vipin. The father of the deceased objected to it. On it, Reena Srivastava felt annoyed. The incident occurred inside the bed-room of Vipin and Reena Srivastava where in the night initially they both went to sleep together but about 1 O'clock in the night Reena left the room and went to sleep on the roof where her mother-in-law was sleeping along with other family members. It has also been proved by these witnesses that so called uncle of Reena along with Narendra and Alka (brother and sister of Reena) slept on that night in the campus of the School adjacent to their house on the pretext of inconvenience in sleeping on the roof. During investigation, the Investigating Officer observed the conduct of both the convicts/appellants and asked the family members to keep an eye on these two persons as they are prime suspects, as has been stated by P.W. 10-Nirankar Singh, Officer in Charge of Police Station, who initially made investigation.

18. P.W. 10 has stated that he conducted 'Panchayatnama' of the body of the deceased, which is exhibit Ka-9. He sent the body of the deceased for post-mortem examination along with relevant papers, which have been proved by him as Exhibit Ka 10 to 14. Thereafter, he recovered from the bed, one blood stained pillow, towel, loincloth, bed-sheet and one corner of mattress by cutting out of the blood stained mattress, on which the deceased had slept at the time of incident and the same were taken into custody and recovery memo was prepared on the spot by him under his own hand-writing and signature. This witness has proved recovery memo as Exhibit Ka-15. He has further stated that he recorded the statement of Satish and Shailendra on 19.06.2005. On 20.06.2005, he received the carbon copy of post-mortem-examination

report and noted the same in the case diary and recorded the statements of other witnesses including the statement of mother of the deceased Prabhavati, Ramesh Babu Srivastava, Shobha Devi, Shyama Devi, Reena (wife of the deceased), Smt. Kailash Devi, Hari Prasad Gupta, Narendra Srivastava, Ajay Srivastava, Mamta Srivastava and Reeta. On 25.06.2005 he recorded the statement of Vinay Kumar and on 26.06.2005 he recorded the statement of Shailendra @ Sonu. Thereafter, he alerted the family members of the deceased to keep a vigil on Reena as the investigation is on its crucial stage. Thereafter he recorded the statement of Vishambhar Dayal, Ajay Srivastava (son of Pyare Lal), Prabhavati and Mamta again. On 27.06.2005 he arrested Reena and Ajai Prasad at 14.15 hours as accused persons and went back to Police Station and entry of the same was made in the General Diary (G.D.) at Rapat No. 21, time 14.40 hours, dated 27.06.2005 on his own dictation by Constable Ashok Singh and he signed the same. The carbon copy of this entry has been proved as Exhibit Ka-16. This witness has further stated that statement of Reena and Ajai Prasad were recorded and both of them confessed their crime. The convict/appellant Ajai Prasad said that he would get recovered the knife used in the murder and also the Vest, which he wore at the time of committing murder. Thereafter, on 27.06.2005 itself he along with S.S.I. Daljeet Singh and fellow Constable Shiv Kumar, in a Government Vehicle driven by Driver Kesh Bahadur Singh along with accused Ajai Prasad with the expectation of recovery of knife, the weapon of crime, started from the police station to village Daudpur, the house of the deceased Vipin, when they reached there, the witnesses Ajay Srivastava son of Pyare Lal and Satish were there, then accused Ajai Prasad got down from the Jeep and started walking towards Prabhavati City Montessori Junior High School, Daudpur and entered inside the gate of that and came out of the north gate and at a distance of about 9 paces from the gate, he took out a knife from Moonj (a sort of grass) present inside the bushes on which the blood was there. He also took out a Vest of white colour, on that also blood stains were there and told that this is the knife by which he killed Vipin stabbing in his neck and this is the Vest which he wore at that time and blood stains were printed on it. He further stated that he hid the same here at this place. This witness has further stated that knife and Vest were taken into police custody in front of the witnesses and recovered articles i.e. knife and Vest were sealed in a cloth and the recovery memo was prepared at the spot upon his dictation by SSI Daljeet Singh and the copy of the same was given to the accused. The recovery memo was signed by the police personnel who accompanied him to the spot. Recovery memo was proved by this witness as Exhibit Ka-6. Recovered knife and the Vest were also summoned in the Court and shown to the witness and he identified as recovered at the pointing out of the accused Ajai Prasad. That knife was exhibited as material exhibit 1 and Vest as material exhibit 2. The articles which were recovered from the room where the deceased was murdered were also summoned in the Court and shown to this witness. He identified the articles as blood soaked pillow, towel, loincloth, bed-sheet, a piece of mattress and the specimen seal. These all exhibited as material Exhibit 3 to 7. S.S.I. Daljeet Singh, who accompanied the Investigating Officer at the time of recovery of knife and Vest at the pointing out of the convict/appellant Ajai Prasad has been examined as P.W. 5. He has also proved the recovery of knife and Vest at the pointing out of the accused Ajai Prasad.

19. Hon'ble Apex Court in the case of ***Kishore Bhadke Versus State of Maharashtra (2017) 3 Supreme Court Cases 760*** has held that "*Section 27* of the Evidence Act is an exception to *Section 25* of the Act. *Section 25* mandates that no confession to a Police Officer while in police custody shall be proved as against a person accused of any offence. *Section 27*, however, provides that any fact deposed to and discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

20. In ***Mehboob Ali and another Versus State of Rajasthan (2016) 14 Supreme Court Cases 640,*** the Hon'ble Apex Court in this regard has held as under:-

"12. *Section 25* of the Evidence Act provides that no confession made to a Police Officer shall be proved as against a person accused of any offence. *Section 26* provides that no confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. *Section 27* is in the form of a proviso, it lays down how much of an information received from accused may be proved. 13. For application of *section 27* of Evidence Act, admissible portion of confessional statement has to be found as to a fact which were the immediate cause of the discovery, only that would be part of legal evidence and not the rest. In a statement if something new is discovered or recovered from the accused which was not in the knowledge of the Police before disclosure statement of the accused is recorded, is admissible in the evidence."

21. Hon'ble Apex Court further held in the above case as under:-

"16. This Court in State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru [(2005) 11 SCC 600] has considered the question of discovery of a fact referred to in section 27. This Court has considered plethora of decisions and explained the decision in Pulukuri Kottaya & Ors. V. Emperor [AIR 1947 PC 67] and held thus :

"125. We are of the view that Kottaya case [AIR 1947 PC 67] is an authority for the proposition that "discovery of fact" cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place.

126. We now turn our attention to the precedents of this Court which followed the track of Kottaya case. The ratio of the decision in Kottaya case reflected in the underlined passage extracted supra was highlighted in several decisions of this Court.

127. The crux of the ratio in Kottaya case was explained by this Court in State of Maharashtra v. Damu. Thomas J. observed that: (SCC p. 283, para 35)

'35. ...The decision of the Privy Council in Pulukuri Kottaya v. Emperor (supra) is the most quoted authority for supporting the interpretation 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.

22. In ***Raju Manjhi Versus State of Bihar (2019) 12 Supreme Court Cases***

784, the Hon'ble Apex Court has held as under:-

"13. The other ground urged on behalf of the appellant is that the so called confessional statement of the appellant has no evidentiary value under law for the reason that it was extracted from the accused under duress by the police. It is true, no confession made by any person while he was in the custody of police shall be proved against him. But, the Evidence Act provides that even when an accused being in the custody of police makes a statement that reveals some information leading to the recovery of incriminating material or discovery of any fact concerning to the alleged offence, such statement can be proved against him. It is worthwhile at this stage to have a look at Section 27 of the Evidence Act.

27. How much of information received from accused may be proved.- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

14. In the case on hand, before looking at the confessional statement made by the accused-appellant in the light of Section 27 of the Evidence Act, may be taken into fold for limited purposes. From the aforesaid statement of the appellant, it is clear that he had explained the way in which the accused committed the crime and shared the spoils. He disclosed the fact that Munna Manjhi was the Chief/Head of the team of assailants and the crime was executed as per the plan made by him. It is also came into light by his confession that the accused broke the doors of the house of informant with the aid of heavy stones and assaulted the inmates with pieces of wood (sticks). He categorically stated that he and Rampati Manjhi were guarding at the outside while other accused were committing the theft. The recoveries of used polythene pouches of wine, money, clothes, chains and bangle were all made at the disclosure by the accused which corroborates his confessional statement and proves his guilt. Therefore, the confessional statement of the appellant stands and satisfies the test of Section 27 of the Evidence Act."

23. In the present matter the convict/appellant Ajai Prasad confessed his crime and got recovered knife used for murdering the deceased Vipin and also got recovered the Vest, which he wore at the time of committing the murder and on that Vest got blood stains due to stabbing of knife to the deceased. The knife and Vest recovered at the pointing out of the convict/appellant Ajai Prasad were sent for forensic examination and the report is Paper No. 70 Ka on the record. This report shows that the knife and Vest have been shown at Serial No. 12 and 13. On all the articles from Serial Nos. 1 to 13 blood was found but origin could not be ascertained as the blood got disintegrated. According to the statement of Investigating Officer and witness Daljeet Singh has proved that blood stains were there on the knife as well as on the Vest.

24. P.W. 9- Chandra Prakash Tiwari, Officer-in-Charge of Police Station Musafirkhana and second I.O. of the case. He took over investigation as the previous I.O. Nirankar Singh was transferred and he (P.W. 9) was posted as Officer-in-Charge of the Police Station Musafirkhana. He has proved the part of investigation made by

him. He inspected the place of recovery of knife and Vest and prepared the site-plan of the place of recovery in his own hand-writing and signature. He has proved the site-plan as Ext. Ka-7. The case property was sent by him for chemical examination on 12.07.2005. On 27.07.2005 he recorded the statements of some other witnesses and on 28.07.2005 he submitted the Charge-sheet No. 73 of 2005 against the convicts/appellants Reena Srivastava and Ajai Prasad under Section 302 IPC. This witness has proved the charge-sheet as Ext Ka-8. The Doctor, who conducted the post-mortem has been examined as P.W. 3. He has proved the post-mortem examination report as Ext. Ka-3. According to the post-mortem-examination-report following injuries were found on the body of the deceased:-

"(i) Incised wound 4 cm X 3 cm X 3 cm over left side neck 4 cm below from left ear lobule margins are clear and underlies, major vessels, muscle and nerve are cut.

(ii) Abrasion 3 cm X 5 cm over left side of face 4 cm below from left ear tragus.

(iii) Incised wound 3 cm X 1 cm X skin deep over right side of scrotum right testicular sac is bulging from injuries. "

This witness has stated that death of the deceased resulted due to shock and hemorrhage as a result of ante-mortem injuries. According to this witness, death of the deceased might be possible on 18/19-06-2005 in the night by an assault of knife. The injuries found on the body of the deceased are in consonance with what have been told by other witnesses of facts as well as Investigating Officer. The weapon of offence which was recovered at the pointing out of the accused Ajai Prasad, is a knife.

25. Learned counsel for the convicts/appellants contended that all the witnesses are relative witnesses, hence they should not be relied on. This contention of the learned counsel is not tenable as it is settled law that the testimony of the related witness cannot be discarded only for the reason that they are relatives of the deceased.

26. In **Kartik Malhar Vs. State of Bihar: (1996) 1 SCC 614,** the Hon'ble Apex Court has held as under:-

"We may also observe that the ground that the witness being a close relative and consequently, being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh's case (supra) in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J., the Court observed :

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rules. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. The State of Rajasthan, [1952] SCR 377 = AIR 1952 SC 54. We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

In this case, this Court further observed as under :

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

27. In another case of ***Mohd. Rojali Versus State of Assam: (2019) 19 SCC 567,*** the Hon'ble Apex Court in this regard has held as under:-

"As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now wellsettled that a related witness cannot be said to be an "interested' witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested' and "related' witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see State of Rajasthan v. Kalki, (1981) 2 SCC 752; Amit v. State of Uttar Pradesh, (2012) 4 SCC 107; and Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC

298). Recently, this difference was reiterated in Ganapathi v. State of Tamil Nadu, (2018) 5 SCC 549, in the following terms, by referring to the three Judge bench decision in State of Rajasthan v. Kalki (supra): "14. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be "interested"..."

11. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in Dalip Singh v. State of Punjab, 1954 SCR 145, wherein this Court observed:

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person..."

12. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in Jayabalan v. Union Territory of Pondicherry, (2010) 1 SCC 199:

"23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

28. Thus to sum up from the above discussion it is clear that prosecution has proved the motive of the crime i.e. accused Ajai Prasad had illicit relations with the accused Reena Srivastava (wife of the deceased). The prosecution has also proved the conduct of the wife of the deceased after the incident. The deceased and the accused Reena Srivastava went to sleep in their room after having meals but after mid-night at about 1 O'clock all of sudden, she went to sleep on the roof where her mother-in-law was sleeping along with other family members. No plausible explanation in this regard has been given from the side of the accused Reena Srivastava. The incident had occurred inside the bed-room where husband and wife went to sleep. It is heavy duty of the wife to explain how the incident occurred or in what state she left the room, where her husband was found murdered. In the morning itself when her mother-in-law asked her to wake her husband up, she ignored and she was busy in preparing the breakfast in the kitchen. These all facts and circumstances have been corroborated by the recovery of knife used in the crime and Vest of the accused Ajai Prasad, which he wore at the time of committing the murder of the deceased Vipin at the pointing out of accused Ajai Prasad. The witnesses examined in defence D.W.1 and D.W. 2 have tried to prove the fact that deceased Vipin was killed by Pankaj Srivastava. All the witnesses of facts, who are family members of the deceased denied the fact of any kind of bickering or dispute between two brothers Pankaj Srivastava and Vipin Srivastava. Hence, it is clear and well established that the murder of the deceased was committed by the convict/appellant Ajai Prasad in connivance with convict/appellant Reena Srivastava in furtherance of a common intention. Therefore, the trial Court has rightly held the accused persons guilty and sentenced them accordingly with imprisonment for life coupled with fine. There appears no ground or reason for interference in the conviction and sentence recorded by the trial Court.

29. In the result, these two appeals are ***dismissed.***

30. The convicts/appellants Smt. Reena Srivastava & Ajai Prasad @ Ajai Kumar @ Dhirendra Kumar Srivastava are stated to be in jail, accordingly they shall serve out the sentence awarded by the trial Court.

31. Office is directed to send a copy of this order along with lower Court record to the trial Court concerned for necessary information and compliance forthwith.

(2022)07ILR A1274
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2022

BEFORE

THE HON'BLE JASPREET SINGH, J.

Matters U/A 227 No. 1602 of 2022

Smt. Kamlesh Singh ...Petitioner
Versus
Board of Revenue of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar, Sri Amit Mishra

Counsel for the Respondents:
C.S.C.

Civil Law - U.P. Revenue Code, 2006 - U.P. Revenue Code Rules, 2016 - Rule 34 (7) - U.P. Revenue Court Manual Regulations, 2016 - Para-494, Chapter-XV - Expeditious Disposal of Cases - Mutation case - time for disposal of mutation case as per Rule 34 (7) of the U.P. Revenue Code Rules, 2016 is 90 days and in case if it is not so decided then reasons have to be recorded - Authorities must devote time for judicial functioning and ensure timely disposal of the cases - Board of Revenue must have regular mechanism to monitor the functioning and oversee the disposal of cases - An effort must be made to oversee and monitor what efforts are made by the Presiding Officers in deciding the revenue cases - it requires a consultative and continuous effort by all the stake holders including the members of the Bar who were requested to act more responsibly (Para 41)

Petitioner approached High Court seeking expeditious disposal of her mutation case u/s 34 U.P. Revenue Code, 2006 pending before the Nayab Tehsildar - Court directed the Nayab Tehsildar to consider and decide the pending mutation case most expeditiously without granting any unnecessary adjournments to either of the parties but after affording fully opportunity of hearing, preferrably within a period of three months (Para9)

Allowed. (E-5)

List of Cases cited:

1. Uday Narain Singh Vs St. of U.P. & ors. reported in 2006 (2) AWC 1399

2. Chandra Bali Vs Additional Commissioner, Varanasi Division, Varanasi & ors., 2012 (4) ADJ 13

3. Yashpal Singh Vs St. of U.P. & ors. (2015) SCC Online All 6752

4. Ex-Captain Harish Uppal Vs U.O.I. & ors. (2003) 2 SCC 45

5. Krishna Kant Tamrakar Vs St. of M.P. (2018) 17 SCC 27

6. District Bar Assc., Dehradun Vs Ishwar Shandilya & ors. AIR (2020) SC 1412

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

1. Heard learned counsel for the petitioner as well as Sri Hemant Kumar Pandey, learned Standing Counsel for the State-respondents.

1A. The petitioner has approached this Court praying for the following relief:-

"(i) direct the Nayab Tehsildar, Jahangirganj, Tahsil-Alapur, District Ambedkar Nagar (opposite party no. 2) to decide the mutation Case No. T202004040402142 (Smt. Kamlesh Singh Vs. Smt. Anju Singh and others), under Section 34 U.P. Revenue Code, 2006 filed by the petitioner before the opposite party No. 2, which is pending before him within stipulated period."

2. This Court by means of order dated 19.05.2022 had passed the following order which reads as under:-

"Heard learned counsel for the petitioner. Notice on behalf of the respondents No.1 and 2 has been accepted by the office of Chief Standing Counsel.

The record indicates that the instant petition has been preferred seeking

expeditious disposal of mutation case pending before the respondent No.2.

The record further indicates that the petitioner had approached this Court earlier by means of Writ Petition No.17492 (M/S) of 2021 which was dismissed as not pressed vide order dated 12.08.2021, a copy of which has been brought on record as Annexure No.3.

It is further stated by the petitioner that in furtherance of the liberty granted to the petitioner, the petitioner has moved an application before the respondent No.1 for expeditious disposal, a copy of which has been brought on record as Annexure No.4.

It is submitted that despite the said application being moved in the month of October, 2021, no orders have been passed on the said application.

Learned standing counsel shall seek complete and detailed instructions from the respondent No.1 as to how many such applications under Para-494, Chapter-XV of the Revenue Code Manual (Amendment) Regulation, 2016 have been received by the Board of Revenue and how many applications have been disposed off and the time taken for disposing the said applications and as on the date, how many applications are pending seeking expedition under the aforesaid Regulation.

Let the complete instructions be made available in proper tabulation within ten days from today.

List this matter again on 30.05.2022, as fresh."

3. On 30th May, 2022, on the request of learned Standing Counsel, the matter was taken up on 31.05.2022 and the learned Standing Counsel in pursuance of the order dated 19.05.2022 has provided the details as sought by the Court in its order dated 19.05.2022. The same is taken on record.

4. The petitioner has approached this Court seeking expeditious disposal of her mutation case pending before the Nayab Tehsildar, Jahangirganj, Tehsil Alapur, District Ambedkar Nagar.

5. It had been specifically averred in the petition that the petitioner had approached this Court by filing W.P. No. 17492 (MS) of 2021 (Smt. Kamlesh Vs. State of U.P. and others) and upon preliminary objection raised by the State-respondents, the petitioner was relegated to avail the alternate remedy of approaching the Board of Revenue by filing an application for expedition in terms of para 494 of the U.P. Revenue Court Manual (Amendment) Regulations, 2016.

6. It is also submitted that despite having moved the said application before the Board of Revenue in the month of October, 2021, yet the said application has not been decided, as a result, neither the application for expedition has been disposed of and in any case, the mutation case of which expedition is sought still remains to be decided, though, under the Rules framed namely U.P. Revenue Code Rules, 2016, the contested mutation cases are to be decided within a period of three months.

7. It is in the aforesaid circumstances, that the Court had called upon the learned Standing Counsel regrading the details and from the perusal of the aforesaid details and stastictics so provided by the learned Standing Counsel that between January,

2019 till May, 2022, a total number of 298 applications under Para 494 of the Revenue Court Manual (Amendment) Regulations, 2016 have been filed out of which 210 expedition applications have been decided and 88 applications are still pending. However, it is not disputed that the application for expedition preferred by the petitioner on 21st October, 2021 has yet not been decided and is fixed for hearing before the Board of Revenue on 19.07.2022.

8. Considering the facts and circumstances and even though the petitioner has moved an application for expedition before the Board of Revenue which has not been decided despite a period of seven months has lapsed and the time for disposal of mutation case as provided in Rule 34 (7) of the U.P. Revenue Code Rules, 2016 is 90 days and in case if it is not so decided then reasons have to be recorded.

9. In the aforesaid circumstances, this Court deems fit that in exercise of the powers under Article 227 of the Constitution of India, the Court dispenses notice on the private respondent nos. 3 and 4 and **directs the respondent no. 2 i.e. the Nayab Tehsildar, Jahangirpur, Tehsil Alapur District Ambedkar Nagar to consider and decide the pending mutation case most expeditiously without granting any unnecessary adjournments to either of the parties but after affording fully opportunity of hearing, preferrably within a period of three months from the date a certified copy of this order is placed before the Court concerned. This order shall also dispose of the expeditious application before the Boar of Revenue bearing E.A./2149/2021.**

10. That the petitoiner had approached this Court only for the limited prayer as noticed above but there are certain disturbing facts which is being noticed by this Court, repeatedly, and thus it is necessary to take cognizance of the same. This Court is deluged with petitions under Article 227 of the Constitution of India seeking expedite orders in respect of matters pending before the various tiers of the hierachy of the Revenue Courts.

11. Primarily, in all such petitions, a prayer for expedition is sought and in largely all of the petitions the petitioners in order to substantiate the injustice caused to them on account of non-disposal of their cases, they bring on record the extracts of the order sheets which divulge a serious malaise affecting the functioning of the revenue courts.

12. This Court has come across cases relating to disposal of suits pending before the revenue Court of first instance wherein persons are seeking declaration of their rights relating to the year 1977. Illustratively, this issue came to be noticed by this Court in (Nirmala Devi Vs. Additional Sub Divisional Officer-1, Sadar Pratapgarh and others) in W.P. No. 2077 of 2022 wherein the plight of the petitioner could be well imagined where the suit for declaration of rights is pending since 1977. Similarly, in another matter (Smt. Bikhana Vs. State of U.P., Principal Secretary, Revenue and 6 others) bearing W.P. No. 1442 of 2022 a suit for declaration of rights was pending before the Court of first instance since 1997.

13. It has further been noticed that the matters relating to consolidation operations under the U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as Act of

1953) are also pending since large many number of years.

14. Illustratively, the issue came to be noticed by this Court in (Pradeep Tiwari Vs. Consolidation Officer, Bikapur, Ayodhya Mandal, Ayodhya and others) bearing Petition No. 1340 of 2022 where the objections under Section 9-A (2) of the U.P. C.H. Act, 1953 were pending before the Consolidation Officer, i.e. the Court of first instance since 1988.

15. Again in (Ajit Singh Vs. State of U.P. and others) bearing petition No. 20470 of 2022, the objections under the U.P.C.H. Act, 1953 were pending since 1986. In the case of (Ram Kuber Vs. Consolidation Officer, Sultanpur writ petition no. 1855 of 2022), the objections under Section 9-A(2) of the U.P.C.H. Act of 1953 were pending since 1989 and again in (Sarju Prasad Vs. Consolidation Officer, Faizabad and others) bearing W.P. No. 1419 of 2021, the objections under the U.P.C.H. Act were pending before the Consolidation Officer since 1994.

16. The reference to the aforesaid cases is only to put the point across and it is not, as if, in few isolated cases such disturbing trend is emerging. Rather this court is pained to say that this problem across the revenue courts is rampant. Mention to the few cases as aforesaid is only illustratively and though it is not confined only to such cases but the dilemma is much more widespread.

17. The Constitution of India envisages the concept of social justice which is a Basic Structure Doctrine of our constitution. The concept of social justice is not uni-dimensional rather it is a concept which can be seen through a prism encapsulating within itself, political and social spheres. Right to legal redressal is also a Basic Structive Doctrine of the constitution.

18. It is often said that justice delayed is justice denied but at the same time, it must be seen that wherever justice is being dispensed, it must be done within some reasonable time or else if it is left without any legal harness of timelines, it may result in catestrophic consequences which shall erode the faith and confidence of the common persons.

19. In our country, large part of the society is agrarian and rural which necessarily amongst othes involve the rights, liabilities and obligations relating to agricultural/revenue paying land of the people which is situate in the core of the countryside and villages. Large part of our population also resides in such villages and large number of families are dependent on agriculture for their livelihood. The agricultural land for them is not only a matter of social security but also their livelihood and their rights, prosperity including that of their generations is dependent thereon.

20. The matters pending before the Revenue Court emnate primarily from three Acts (i) Uttar Pradesh Land Revenue Act, 1901, (ii) The Uttar Pradesh Zamindari and Land Abolition Reforms Act, 1950 (iii) The Uttar Pradesh Consolidation of Holdings Act, 1953.

21. The U.P. Land Revenue Act, 1901 and the U.P.Z.A. & L.R. Act, 1950 came to be repealed and have now been replaced by the U.P. Revenue Code, 2006. It is these Acts which govern the rights, liabilities relating to agricultural land and also

involves the litigation therefrom. The aforesaid Acts have an hierachy of courts which is manned by Presiding Officers who are appointed and controlled by the State Government. The highest Authority of the Revenue Court is the Board of Revenue which exercises the power of superintendence over such subordinate revenue courts and authorities including powers of revision and also has been conferred the power of review.

22. This Court finds that the issue which is raised herein is not new rather it has a lamenting past. This aspect of the matter was taken note of by a coordinate Bench of this Court in ***Uday Narain Singh Vs. State of U.P. and others reported in 2006 (2) AWC 1399*** wherein noticing the plight of a litigant viz. a viz. his litigation before the Revenue Courts, the Court in paragraphs 11, 12, 13, 14 and 16 has held as under:-

"..11. In a recent decision rendered by this Court, it was noticed with concern that cases have been lingering in various courts dealing with revenue cases and in consequence, a peremptory direction has been issued with a view to regulating the working of these courts by prescribing fixed hours and days untramrneled by the pressure of any other duties on administrative side. The present case is not dissimilar to the case noticed above and in the facts and circumstances, when the case in hand has been suffering protraction for more than 15 years, I deem it my sacred duty to do something towards reonentation in the realm occupied by these officers on executive side. This court is fully conscious that these executive officers are more often required to discharge executive functions which include functions of law and order and have to deal with unpleasant emergent situation and in discharge of these functions and in doing so they feel compelled to relegate the adjudicatory function to secondary position. Their executive and administrative functions apart, there is felt need that these officers should be mandated to devote few days and hours to these adjudicatory functions so that the statutory duties should not suffer at the altar of executive or administrative exigencies.

12. There is another aspect to be reckoned with. As noticed above, it is manifested from a perusal of the order-sheet that the case suffered.epeated adjournments on account of strike by the lawyers. By a catena of decisions rendered by the Apex court, it has been held that the lawyers strikes are illegal and that effective steps should be taken to stop the growing tendency. It has also been held that advocates have no right to go on strike and that the courts are under no obligation to adjourn matters because of strike by lawyers, It has further been held that it is the duty of all courts to go on with matters on their boards even the absence of lawyers and further that the courts must not be privy to strikes or calls for boycotts. (See , 1993 (3) SSC 256, (1995) 3 SCC 19, 1995 (1) SCC 619, , , and .

13. Upon a cumulative reading of the mandate of the Apex court embodied in the aforestated decisions, this Court on administrative side, issued circular No. 35/IIIb-36/Admin 'G' Dated: Oct: 4,2004 squeezing from above decisions the following directions for compliance by the subordinate courts in the event of strike by lawyers.

"1. The Subordinate Courts shall not take cognizance of any resolution

passed by the Bar Associations to strike and to stop; judicial work. The District Judge concerned shall not entertain or circulate any such resolutions amongst the Judicial officers in his Judgeship.

2, The Judicial Officers must strictly adhere to Court hours. They shall perform the entire judicial work on the dais and shall not accept any request to rise, on to stop judicial work on the request of lawyers or litigants. In case lawyers do not attend to work the judicial officers shall proceed to work in the following manner:-

A. Where the parties are willing they shall be heard personally and necessary orders shall be passed in cases requiring no further evidence.

B. In matters fixed for evidence parties shall be allowed to file documents and do examinations/cross examinations of witnesses, if so desire.

C. In revisions, review, appeals (Civil and Criminal both), bails and urgent applications, the orders should be passed on merits of the case.

D. In criminal trials of the court of Sessions or Magistrate the witnesses in attendance should be examined by the public prosecutor/prosecuting officer as the case be, giving an option to the accused to either cross examine the witnesses himself or bear the expenses for recalling of the witnesses, for cross examination on the date (s) next to be fixed.

3. The District judges shall submit weekly reports to the Court, with regard to any incident, which may take place in the judgeship with compliance report of these directives.

4. In case any lawyer or group of lawyers or litigants, creates indiscipline in the Court or try to obstruct court proceedings, the Judicial Officer concerned should immediately inform the District Judge, who shall immediately arrange for the police force and restore the functioning of the Court. In case any damage is caused to the records or the court: property, the District Judge shall immediately get the First Information Report of the incident lodged.

5. The District Judges shall arrange for adequate police force, to be kept in reserve in the judgeship, to be deployed for protection of the judicial officers and the court property.

6. The District Judge should inform the names of the persons involved in disrupting the court proceeding to the High Court forthwith.

7. The Judicial Officers shall not: perform any judicial work in their chambers.

14. By virtue of Article 141 of the Constitution of India, all courts in India are bound to follow :he decision of the Supreme Court. The courts dealing with disputes under the U.P. Land Revenue Act, U.P.Z.A.& L.R.Act and U.P. Consolidation of Holdings Act: are courts and as such these courts cannot turn a blind eye and are bound to abide by the mandate of the Apex court."

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"...16. In view of the above, there is felt need that functioning of the courts created under the statutes i.e. under the

U.P.Z.A. & L.R.Act, the U.P. Land Revenue Act and the U.P. Consolidation of Holdings Act and also other courts created under various other Acts dealing with the disputes pertaining to agricultural land, should be regulated simulating the standard of a regular court of law so as to appear to be acting judicially."

23. Again in the year 2012 this Court in **Chandra Bali Vs.Additional Commissioner, Varanasi Divsion, Varanasi and othes, 2012 (4) ADJ 13** noticing similar difficulties had to issue a general mandamus prescribing certain directions and timelines and the relevant paragraph 12 and 13 of the said opinion reads as under:-

" 12. In view of the above, I am of the opinion that not only land acquisition cases or other cases for which time period for disposal has been prescribe, all cases incuding revenue cases and cases arising under the U.P. Z.A. and L.R. Act should also be decided within a time specified.

Time management for disposal of cases is necessary to tackle the problem of arrears and pendency."

13. Accordingly. 1 issue a general mandamus that at least in revenue cases and cases arising under the U. P. Z. A. and L. R. Act. the Courts/authorities must follow a set time table for disposal of cases as provided herein below

(1) All suits/original proceedings under U. P. Z. A. and L. R. Act be decided within a period of one year from their Institution with the outer limit of one year six months;

(2) All appeals arising there to be decided within a period of four months and within the maximum period of six months from the filing:

(3) All revisions be decided within three months and within the maximumperiod of four months from the filing; and

(4) All miscellaneous applications, if pressed, which do not require disposal along with cases/suit, appeal or revision be decided within six weeks of their filing with the outer limit of three months.

In view of the aforesaid facts and circumstances of the case, I dispose of this writ petition with the direction upon respondent No. 1 to decide the above appeal in accordance with law as expeditiously as possible as per the time schedule laid down above.

Let a copy of this judgment and order be sent by the Registry of this Court to the Chief Secretary, Revenue State of U. P., and the Chairman, Board of Revenue at Lucknow and Allahabad for circulation to all revenue courts and authorities for necessary compliance.

24. Despite the aforesaid decisions, it appears that no headway has been made, accordingly, once again the issue engaged the attention of a Division Bench of this Court in a Public Interest Litigation titled Y**ashpal Singh Vs. State of U.P. and others (2015) SCC Online All 6752** wherein the Court observed as under:-

"This Court directed the Chairman of the Board of Revenue to look into the matter and to take an appropriate administrative decision to obviate the grievances of the members of the Bar. In

pursuance of the order of this Court dated 4 December 2015, an affidavit has been filed by the Registrar of the Board of Revenue. The affidavit states that 6,01,543 revenue cases were pending as on 1 January 2015. 14,63,886 new revenue cases were instituted between 1 January 2015 and 31 December 2015. Until 31 December 2015, 14,92,833 revenue cases have been disposed of. In consequence, 5,76,122 revenue cases are still pending for disposal. These figures indicate to the Court that there has been progress in the matter of streamlining the work of revenue cases and the rates of disposal have increased. However much still remains to be achieved since pendency of 5.76 lacs is itself a substantial figure. As regards, the proposal for creation of a cadre of officers exclusively for the resolution of revenue cases, it has been stated that the Department of Revenue sent the proposal to the Law Department and the Department of Personnel for their consent. It has been stated that the departments concerned have furnished their consent to the proposal. Moreover, it has been stated that in view of the provisions of the Uttar Pradesh Revenue Code 2006, once officers are designated exclusively for judicial work, there would be no shortage of presiding officers.

We are of the view that the State Government must immediately take steps under the enabling provisions of sub section (5) of Section 11 and Section 12 and sub section (6) of Section 13. This would ensure that judicial work is assigned to officers who would only perform judicial duties on the revenue side and would be exempted from administrative functions. Judicial work requires a frame of mind, qualification and experience which are quite different from the discharge of administrative duties and it is but necessary that the provisions which have been contained in the newly enforced provisions of the Code are implemented in the State expeditiously. As regards the proposal for the creation of a cadre, it has been stated that the Finance Department to whom a proposal was submitted for consent had raised certain queries which has been responded to on 22 February 2016 by the Board of Revenue. After the consent of the Finance Department, the proposal would be placed before the Cabinet after obtaining the consent of the Law Department and the Department of Personnel. Since the proposal is now pending before the Government and the Government has indicated its intention to finalize the matter expeditiously, we direct that a final decision thereon should be taken within a period of six months from the receipt of a certified copy of this order.

In view of the enabling provisions which are contained in the provisions of the Code, and since the State Government has initiated steps, we expect that a decision be taken thereon expeditiously within a period of six months. Insofar as the strike by the members of the Revenue Bar Association, Bijnor is concerned, we take on record the undertaking and assurances which have been tendered before this Court in terms of the resolution which has been passed by the Bar. The members of the Bar are expected to display a sense of responsibility particularly having regard to the judgments of the Supreme Court laying down the need for restraint in the striking of work by the members of the legal profession. Nothing further would survive in the public interest litigation at this stage."

25. From the perusal of the aforesaid observations made by the Court in the

decisions noticed above, from time to time, it can be seen and noticed that spate of cases seeking expedition of cases pending in the Revenue Courts has amplified and the problem has assumed a greater proportion now than it was then noticed while rendering the decisions by the Court at earlier point of time.

26. It will also be relevant to notice that with the advent of U.P. Revenue Code, 2006, the legislature in its wisdom has provided timelines for the disposal of the cases which ranges from 45 days to six months depending on the nature of the case.

27. The U.P. Revenue Code Rules, 2016 also gives a list of case, which are to be tried in a summary manner, as enumerated in Rule 192 which is referrable to Section 225-A of the U.P. Revenue Code, 2006.

28. The U.P. Revenue Court Manual Regulations, 2016 contains relevant guidelines for the purposes of conduct of day to day affairs of the cases pending before the Revenue Courts and Authorities. These regulations also came to be amended in the year 2016 wherin Chapter L Rule 494 was duly amended and incorporated which reads as under:-

Chapter L:- Order or Directions for Expeditios Disposal of Cases:-

494:- (i) The Board may suo motu or on the application of a party to the suit, appeal, revision or other proceeding pass general or specific order directing the court below to decide the suit, appeal, revision or other proceeding with the period mumersed in the order.

(2) The applican for direction to decide the suit, appeal, revision or other proceeding within the period stipulated by the Board shall be accompanied by affidavit

(3) Besides the brief facts of the case, the reasons for the delay in disposal of the case shall be disclosed in the affidavit filed in support of the applications and a copy of the entire order sheet or the extract thereof shall be annexed to the affidavit.

(4) The Board shall, while passing the order directing the court below to decide the case within the goland period, keep in mind, the conduct of the party applying for the direction, the comparative urgency for the early disposal of the case and the unther of cases pending in the court concerned

(5) Mere filing of transfer application does not amount to stay of the proceeding in the Court below unless the stay order is passed on the transfer application by the competent Court. The court below shall endeavour to comply with the direction passed by the Board for the expeditious disposal of the case and the provisions of rule 195 of the Rules, shall, mutatis mutandis, apply regarding the compliance of the order under this para.

29. From the perusal of the Revenue Court Manual, one would find, that it contains comprehensive guidelines and regulations for the day to day functioning of the Revenue Courts which includes mattes relating to daily siting of officers, officer hours, the manner in which the orders have to be passed, preparation of cause lists, carry forward of cases, early

hearing of cases, speedy disposal amongst others.

30. In furtherance of the aforesaid, the Board of Revenue which exercises the power of superintendence over the subordinate revenue courts and authorities has also been conferred with the power of expediting cases pending before the Revenue Courts and Authorities. An alarming feature which has come to the notice of the Court as evident from the instructions and the stastactics provided by the learned Standing Counsel indicates that 298 expedite applications were filed before the Board of Revenue between January, 2019 till 30th April, 2022. Out of 298 applications so filed, 210 applications have been decided but what is disturbing is that only 70 such applications were decided within a period of one month while rest of the applications so decided took several months and even years to be decided.

31. From the stastatics so provided, out of the 88 applications still pending, two of them relate to the month of September, 2019 while most of them are from the year 2021 and only 14 applications are such which have been filed in the year 2022 and still pending while we are here in the end of May, 2022.

32. Thus, what can be seen is that an application to seek expedition is taking huge time ranging over several months whereas the U.P. Revenue Act, 2006 as noticed above has provided timelines ranging from 45 days to 6 months for disposal of cases in summary manner.

33. From the aforesaid, it is apparent that an application for expedite is taking more than 6 months to one year or even more for decision then, what can be said of principal litigation of which expedition is sought is only heart wrenching and painful. It needs to be realised that where matters are pending before the Court of first instance relating to the year 1977, 1980s and 1990s and the said litigation has further two tiers of appeal/revision as the case may be. It leaves very little to imagination, what would be the plight of such litigants and how many generations would suffer on account of such unending litigation.

34. Another aspect which has come to the fore from the perusal of the extracts of the ordersheets which are being brought on record in the various petitions, a reference of few has been noticed in the preceeding paragraphs indicates a hugely disturbing trend of abstention of work by lawyers resorting to most unreasonable and unwarrented strikes and boycotts. This Court has come across various cases wherein for months at an end, no judicial work could be transacted on account of resolutions passed by the members of the bar abstaining from judicial work. This is one major cause of delay.

35. The other major cause for pendency reflected from the order sheets appears to be non-availability of the officers who are assigned judicial work but as they are primarily busy in other administrative and executive duties. Unfortunately, this Court finds that the Regulations of 2016 is hardly being followed and the functioning of the Revenue Court and Authorties is indicative that the Presiding Officers are completely oblivious to the said regulations and there is even no effort of its adherence.

37. The third major cause appears to be, the grant of endless adjournment at the asking of any party, least realizing what

effect it has on the rights of the parties involved in a litigation. All the above three causative factors have almost brought the functioning of the revenue courts to disrepute for which all the stake holders are responsible.

38. The issue regarding abstention of works and strikes has already been taken note of by the Apex Court in the constitutional Bench case of ***Ex-Captain Harish Uppal Vs. Union of India and others (2003) 2 SCC 45*** and the relevant portion thereof reads as under:-

"30. In the light of the abovementioned views expressed by the Supreme Court, lawyers have no right to strike i.e. to abstain from appearing in Court in cases in which they hold vakalat for the parties, even if it is in response to or in compliance with a decision of any association or body of lawyers. In our view, in exercise of the right to protest, a lawyer may refuse to accept new engagements and may even refuse to appear in a case in which he had already been engaged, if he has been duly discharged from the case. But so long as a lawyer holds the vakalat for his client and has not been duly discharged, he has no right to abstain from appearing in Court even on the ground of a strike called by the Bar Association or any other body of lawyers. If he so abstains, he commits a professional misconduct, a breach of professional duty, a breach of contract and also a breach of trust and he will be liable to suffer all the consequences thereof. There is no fundamental right, either under Article 19 or under Article 21 of the Constitution, which permits or authorises a lawyer to abstain from appearing in Court in a case in which he holds the vakalat for a party in that case. On the other hand a litigant has a fundamental right for speedy trial of his case, because, speedy trial, as held by the Supreme Court in Hussainara Khatoon (I) v. Home Secy., State of Bihar [(1980) 1 SCC 81 : 1980 SCC (Cri) 23 : AIR 1979 SC 1360] is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21 of the Constitution. Strike by lawyers will infringe the abovementioned fundamental right of the litigants and such infringement cannot be permitted. Assuming that the lawyers are trying to convey their feelings or sentiments and ideas through the strike in exercise of their fundamental right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution, we are of the view that the exercise of the right under Article 19(1)(a) will come to an end when such exercise threatens to infringe the fundamental right of another. Such a limitation is inherent in the exercise of the right under Article 19(1)(a). Hence the lawyers cannot go on strike infringing the fundamental right of the litigants for speedy trial. The right to practise any profession or to carry on any occupation guaranteed by Article 19(1)(g) may include the right to discontinue such profession or occupation but it will not include any right to abstain from appearing in Court while holding a vakalat in the case. Similarly, the exercise of the right to protest by the lawyers cannot be allowed to infract the litigant's fundamental right for speedy trial or to interfere with the administration of justice. The lawyer has a duty and obligation to cooperate with the Court in the orderly and pure administration of justice. Members of the legal profession have certain social obligations also and the practice of law has a public utility flavour. According to the Bar Council of India Rules, 1975 'an advocate shall, at all times, comport himself in a manner befitting his

status as an officer of the Court, a privileged member of the community and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar or for a member of the Bar in his non-professional capacity, may still be improper for an advocate'. It is below the dignity, honour and status of the members of the noble profession of law to organize and participate in strike. It is unprofessional and unethical to do so. In view of the nobility and tradition of the legal profession, the status of the lawyer as an officer of the court and the fiduciary character of the relationship between a lawyer and his client and since strike interferes with the administration of justice and infringes the fundamental right of litigants for speedy trial of their cases, strike by lawyers cannot be approved as an acceptable mode of protest, irrespective of the gravity of the provocation and the genuineness of the cause. Lawyers should adopt other modes of protest which will not interrupt or disrupt court proceedings or adversely affect the interest of the litigant. Thereby lawyers can also set an example to other sections of the society in the matter of protest and agitations.

31. Every court has a solemn duty to proceed with the judicial business during court hours and the court is not obliged to adjourn a case because of a strike call. The court is under an obligation to hear and decide cases brought before it and it cannot shirk that obligation on the ground that the advocates are on strike. If the counsel or/and the party does not appear, the necessary consequences contemplated in law should follow. The court should not become privy to the strike by adjourning the case on the ground that lawyers are on strike. Even in Common Cause case [(1995) 1 Scale 6] the Supreme Court had asked the members of the legal profession to be alive to the possibility of Judges refusing adjournments merely on the ground of there being a strike call and insisting on proceeding with the cases. Strike infringes the litigant's fundamental right for speedy trial and the court cannot remain a mute spectator or throw up its hands in helplessness on the face of such continued violation of the fundamental right.

32. Either in the name of a strike or otherwise, no lawyer has any right to obstruct or prevent another lawyer from discharging his professional duty of appearing in court. If anyone does it, he commits a criminal offence and interferes with the administration of justice and commits contempt of court and he is liable to be proceeded against on all these counts."

Further, the Hon'ble Supreme Court in Ex-Capt. Harish Uppal (supra) noticed the consequences of strikes/boycott calls. The Constitution Bench of Hon'ble Supreme Court found that such actions hold the judicial system to ransom and threaten the administration of justice :

"20. Thus the law is already well settled. It is the duty of every advocate who has accepted a brief to attend trial, even though it may go on day to day and for a prolonged period. It is also settled law that a lawyer who has accepted a brief cannot refuse to attend court because a boycott call is given by the Bar Association. It is settled law that it is unprofessional as well as unbecoming for a lawyer who has accepted a brief to refuse to attend court even in pursuance of a call for strike or boycott by the Bar Association or the Bar Council. It is settled law that courts are

under an obligation to hear and decide cases brought before them and cannot adjourn matters merely because lawyers are on strike. The law is that it is the duty and obligation of courts to go on with matters or otherwise it would tantamount to becoming a privy to the strike. It is also settled law that if a resolution is passed by Bar Associations expressing want of confidence in judicial officers, it would amount to scandalising the courts to undermine its authority and thereby the advocates will have committed contempt of court. Lawyers have known, at least since Mahabir Singh case [(1999) 1 SCC 37] that if they participate in a boycott or a strike, their action is ex facie bad in view of the declaration of law by this Court. A lawyer's duty is to boldly ignore a call for strike or boycott of court/s. Lawyers have also known, at least since Ramon Services case [(2001) 1 SCC 118 : 2001 SCC (Cri) 3 : 2001 SCC (L&S) 152] that the advocates would be answerable for the consequences suffered by their clients if the non-appearance was solely on grounds of a strike call.

21. It must also be remembered that an advocate is an officer of the court and enjoys special status in society. Advocates have obligations and duties to ensure smooth functioning of the court. They owe a duty to their clients. Strikes interfere with administration of justice. They cannot thus disrupt court proceedings and put interest of their clients in jeopardy. In the words of Mr H.M. Seervai, a distinguished jurist:

"Lawyers ought to know that at least as long as lawful redress is available to aggrieved lawyers, there is no justification for lawyers to join in an illegal conspiracy to commit a gross, criminal contempt of court, thereby striking at the heart of the liberty conferred on every person by our Constitution. Strike is an attempt to interfere with the administration of justice. The principle is that those who have duties to discharge in a court of justice are protected by the law and are shielded by the law to discharge those duties, the advocates in return have duty to protect the courts. For, once conceded that lawyers are above the law and the law courts, there can be no limit to lawyers taking the law into their hands to paralyse the working of the courts. "In my submission', he said that "it is high time that the Supreme Court and the High Courts make it clear beyond doubt that they will not tolerate any interference from any body or authority in the daily administration of justice. For in no other way can the Supreme Court and the High Courts maintain the high position and exercise the great powers conferred by the Constitution and the law to do justice without fear or favour, affection or ill will."

22. It was expected that having known the well-settled law and having seen that repeated strikes and boycotts have shaken the confidence of the public in the legal profession and affected administration of justice, there would be self-regulation. The abovementioned interim order was passed in the hope that with self-restraint and self-regulation the lawyers would retrieve their profession from lost social respect. The hope has not fructified. Unfortunately strikes and boycott calls are becoming a frequent spectacle. Strikes, boycott calls and even unruly and unbecoming conduct are becoming a frequent spectacle. On the slightest pretence strikes and/or boycott calls are resorted to. The judicial system is being held to ransom. Administration of law and

justice is threatened. The rule of law is undermined."

The Apex Court further went on and relied on the law laid down in Supreme Court Bar Association Vs Union of India reported at 1998 (4) SCC 409 that every advocate should boldly ignore call for strike/boycott:

"25. In the case of Supreme Court Bar Assn. v. Union of India [(1998) 4 SCC 409] it has been held that professional misconduct may also amount to contempt of court (para 21). It has further been held as follows: (SCC pp. 444-46, paras 79-80)

"79. An advocate who is found guilty of contempt of court may also, as already noticed, be guilty of professional misconduct in a given case but it is for the Bar Council of the State or Bar Council of India to punish that advocate by either debarring him from practice or suspending his licence, as may be warranted, in the facts and circumstances of each case. The learned Solicitor-General informed us that there have been cases where the Bar Council of India taking note of the contumacious and objectionable conduct of an advocate, had initiated disciplinary proceedings against him and even punished him for "professional misconduct', on the basis of his having been found guilty of committing contempt of court. We do not entertain any doubt that the Bar Council of the State or Bar Council of India, as the case may be, when apprised of the established contumacious conduct of an advocate by the High Court or by this Court, would rise to the occasion, and take appropriate action against such an advocate. Under Article 144 of the Constitution "all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court'. The Bar Council which performs a public duty and is charged with the obligation to protect the dignity of the profession and maintain professional standards and etiquette is also obliged to act "in aid of the Supreme Court'. It must, whenever facts warrant, rise to the occasion and discharge its duties uninfluenced by the position of the contemner advocate. It must act in accordance with the prescribed procedure, whenever its attention is drawn by this Court to the contumacious and unbecoming conduct of an advocate which has the tendency to interfere with due administration of justice. It is possible for the High Courts also to draw the attention of the Bar Council of the State to a case of professional misconduct of a contemner advocate to enable the State Bar Council to proceed in the manner prescribed by the Act and the Rules framed thereunder. There is no justification to assume that the Bar Councils would not rise to the occasion, as they are equally responsible to uphold the dignity of the courts and the majesty of law and prevent any interference in the administration of justice. Learned counsel for the parties present before us do not dispute and rightly so that whenever a court of record records its findings about the conduct of an advocate while finding him guilty of committing contempt of court and desires or refers the matter to be considered by the Bar Council concerned, appropriate action should be initiated by the Bar Council concerned in accordance with law with a view to maintain the dignity of the courts and to uphold the majesty of law and professional standards and etiquette. Nothing is more destructive of public confidence in the administration of justice than incivility, rudeness or disrespectful conduct on the part of a counsel towards the court or disregard by

the court of the privileges of the Bar. In case the Bar Council, even after receiving "reference' from the Court, fails to take action against the advocate concerned, this Court might consider invoking its powers under Section 38 of the Act by sending for the record of the proceedings from the Bar Council and passing appropriate orders. Of course, the appellate powers under Section 38 would be available to this Court only and not to the High Courts. We, however, hope that such a situation would not arise.

80. In a given case it may be possible, for this Court or the High Court, to prevent the contemner advocate to appear before it till he purges himself of the contempt but that is much different from suspending or revoking his licence or debarring him to practise as an advocate. In a case of contemptuous, contumacious, unbecoming or blameworthy conduct of an Advocate-on-Record, this Court possesses jurisdiction, under the Supreme Court Rules itself, to withdraw his privilege to practise as an Advocate-on-Record because that privilege is conferred by this Court and the power to grant the privilege includes the power to revoke or suspend it. The withdrawal of that privilege, however, does not amount to suspending or revoking his licence to practise as an advocate in other courts or tribunals."

Thus a Constitution Bench of this Court has held that the Bar Councils are expected to rise to the occasion as they are responsible to uphold the dignity of courts and majesty of law and to prevent interference in administration of justice. In our view it is the duty of the Bar Councils to ensure that there is no unprofessional and/or unbecoming conduct. This being their duty no Bar Council can even consider giving a call for strike or a call for boycott. It follows that the Bar Councils and even Bar Associations can never consider or take seriously any requisition calling for a meeting to consider a call for a strike or a call for boycott. Such requisitions should be consigned to the place where they belong viz. the waste-paper basket. In case any Association calls for a strike or a call for boycott the State Bar Council concerned and on their failure the Bar Council of India must immediately take disciplinary action against the advocates who give a call for strike and if the Committee members permit calling of a meeting for such purpose, against the Committee members. Further, it is the duty of every advocate to boldly ignore a call for strike or boycott."

The Hon'ble Supreme Court in Ex-Capt. Harish Uppal (supra) unequivocally asserted that courts are not helpless in this matter:

"26. It must also be noted that courts are not powerless or helpless. Section 38 of the Advocates Act provides that even in disciplinary matters the final appellate authority is the Supreme Court. Thus even if the Bar Councils do not rise to the occasion and perform their duties by taking disciplinary action on a complaint from a client against an advocate for non-appearance by reason of a call for strike or boycott, on an appeal the Supreme Court can and will. Apart from this, as set out in Ramon Services case [(2001) 1 SCC 118 : 2001 SCC (Cri) 3 : 2001 SCC (L&S) 152] every court now should and must mulct advocates who hold vakalatsbut still refrain from attending courts in pursuance of a strike call with costs. Such costs would be in addition to the damages which the advocate may have to pay for the loss

suffered by his client by reason of his non-appearance."

The Apex Cour after declining to accept the reasons given to justify a strike or call for boycott, the Hon'ble Supreme Court in Ex-Capt. Harish Uppal (supra) held that lawyers do not have the right to go on strike :

"32. Now let us consider whether any of the reasons set out in the affidavit of the Bar Council of India justify a strike or call for boycott. The reasons given are: (1) Local issues.--A dispute between a lawyer/lawyers and police or other authorities can never be a reason for going on even a token strike. It can never justify giving a call for boycott. In such cases an adequate legal remedy is available and it must be resorted to. The other reasons given under the item "local issues" and even Items (IV) and (V) are all matters which are exclusive within the domain of courts and/or legislatures. Of course the Bar may be concerned about such things but there can be no justification to paralyse the administration of justice. In such cases representations can and should be made. It will be for the appropriate authority to consider those representations. We are sure that a representation by the Bar will always be seriously considered. However, the ultimate decision in such matters has to be that of the authority concerned. Beyond making representations no illegal method can be adopted. At the most, provided it is permissible or feasible to do so, recourse can be had by way of legal remedy. So far as problems concerning courts are concerned, we see no harm in setting up Grievance Redressal Committees as suggested. However, it must be clear that the purpose of such Committees would only be to set up a forum where grievance can be ventilated. It must be clearly understood that recommendations or suggestions of such Committees can never be binding. The deliberations and/or suggestions and/or recommendations of such Committees will necessarily have to be placed before the appropriate authority viz. the Chief Justice or the District Judge concerned. The final decision can only be of the Chief Justice concerned or the District Judge concerned. Such final decision, whatever it be, would then have to be accepted by all and no question then arises of any further agitation. Lawyers must also accept the fact that one cannot have everything to be the way that one wants it to be. Realities of life are such that, in certain situations, after one has made all legal efforts to cure what one perceives as an ill, one has to accept the situation. So far as legislation, national and regional issues are concerned, the Bar always has recourse to legal remedies. Either the demand of the Bar on such issues is legally valid or it is not. If it is legally valid, of all the persons in society, the Bar is the most competent and capable of getting it enforced in a court of law. If the demand is not legally valid and cannot be enforced in a court of law or is not upheld by a court of law, then such a demand cannot be pursued any further.

33. The only exception to the general rule set out above appears to be Item (III). We accept that in such cases a strong protest must be lodged. We remain of the view that strikes are illegal and that courts must now take a very serious view of strikes and calls for boycott. However, as stated above, lawyers are part and parcel

of the system of administration of justice. A protest on an issue involving dignity, integrity and independence of the Bar and the judiciary, provided it does not exceed one day, may be overlooked by courts, who may turn a blind eye for that one day."

Finally the Hon'ble Supreme Court in Ex-Capt. Harish Uppal (supra) laid down nature of right to practise law and the powers of courts by holding thus:

34. One last thing which must be mentioned is that the right of appearance in courts is still within the control and jurisdiction of courts. Section 30 of the Advocates Act has not been brought into force and rightly so. Control of conduct in court can only be within the domain of courts. Thus Article 145 of the Constitution of India gives to the Supreme Court and Section 34 of the Advocates Act gives to the High Court power to frame rules including rules regarding condition on which a person (including an advocate) can practise in the Supreme Court and/or in the High Court and courts subordinate thereto. Many courts have framed rules in this behalf. Such a rule would be valid and binding on all. Let the Bar take note that unless self-restraint is exercised, courts may now have to consider framing specific rules debarring advocates, guilty of contempt and/or unprofessional or unbecoming conduct, from appearing before the courts. Such a rule if framed would not have anything to do with the disciplinary jurisdiction of the Bar Councils. It would be concerning the dignity and orderly functioning of the courts. The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for clients before an arbitrator or arbitrators etc. Such a rule would have nothing to do with all the acts done by an advocate during his practice. He may even file vakalat on behalf of a client even though his appearance inside the court is not permitted. Conduct in court is a matter concerning the court and hence the Bar Council cannot claim that what should happen inside the court could also be regulated by them in exercise of their disciplinary powers. The right to practise, no doubt, is the genus of which the right to appear and conduct cases in the court may be a specie. But the right to appear and conduct cases in the court is a matter on which the court must and does have major supervisory and controlling power. Hence courts cannot be and are not divested of control or supervision of conduct in court merely because it may involve the right of an advocate. A rule can stipulate that a person who has committed contempt of court or has behaved unprofessionally and in an unbecoming manner will not have the right to continue to appear and plead and conduct cases in courts. The Bar Councils cannot overrule such a regulation concerning the orderly conduct of court proceedings. On the contrary, it will be their duty to see that such a rule is strictly abided by. Courts of law are structured in such a design as to evoke respect and reverence to the majesty of law and justice. The machinery for dispensation of justice according to law is operated by the court. Proceedings inside the courts are always expected to be held in a dignified and orderly manner. The very sight of an advocate, who is guilty of contempt of court

or of unbecoming or unprofessional conduct, standing in the court would erode the dignity of the court and even corrode its majesty besides impairing the confidence of the public in the efficacy of the institution of the courts. The power to frame such rules should not be confused with the right to practise law. While the Bar Council can exercise control over the latter, the courts are in control of the former. This distinction is clearly brought out by the difference in language in Section 49 of the Advocates Act on the one hand and Article 145 of the Constitution of India and Section 34(1) of the Advocates Act on the other. Section 49 merely empowers the Bar Council to frame rules laying down conditions subject to which an advocate shall have a right to practise i.e. do all the other acts set out above. However, Article 145 of the Constitution of India empowers the Supreme Court to make rules for regulating this practice and procedure of the court including inter alia rules as to persons practising before this Court. Similarly Section 34 of the Advocates Act empowers High Courts to frame rules, inter alia to lay down conditions on which an advocate shall be permitted to practise in courts. Article 145 of the Constitution of India and Section 34 of the Advocates Act clearly show that there is no absolute right to an advocate to appear in a court. An advocate appears in a court subject to such conditions as are laid down by the court. It must be remembered that Section 30 has not been brought into force and this also shows that there is no absolute right to appear in a court. Even if Section 30 were to be brought into force control of proceedings in court will always remain with the court. Thus even then the right to appear in court will be subject to complying with conditions laid down by courts just as practice outside courts would be subject to conditions laid down by the Bar Council of India. There is thus no conflict or clash between other provisions of the Advocates Act on the one hand and Section 34 or Article 145 of the Constitution of India on the other.

35. In conclusion, it is held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any is required, can only be by giving press statements, TV interviews, carrying out of court premises banners and/or placards, wearing black or white or any colour armbands, peaceful protest marches outside and away from court premises, going on dharnas or relay fasts etc. It is held that lawyers holding vakalats on behalf of their clients cannot refuse to attend courts in pursuance of a call for strike or boycott. All lawyers must boldly refuse to abide by any call for strike or boycott. No lawyer can be visited with any adverse consequences by the Association or the Council and no threat or coercion of any nature including that of expulsion can be held out. It is held that no Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored. It is held that only in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake, courts may ignore (turn a blind eye) to a protest abstention from work for not more than one day. It is being clarified that it will be for the court to decide whether or not the issue involves dignity or integrity or independence of the Bar and/or the Bench. Therefore in such cases the President of the Bar must first consult the Chief Justice or the District Judge before advocates decide to absent themselves from court. The decision of the

Chief Justice or the District Judge would be final and have to be abided by the Bar. It is held that courts are under no obligation to adjourn matters because lawyers are on strike. On the contrary, it is the duty of all courts to go on with matters on their boards even in the absence of lawyers. In other words, courts must not be privy to strikes or calls for boycotts. It is held that if a lawyer, holding a vakalat of a client, abstains from attending court due to a strike call, he shall be personally liable to pay costs which shall be in addition to damages which he might have to pay his client for loss suffered by him."

39. This was further taken note of by the Apex Court in ***Krishna Kant Tamrakar Vs. State of M.P.*** reported in ***(2018) 17 SCC 27.*** Lately, the Apex Court again in ***District Bar Association, Dehradun Vs. Ishwar Shandilya and others*** reported in ***AIR (2020) SC 1412***, Considering the earlier Authorities on the said point thereafter in para 7 has held as under:-

"7. As observed hereinabove, in spite of the decisions of this Court in the cases of Ex-Capt Harish Uppal (supra), Common Cause, A Registered Society (supra) and Krishnakant Namrakar (supra) and despite the warnings by the courts time and again, still, in some of the courts, the lawyers go on strikes/are on strikes. It appears that despite the strong words used by this Court in the aforesaid decisions, criticizing the conduct on the part of the lawyers to go on strikes, it appears that the message has not reached. Even despite the resolution of the Bar Council of India dated 29.09.2002, thereafter, no further concrete steps are taken even by the Bar Council of India and/or other Bar Councils of the States. A day has now come for the Bar Council of India and the Bar Councils of the States to step in and to take concrete steps. It is the duty of the Bar Councils to ensure that there is no unprofessional and unbecoming conduct by any lawyer. As observed by this Court in the case of Ex-Capt. Harish Uppal (supra), the Bar Council of India is enjoined with a duty of laying down the standards of professional conduct and etiquette for Advocates. It is further observed that this would mean that the Bar Council of India ensures that advocates do not behave in an unprofessional and unbecoming manner. Section 48 of the Advocates Act gives a right to the Bar Council of India to give directions to the State Bar Councils. It is further observed that the Bar Associations may be separate bodies but all advocates who are members of such associations are under disciplinary jurisdiction of the Bar Councils and thus the Bar Councils can always control their conduct. ***Therefore, taking a serious note of the fact that despite the aforesaid decisions of this Court, still the lawyers/Bar Associations go on strikes, we take suo moto cognizance and issue notices to the Bar Council of India and all the State Bar Councils to suggest the further course of action and to give concrete suggestions to deal with the problem of strikes/abstaining the work by the lawyers. The Notices may be made returnable within six weeks from today. The Registry is directed to issue the notices to the Bar Council of India and all the State Bar Councils accordingly."***

40. Having noticed the aforesaid decisions, it would be relevant to see that the dictum of the Apex Court is binding on all Courts and Authorities in the country in terms of Article 141 of the Constitution of India. This equally applies on all the revenue courts and authorities. Thus, it cannot be said that the Revenue Courts and

Authorities can be exempted or not bound by the decisions. The Revenue Courts must take note of the aforesaid decisions and ignore any such resolutions passed by the local Bar Associations which has the effect of paralyzing the functionings of the Courts and in turn cause insurmountable difficulties for the litigants.

41. In terms of the U.P. Revenue Court Regulations, 2016, the Authorities must devote time for judicial functioning and ensure timely disposal of the cases. The Board of Revenue being the highest court supervising the functioning of the Revenue Courts and Authorities must have regular mechanism to monitor the functioning and oversee the disposal of cases. An effort must be made to oversee and monitor what efforts are made by the Presiding Officers in deciding the revenue cases. The grant of adjournments at the asking is not the answer rather a pro-active approach is required to be adopted by the Courts before it gets too late. An overnight improvement in the scenario may not be possible but it requires a consultative and continuous effort by all the stake holders including the members of the Bar who are requested to act more responsibly looking into the fact that they are an integral part of the justice delivery system.

42. In this regard, this Court had the occasion to consider the similar issue in W.P. No. 1142 of 2022 (Sabhajeet Vs. Consolidation Officer, Bikapur Ayodhya and others) wherein on 04.05.2022, the Court had passed the following order which reads as under:-

"Heard learned counsel for the petitioner as well as learned Additional Chief Standing Counsel for the State-respondents.

The petitioner has approached this Court with the following prayer, which reads as under:-

"(a) direct the Consolidation Officer, Tehsil-Bikapur, Ayodhya, Opposite Party No.1 to decide the Case No.501 and Case No.502 (Ram Baran vs. Ram Lal) filed by the petitioner and opposite party No.2 U/S 9-A(2) of the C.H. Act which is pending before the Opposite Party No.1.

(b) pass any other order or direction as this Hon'ble Court may deem just and proper in the circumstances of the case in favour of the petitioner.

(c) allow the petition with costs."

This Court on 20.04.2022 had passed the following order which reads as under:-

"Heard the learned counsel for the petitioner. Notice on behalf of the respondent no.1 has been accepted by the office of the Chief Standing Counsel.

The grievance of the petitioner is that the petitioner has filed objections under Section 9-A(2) of the U.P. C.H. Act before the Consolidation Officer since 1989.

Learned Standing Counsel shall seek instructions and inform the Court the reasons with sufficient particularity as to why the proceedings have yet not been decided when the objections are pending since 1989. Proper details shall be provided within a period of ten days.

List this matter again on 2nd of May, 2022, as fresh."

In pursuance of the order dated 20.04.2022, the learned Additional Chief Standing counsel has submitted that he has received the instructions and on the basis thereof he has sought to justify the pendency of the objections preferred under Section 9-A(2) of the U.P. Consolidation and Holdings Act, 1953 pending since 1989.

The learned Additional Chief Standing counsel submits that the evidence of the petitioner is complete and though time was granted to the private-respondent No.2 and on one occasion the matter also proceeded ex-parte but yet the matter remained pending and now the matter shall be decided soon and a request was made for reasonable time of three months to decide as the Court is held twice a week only.

The explanation as put forward by the learned Additional Chief Standing Counsel on the basis of written instructions received by him cannot be accepted. The casual manner in which it has been informed through the written instructions that though the evidence of the present petitioner had concluded and the private-respondent No.2 was taking time and in order to avoid the same once the matter had also proceeded ex-parte against the private-respondent, yet again the matter remained pending for the evidence of the private-respondent, this explanation is not good enough.

It is high time that the Revenue/Consolidation Authorities realized that they cannot take the matters so casually and lightly where they are bound to perform judicial and quasi-judicial function relating to disputes of farmers and land holders.

For a farmer his entire livelihood and future and that too of his family is at stake and connected with his land holding. The instant case is an example where the matter is pending before the Court of first instance since 1989. More than thirty years have gone by and the manner in which the explanation has been given that the matter shall be decided soon shows insensitivity least realizing that thirty years is not a short span of time.

The Presiding Officers of Revenue Courts cannot remain mute spectators permitting the parties to prolong the litigation with an indifferent attitude. The Presiding Officer must take proactive measures to bring the lis to its conclusion so that no party may abuse the process of law or take advantage of procedural tactics to keep the matter pending indefinitely. This will not only result in timely disposal of cases but will also reinforce the faith of the litigating public in the judicial system.

In the facts and circumstances of this case, the Court takes an exception to the explanation furnished, however, in view of the order proposed to be passed by the Court, notice to the private-respondent No.2 is dispensed with.

The petition is disposed of with a direction to the respondent No.1 to take up the matter on weekly basis. It has been informed that the matter is fixed on 16.05.2022 and the Presiding Officer shall make an endeavour to decide the matter within a period of four weeks from the date an authenticated copy of this order is placed before him, after affording full opportunity of hearing to the parties, but without granting any unnecessary adjournment to either of the parties. The parties shall also cooperate in early

hearing and in case if any party is found to be misusing the liberty, appropriate costs be imposed. The matter would be taken up on the date fixed as deemed convenient by the Presiding Officer irrespective of any resolution passed by the Members of the Bar and the matter would be heard and taken forward to be finally decided within the time span as mentioned above.

It is also made clear that the Court has not examined the case of either of the parties on merits and the respondent No.1 shall decide the lis strictly in accordance with law.

Before parting, it may be observed that this Court is seeing a deluge of petitions filed under Article 227 of the Constitution of India seeking expeditious disposal of cases pending before the Revenue Courts. The common ground taken in almost all the petitions is the casual manner and attitude with which frequent adjournments are granted and frequent dates due to non holding of the Courts by the Presiding Officer, grant of general dates for reasons such as resolution passed by the Members of the Bar amongst others.

This Court has to spend considerable time to pass orders on such petitions which is unproductive and precious judicial time is wasted which can be better utilized for deciding substantive litigation.

In view of the aforesaid, this Court deems fit that the matter should be noticed by the appropriate authorities at the State level and administration to frame proper guidelines for disposal of old cases in time bound fashion to be monitored regularly so that the guidelines do not remain only on paper but are truly implemented so that the litigants from the rural section of the society can get succor and respite from vicious cycle of unending dates, without substantive hearing, causing heavy pendency of old cases.

A copy of this order be communicated to the Principal Secretary (Revenue), State of U.P. through the Senior Registrar of this Court, who shall device an action plan for time bound disposal of old matters and its constant monitoring, within six weeks and place a report before this Court on 08.07.2022.

The matter shall be listed again on 08.07.2022 only for the purpose of the report to be furnished, as above.

42. A word of caution is sounded that the members of the Bar must rise to the occasions and be an equal partner in easing out the situation rather than becoming stumbling blocks in the peaceful and smooth dispensation of justice. Lately, noticing this aspect, a coordinate Bench of this Court in Contempt Application (Civil) No. 1008 of 2022 (Pawan Kumar and Another Vs. Dewa Nand Tiwari) vide order dated 19.05.2022 has issued notices of contempt against members of local Bar Association and the order reads as under:-

1. Heard Sri Vijay Kumar Shukla, as well as Sri G.K. Singh, learned Additional Chief Standing Counsel.

2. By means of order dated 05.07.2022 passed in Writ Petition No. 13607 (MS) of 2021, this court while disposing of the writ petition had directed the Tehsidarl, Alapur, District Ambedkar Nagar to make earnest endeavour to decide the case expeditiously.

3. Learned counsel for applicant has annexed a copy of order-sheet of the proceedings of the Case No. 04060/2018 under Section 34 of U.P. Revenue Code. According to which on most of the dates, the proceedings could not take place on account of strike of the Local Bar Association and hence the present contempt petition has been filed against the authorities for not complying with the order of the writ court.

4. It is submitted that frequent call of strikes by the bar association is in gross violation of the judgments of the Hon'ble Supreme Court in the cases of Ex-Capt. Harish Uppal Vs. Union of India and another reported in 2003 (2) SCC 45 and Hussain and another Vs. Union of India reported in 2017 (5) SCC 702 as well as of this Court in the case of Vinod Kumar Vs. Naib Tehsildar, and Ors., Misc. Single No. 23446 of 2019.

5. It is also stated that the poor litigants whose cases are pending before the revenue courts for a very long time having no other remedy approached this Court in exercise of jurisdiction under Article 226/227 of the Constitution of India to seek direction for expeditious disposal of the cases like the mutation, partition for which time period has also been specially prescribed under the various laws including the U.P. Revenue Code extending from 90 days to six months etc. Much after expiry of prescribed time when the cases are not decided, they approached this Court seeking a suitable direction to the concerned authorities to decide their cases expeditiously. Like in the present case, the writ court has directed the S.D.M. concerned to decide the case under Section 12 of U.P. Panchayati Raj Act within the stipulated period which has been fixed as six months by the order of the Court.The cases remain pending as the call for boycott from judicial work by local Bar Association is very frequent, and no judicial work is carried out during that day.

6. Hon'ble the Supreme Court vide order dated 28.02.2020 passed in District Bar Association, Deharadun through its Secretary Vs. Ishwar Shandilya & Ors, Special Leave petition (Civil) No. 5440 of 2020, has held as under:-

"35. In conclusion, it is held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike.

..... It is held that lawyers holding vakalats on behalf of their clients cannot refuse to attend courts in pursuance of a call for strike or boycott. All lawyers must boldly refuse to abide by any call for strike or boycott. No lawyer can be visited with any adverse consequences by the Association or the Council and no threat or coercion of any nature including that of expulsion can be held out. It is held that no Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored. It is held that only in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake, courts may ignore (turn a blind eye) to a protest, abstention from work for not more than one day. It is being clarified that it will be for the court to decide whether or not the issue involves dignity or integrity or independence of the Bar and/or the Bench"

7. The order-sheet clearly indicates that one of the main reasons for not conclusion of the proceedings is the strike called for by the Bar Association and

despite the order passed by this Court, the cases could not be decided.

8. Sri G.K. Singh, learned Additional Chief Standing Counsel has informed following office bearers of the Local Bar Association, Aalapur, Ambedkar Nagar.

(i) Sri Ram Prakash Tiwari, President, Bar Association, Tehsil - Aalapur, District Ambedkar Nagar.

(ii) Sri Krishna Gopal Mishra, Ex-President, Bar Association, Tehsil - Aalapur, District Ambedkar Nagar.

(iii) Sri Yogendra Yadav, Secretary, President, Bar Association, Tehsil - Aalapur, District Ambedkar Nagar.

10. Accordingly, learned counsel for applicant is directed to implead the aforesaid office bearers forthwith.

11. In view of the above, professional misconduct of a lawyer may also amount to contempt of court.

12. Accordingly, issue notice to newly added respondent Nos. 2 to 4 to show cause through counsel as to why contempt proceedings should not be initiated against them for frequently calling for strikes of the bar association due to which the judicial work of the revenue courts is affected which is amount to willful disobedience of the judgment passed by Hon'ble Supreme Court in the case Ex-Capt. Harish Uppal (Supra), Hussain (Supra), District Bar Association Dehradun (Supra) as well as direction of the Court vide order 05.07.2022 passed in Writ Petition No. 13607 (MS) of 2021.

13. Learned counsel for applicant shall take steps within one week.

14. List this case on 29.07.2022.

15. On the said date, newly added respondent Nos. 2 to 4 shall appear in person before this Court.

43. It is high time when a concerted effort has to be made by all stake holders to arrest the situation from getting any worse than it already is and devise a roadmap to improve the working and functioning of revenue courts and disposal of old cases.

44. It is in this view of the matter that the Court takes cognizance of the matter and directs the (i) Chief Secretary (Revenue), State of U.P. (ii) Chairman Board of Revenue both at Prayagraj and Lucknow and (iii) Principal Secretary (Law) and to take note of the systematic delay which is deeply rooted in the system and monitor the same by not only instructing the officers to follow the Regulations of 2016 but by continuous monitoring as well as inform this Court what efforts, ways and means have been devised by the State to ensure that the litigation pending before the Revenue Courts are decided on priority and also hold consultative dialogues with the members of the Bar by inviting the members of the Bar Council who is the representative body of the lawyers in the State and devise a Scheme, methodology for shunning the practice of strikes and proceeding ahead in deciding matters judicially for ameliorating the plight of the litigants.

45. A copy of this order be circulated to the (i) Chief Secretary (Revenue), State of U.P. (ii) Chairman, Board of Revenue at Prayagraj and Lucknow (iii) Principal

Secretary (Law), State of U.P., (iv) Chairman, Bar Council of Uttar Pradesh through the Senior Registrar of this Court and let the matter be placed before this Court on 3rd of August, 2022 on which date the State and other Authrities shall inform what steps have been taken to ameliorate and ease out the grave situation as noticed hereinabove.
